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OF CASES RELATING TO

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CONTAINING ALL

DECISIONS OF THE COURTS OF LAW AND EQUITY

IN

The United Kingdom.

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CORRIGENDA.

Page 501 (judgment of Atkin, L.J.):

First col., line 49, *for* "such a different question" *read* "quite a different question."

First col., line 54-55, *for* "they were to be" *read* "they cease to be."

First col., line 60, *for* "for collision" *read* "for the collision."

First col., line 66, *for* "so if he" *read* "so also if he."

REPORTS

OF

Cases Argued before and Determined by the Superior Courts

RELATING TO

MARITIME LAW.

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, May 21, 1922.

(Before Bankes, Scrutton, and Atkin, L.JJ.)

The San Onofre (*a*)

APPEAL FROM THE ADMIRALTY DIVISION.

Collision — Ship in fault disabled — Salvage services by the innocent ship—Damage to the innocent ship in the course of rendering services —Reasonable and natural result of the collision —Remoteness of damage—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *s.* 422.

The steamer M. *was damaged in a collision with the steamer* S. *for which the* M. *was found alone to blame. After the collision the* S. *took off the crew of the* M., *lashed herself alongside, and endeavoured to beach the* M. *In doing so the* S. *herself without negligence went aground and was damaged. At the reference the owners of the* S. *claimed the damage which they had sustained by grounding during the beaching operation, and this item was allowed by the registrar. The owners of the* M. *moved in objection to the report of the registrar on the ground that he had improperly allowed the damage by grounding, which they said was damage not arising directly from the collision and was too remote.*

Held, that since the operation of beaching the M. *could not have been undertaken without risk to the* S. *there was no obligation to attempt to render assistance upon the* S. *under sect.* 422 *of the Merchant Shipping Act* 1894. *The damage sustained by the* S. *was not the result of a statutory obligation upon the* S. *to help the* M. *Nor was it a reasonable and natural result of the collision, but was rather a result of the salvage operation. It was therefore too remote to be recovered as an item of damage in the collision action.*

Judgment of Duke, P. (infrà) *affirmed.*

Appeal by the owners of the *San Onofre* from the judgment of Duke, P., on a motion by the owners of the *Melanie* in objection to a report of the Admiralty registrar.

The plaintiffs were the owners of the steamer *San Onofre*, which was damaged in collision with the defendants' steamer *Melanie* in the Bristol Channel on the 27th Dec. 1916. After the collision the *San Onofre* endeavoured to beach the *Melanie*, which was in a sinking condition, and in doing so herself sustained damage by stranding. In the subsequent litigation the *Melanie* was found in the House of Lords alone to blame, and a second action in which the *Melanie* alleged that after the collision the *San Onofre* negligently put her ashore, for which she claimed damages, was dismissed. A salvage action by the owners, master and crew of the *San Onofre* had also been commenced against the *Melanie*, but at the time of the hearing of this motion had not come to trial. At the reference following the collision action the plaintiffs claimed to recover as an item of the collision damage the damage sustained by the *San Onofre* by stranding. The registrar allowed this item.

The report of the registrar was as follows:

This reference arose out of a collision between the *Melanie* and the *San Onofre*, for which the *Melanie* was eventually held to be alone to blame. The collision occurred in the Bristol Channel on the 27th Dec. 1916, at 9.45. The master and the crew of the *Melanie* came on board the *San Onofre*, as they believed their ship to be about to sink. The master of the *San Onofre* induced some of the crew to return, and having made fast at 10.24, the *Melanie* decided to take her into safety. At 11.14 the vessels grounded; considerable bottom damage was done to the *San Onofre*. A salvage action has been commenced against the *Melanie* by the *San Onofre*, but has not yet been heard. In another action by the *Melanie* against the *San Onofre* for negligently stranding her, the court has held that the *San Onofre* did not act negligently in the above-mentioned operation.

The basic question at the reference was whether the stranding damage to the *San Onofre* was a result of the collision so that the expenses resulting from it could be recovered as damages arising from the collision. In my opinion they are part of such damages. That after a collision one vessel should be in danger of sinking is a natural result of it, an endeavour to save her by the other ship is equally a natural result, and if damages are suffered during such action they are proximately a

(a) Reported by Geoffrey Hutchinson and W. C. Sandford, Esqrs., Barristers-at-Law.

consequence of the collision. The sequence of facts forms one group of occurrences. Under these circumstances the claimants are entitled to recover the claim in full, subject to any points as to the details of the several amounts, and unless the items are agreed. Some misapprehension arose between the solicitors as to an agreement as to amounts and apportionment. This question of amounts and apportionment was therefore adjourned. It should, however, be stated, in regard to loss by detention, that the amount allowed for seventy-eight days is 9092*l.* 2*s.*

It is necessary, in view of the judgment of the court on the 20th June 1920, to say that if the stranding damage had not been, in my view, a result of the collision, the length of time for which loss of time was recoverable in respect of the collision only was fifty days. We also find that, had there been no stranding, it was necessary for the *San Onofre* to go to the Tyne for collision repairs only.

By sect. 422 (i.) of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) it is provided :

In every case of collision between two vessels it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without danger to his own vessel, crew and passengers, (*a*) to render to the other vessel, her master, crew and passengers, such assistance as may be practicable and may be necessary to save them from any danger caused by the collision, and to stay by the other vessel until he has ascertained that she has no further need of assistance. . . .

Butler Aspinall, K.C. and *Stranger* for the defendants, the owners of the *Melanie.*—The report of the registrar ought not to be confirmed because the registrar has allowed damage sustained by the *San Onofre* in attempting to render salvage services to the *Melanie.* In attempting to render such services the master of the *San Onofre* embarked upon a new adventure. The damage was sustained in the course of this adventure and resulted from it, and not from the collision. The salvage operation was not a reasonable and natural result of the collision. Under sect. 422 of the Merchant Shipping Act 1894 no obligation was imposed upon the *San Onofre* to render assistance, since the passengers and crew of the *Melanie* were already in safety upon the *San Onofre*, and the *San Onofre* could not in the circumstances render assistance to the *Melanie* without endangering herself. The *San Onofre* therefore voluntarily undertook to salve the *Melanie.* This service was not such a reasonable and natural result of the collision as will give rise to damages :

Mayne on Damages, 9th edit., p. 45 ;
Hobbs v. *London and South Western Railway Company*, 32 L. T. Rep. 252 ; L. Rep. 10 Q. B. 111 ;
The Argentino, 6 Asp. Mar. Law Cas. 433 ; 61 L. T. Rep. 706 ; 14 App. Cas. 519.

Bateson, K.C., and *Dumas* for the plaintiff, the owners of the *San Onofre.*—It is the natural and probable result of a collision that vessels will endeavour to help each other, and the damage so incurred is a proper item of collision damage. In this case there was also a statutory duty on the *San Onofre* to render assistance to the *Melanie.* When one vessel assists another there is always an element of danger ; in applying sect. 422 of the Merchant Shipping Act 1894 regard must be had to the degree of danger. Here the degree of danger was not so high as to relieve the *San Onofre* from the obligation imposed by the statute.

Reference was also made to

The City of Lincoln, 6 Asp. Mar. Law Cas. 475 ; 62 L. T. Rep. 49 ; 15 Prob. Div. 15.

Stranger replied.

Sir HENRY DUKE.—This is an interesting case, but I think it is not necessary that I should reserve judgment. I have made up my mind upon it, and the only advantage of reserving judgment would be that I should have the satisfaction of expressing myself with greater deliberation than I am able to do if I deliver judgment forthwith. But it is in the interest of the parties, as it is one of the necessities arising from the condition of business in the court, that time should not be unnecessarily devoted to purposes where the necessity is not imperative.

The facts of the case are not at all in dispute : the *Melanie* and the *San Onofre* were in collision on the 27th Dec. 1916, somewhere to the southward and westward of Nash Point, and at a distance which was estimated to be some five or six miles from there. The collision took place in a dense fog, with the result that the *Melanie* was very badly damaged, and so badly damaged that her master and crew immediately came on board the *San Onofre.* The *San Onofre* was damaged but not so much so that she could not proceed under her own steam, or in such a direction as her master might think fit to take. In that state of the case the master of the *Melanie* was ready to abandon his ship. He came to the conclusion that she was a lost ship, but the master of the *San Onofre* took a different view. He formed the opinion which was, as it was proved to be, the correct opinion, namely, that by enterprise and skill the *Melanie* might be brought to port, and he determined—with some assistance which was available to him—to set about bringing her to port, his idea being to bring her into Barry Dock. He secured the assistance of a vessel then in the public service, the *Urania*, and after a delay of something like an hour apparently (during which the *Melanie* and the *San Onofre*, the former drifting and the latter proceeding under her own steam in a direction which made it impossible to determine precisely what was her position relatively to making Barry Dock) the *Urania* took charge of the *Melanie.* The *Melanie* and the *San Onofre* were respectively lashed to the *Urania*, one on each side of her, and in that manner the *Melanie*, under the direction apparently of the master of the *San Onofre*, was brought in towards Barry Dock ; but by reason of the

fog two of the vessels at any rate (the *Melanie* and the *San Onofre*) went round a point which was at some distance along the coast from the dock.

A variety of litigation has arisen out of the various events. There was a damage action, which was natural, and in that damage action the *Melaine* was found wholly to blame. There was an action for damage for negligence which the *Melanie* brought against the *San Onofre*, and in that action the *San Onofre* was found to have been free from negligence—to have been guilty of no negligence. A salvage action was also instituted by the *San Onofre* on behalf of the owners and crew of the *San Onofre* against the owners of the *Melanie*, and that action is still pending, and it is not without consequence in this case that that action is still pending. It is of consequence from the point of view of the general situation of the case that the damage which is in question here—the damage to the *San Onofre* in rendering salvage services—is an item of consideration in the pending claim of the *San Onofre* to have salved the *Melanie*. It is not decisive of questions in this case but it is quite true (as was submitted to me) that facts in their juristic effect may have possibly a causative effect, and give rise to claims, but they cannot both subsist together. The results of the litigations so far as they have gone need only to be further considered to this extent, that the *Melanie* was held in the Court of Appeal and in the House of Lords to be wholly to blame and the *San Onofre* to be free from blame. So that on the morning of the 27th Dec. at the time when the two vessels—one of them adrift and the other under her own engine power—were afloat in the Bristol Channel, the *San Onofre* was a vessel which if she rendered service was rendering it not because she had disabled the vessel to which she rendered it, but either under a general obligation or from a duty arising under the Merchant Shipping Act of 1894, s. 422. It has been put on behalf of the plaintiffs in this action, the *San Onofre*, who have been successful (it would be more correct perhaps to call them the claimants) on two grounds: it has been said that there was a duty apart from the statute of 1894, and there was a duty under the statute of 1894. This further has been said, that if there were no legal obligation, either by general law or by virtue of the Act of 1894, this salvage service was so inevitable an act on the part of the master and crew of the *San Onofre* acting on behalf of the owners of the *San Onofre*, as would entitle it to be reckoned as, if not an inevitable consequence of the collision, nevertheless in contemplation of law a consequence of the collision, and part of the event of the collision, out of which the claim of the owners of the *San Onofre* to be compensated in damages by the owners of the *Melanie* must be deemed to have arisen.

After the course of litigation to which I have referred, the liability of the owners of the *Melanie* having been established, a reference was made to the registrar and merchants to ascertain the damages to the owners of the *San Onofre*, and it is from the report by the learned registrar upon that reference that the present appeal is brought by the owners of the *Melanie*.

The learned registrar determined that the damage caused to the owners of the *San Onofre* by her being put aground in the course of the services which she rendered on the 27th Dec. 1916, was damage which was a result of the collision, so that the expenses resulting from it could be recovered as damage arising from the collision. The learned registrar expressed it in these words: "In my opinion they are part of such damages. That after a collision one vessel should be in danger of sinking is a natural result of it, an endeavour to save her by the other ship is equally a natural result, and if damages are suffered during such action they are proximately a consequence of the collision. The sequence of facts forms one group of occurrences. Under these circumstances the claimants are entitled to recover the claim in full." The owners of the *Melanie* appealed against that finding and asked that that report so far as it depends upon that finding shall not be confirmed. The ground of decision there is the third ground which I mentioned in considering what had been presented to me on behalf of the claimants—that is the ground that the action of the salvors in this case was the natural result of the collision, and that the damage suffered in the salvage was the natural result of the effort to salve, under the circumstances, and that therefore the claim is within the liability which lies upon those who are answerable for damages caused by a negligent collision.

Perhaps it would be as well, in the first place, to deal with the question under the Merchant Shipping Act of 1894. If there was a statutory duty on the master and crew of the *San Onofre* to render the services they were rendering when the vessel went aground then there would be a strong *primâ facie* case in favour of the proposition that the damage so suffered was the immediate result of the collision. I must consider whether there was such a duty. Sect. 422 provides "that in every case of collision it shall be the duty of the master or person in charge of each vessel if and so far as he can do so without danger to his own vessel, crew and passengers, if any, to render to the other vessel, her master, crew and passengers, if any, such assistance as may be practicable." It is said that there was here a case in which the master of the *San Onofre* could without danger to his own vessel, render to the other vessel practical assistance by salving her, and, if that is a correct proposition, it goes a long way to establish the correctness of the conclusion arrived at by the learned registrar. It is a question of fact whether the *San Onofre* could without damage proceed to salve the *Melanie*. That she could without damage render assistance to the master and crew of the *Melanie*, I think, goes without

saying. They came on board her and they could have been promptly and safely removed and brought to land; but the question whether she could without danger undertake the expedition on which she embarked is a totally different question. I look at the circumstances of the case: a collision in a dense fog, one vessel absolutely powerless, the other vessel partly disabled, that is to say substantially damaged, uncertainty as to the bearings of both vessels, and a time of great peril for both vessels afloat. I must take notice of that—it has been dwelt upon by counsel, and I cannot but take notice of it. To linger helpless in any position in an avenue to one of one great ports of this country was a matter of extreme peril in itself. I have to answer for myself—and it has been agreed that I must answer on the facts before me—the question, Could the master of the *San Onofre* render the service without danger to his vessel, namely, salvage service to the *Melanie*? I have come to the conclusion that he could not; and, that being so, that sect. 422 did not put upon him the statutory obligation to do what he did—take the *Melanie* in tow and remove her to a place where she might be repaired and rendered again fit for sea service.

Whether, if he had been in circumstances of less danger, it would have been proper that he should have rendered some service, it is not necessary for me to consider. I find that the *San Onofre* could not render the service which she proceeded to render, without danger, and that therefore the master was under no obligation under sect. 422. Was there a duty upon him to render that service apart from the statute so as to make the rendering of that service one of the immediate results of the collision in which his vessel had been injured? His first duty, it was said in the course of the argument—and I think fairly said—was to provide for the safety of his own vessel and crew. If he had a duty towards the *Melanie* which had injured the *San Onofre*, and partly disabled her, it was a duty arising upon ethical grounds, and not as a conclusion of law. He had a duty which has been described on some occasions as a duty of imperfect obligation. He was in a situation in which it was for him to determine whether he should or should not seek to salve the *Melanie*. Where the choice was with him, and no law prescribed the conclusion to which he should come, I cannot myself see that there is ground for finding that he was under a duty to render these services. The third ground is the ground which has been very much pressed upon me in the course of a forcible argument to which I have given the attention which it deserves, namely, that a seaman placed in the position of the master of the *San Onofre* would inevitably do what the master of the *San Onofre* did in this case. That is a fascinating proposition: no man who comes to be concerned with the doings of seamen in circumstances of peril will ever under-estimate the courage and the magnanimity which they display, or their readiness to assume risks and obligations of humanity which are in no sense part of their duty. Mr. Bateson said that it was a most natural thing—so natural as to be inevitable. I am happy to say that it was a natural thing. If there had not been a hope of reward, if the safety of the crew of the *Melanie* had depended upon it, I well believe that the master of the *San Onofre* would rather have undertaken the perilous business of towing a vessel from which he could not release her crew than abandon her with the probability that she would perish. The situation was not of that kind, and the question was not one of saving the crew of the *Melanie*, but of saving the ship itself. I agree that in the sense in which it was put to me, as a thing likely to be undertaken by courageous and high-spirited seamen, it was a natural thing. Is that enough in this case? It was not inevitable in point of duty, and if it were inevitable at all it was because of the inclination of the master and crew of the *San Onofre*.

I think I cannot do better than refer to the standard authority upon this question of what degree of proximity and causative sequence is necessary to establish liability where it is claimed that damage is the result of an action so as to be recoverable in an action for damages caused thereby.

I find in the judgment of Lord Esher in the *Argentino* (6 Asp. Mar. Law Cas. 348; 59 L. T. Rep. 914; 13 Prob. Div. 191) a statement perfectly explicit and long acted upon, and I will refer to the passages in it which bear on this case. Lord Esher said at p. 198 of 13 P. (p. 350 of 6 Asp. Mar. Law Cas.; p. 916 of 59 L. T. Rep.): "The damage must be an actual damage proved to have occurred in the particular case." That test is satisfied here. "It must be the reasonable and natural result of the act complained of. If it can be shown that the result which has occurred is such as would be the consequence of the act in the ordinary course of things, this requirement is satisfied. . . . If the result in the particular case fails to satisfy all these conditions, the case fails. . . . If the result satisfies these conditions, it must still further be the direct or immediate or proximate result of the act complained of."

Now was this the direct or immediate result or proximate result of the act complained of? Was it the reasonable and natural result of the act complained of? It is not enough in my judgment to say that it is such a consequence as would result from the determination of a courageous man who saw a vessel or property or lives in peril. The damage must result from the act complained of: the collision; and it must result directly and immediately.

As I watched the argument for the claimants, I felt that they had never got beyond this stage: that the salvage was the natural result of the collision—the decision to salve—and that the stranding was, in the circumstances, a natural result of the salvage. If that be the true view of the matter, it puts the stranding not immediately in causative sequence with the collision, but it puts it in point of sequence one

place removed—it makes it a consequence not of the collision but a consequence of the salvage. In my judgment that is the most favourable way in which the claimants' case could have been put by Mr. Bateson. But I am not able to accept the conclusion that the salvage was in point of law the reasonable and natural result of the collision. To be the reasonable and natural result so as to involve liability for damage it must be more than an optional result, in my judgment, on the part of the person who sets up the claim in respect of the damage suffered—it must be a result imposed upon him by the fact of which he complains.

My view of the true effect of the facts in this case is that the master of the *San Onofre*, with courage and excellent judgment, determined that there was a ship here in great peril, likely to be abandoned, but which he could save, and which he set about saving. My view is that that determination of the master of the *San Onofre* was a determination which he was free to resolve upon, however, and that the subsequent mischances of his enterprise in the salvage were mischances in that enterprise independently and freely undertaken by him, and not consequences thrown upon him without volition on his part, as part of the damage of the collision in which he was involved by the fault of the *Melanie*. As I said, it would have been easier to compress the conclusions at which I have arrived within a narrower compass if I had put them into writing. I have endeavoured to make them clear in order that the parties may have no doubt as to what the grounds of my decision are. Taking the view which I do take of the law and of the facts, the report cannot be sustained. It is defective in not finding that the damage here in question was the direct consequence of the collision, but I think it is also defective in finding that it was the natural consequence without finding that it was the probable consequence of the collision. Those two matters are much involved.

For the reasons I have stated the motion must succeed, and the damages which are attributable to the stranding of the *San Onofre* must be excluded from the damages which are to be assessed against the owners of the *Melanie* and against the ship in the damage action. What will result when the salvage action is brought to trial it is not for me now to forecast.

All that I desire to make clear is that I am not conscious of having said or decided anything in this case which can prejudice the position of either party when they come, in case the action of salvage is fought, to ask for the determination of the question what is the effect which ought to be given in the assessment of salvage damage—if there were salvage—to the fact that in the rendering of the salvage relied on, the *San Onofre* was put aground.

The owners of the *San Onofre* appealed.

Bateson, K.C., and *H. C. S. Dumas* for the appellants.

Butler Aspinall, K.C., and *Stranger* for the respondents.

Cur. adv. vult.

The following judgments were read :

Bankes, L.J.—The proposition for which the appellants are contending in the present appeal is that where two vessels have been in collision, and the vessel which is wholly to blame is being assisted to a place of safety by the other vessel, if the latter while so assisting meets with an accident, not due to any negligence, and is damaged, the vessel which is wholly to blame is liable not only for any damage caused to the other vessel by the collision, but also for any damage the result of the accident.

It is not necessary to state the facts of the case in detail as they are fully set out in the judgment of the President. The accident in the present case occurred within two hours of the collision. If the proposition contended for is sound it would be immaterial whether the accident occurred two hours or two days or two weeks after the collision. The argument is based upon two grounds (1) that the damages resulting from the accident were the natural and probable result of the collision and as such are recoverable, (2) that in rendering assistance to the injured vessel the *San Onofre* was acting in pursuance of a statutory duty and that the damage she suffered while so acting was thus sufficiently connected with the collision as to render the damages claimed recoverable. Upon the first point I agree with the view taken by the President. I cannot distinguish the case from that of two pedestrians who collide in the street, and the one whose negligence caused the collision is injured and is assisted to the hospital by the other, there being no one else available to render such assistance. If on the way to the hospital the one who is assisting the other accidentally slips and breaks his leg, he cannot in my opinion, claim damages from that other on the ground that but for the negligence in bringing about the collision he would not have been where he was and would not have slipped and broken his leg. The collision no doubt caused a state of things which rendered it natural that the assistance should have been rendered. The motive which led to the rendering of the assistance seems to me to be quite immaterial. It may have been purely humanitarian, and therefore praiseworthy. It may have been purely mercenary, and therefore unworthy. It may have been a mixture of the two. Whichever it was the result appears to me the same. The man, or the vessel, as the case may be, was a pure volunteer, and the negligence which caused the collision cannot be said, adopting Lord Sumner's language in *Weld-Blundell* v. *Stephens* (123 L. T. Rep. at p. 600 ; (1920) A. C., at pp. 983, 984), to be the direct cause of the subsequent accident. A number of cases were cited by appellants' counsel in support of his argument. I do not think they are of any assistance in deciding this case, as each decision must depend upon the particular facts of the case. For instance, in *The Despatch* (1860

Lush. 98; 14 Moore 83), where the decision turned upon the fact that as the collision broke one of the chains of the vessel claiming damages and so weakened her power to resist the force of the gale the collision might be regarded as the efficient cause of the subsequent accident, which, in that case, was the driving of the vessel on to the rocks. In *The City of Lincoln* (6 Asp. Mar. Law Cas. 475; 62 L. T. Rep. 49; 15 Prob. Div. 15), the court held that the grounding of the barque subsequent to the collision was the natural and reasonable consequence of the collision because the barque had lost her steering compass, logline and charts in the collision, which deprived the captain of the means of ascertaining his position and of properly navigating his ship.

I express no opinion as to whether the appellant's position would have been any better if it could have been established that in rendering assistance to the *Melanie* the master of the *San Onofre* was acting under a statutory duty. The President held that he was not acting under any such duty. Here, again, I agree with the President. The duty of rendering all possible assistance to a vessel in distress cannot be too strongly insisted upon, and one does not sympathise with a defence such as is suggested here. In the case of a collision between two vessels the duty upon the master or person in charge of each vessel to stand by and to render such assistance as is possible is a statutory duty, and the failure without reasonable cause to fulfil that duty is a criminal offence. The provision to that effect is contained in sect. 422 of the Merchant Shipping Act 1894. The obligation is qualified by the limitation of the duty to cases where it can be exercised without danger to the master's own vessel, crew and passengers. In the present case the owners of the *Melanie* contend that the assistance rendered by the *San Onofre* was rendered under such dangerous conditions that it is not permissible for her owners to contend that the master was acting in performance of his statutory duty. The President has accepted this contention. Whether the conditions were such as to justify his conclusion is a question of fact. I am certainly not prepared to disagree with him, and if the proper test to apply is to consider whether, had the master not rendered the assistance, there could have been any reasonable prospect of securing a conviction against him for failing to perform his statutory duty, I have no hesitation in saying that there could not. For these reasons I consider that the appeal fails on both grounds, and must be dismissed with costs.

SCRUTTON, L.J.—The question in this appeal is whether the President was right in holding that certain damage caused to the owners of the *San Onofre* by the stranding of the *San Onofre* while attempting to salve the *Melanie* was recoverable by the *San Onofre* as damages occasioned by the negligence of the *Melanie* in colliding with the *San Onofre*. Shortly, the facts are that about 9.30 a.m. on a foggy morning in the Bristol Channel, the *Melanie* collided with the *San Onofre*, and has been found alone to blame for the collision. The *Melanie* was seriously damaged, so that her master and all her crew came on board the *San Onofre*. The *San Onofre* was very slightly damaged, some rivets being started in the forepeak. The master of the *San Onofre*, to use his own words, "thought there was a chance of saving the *Melanie*, and also of getting her out of the traffic." He persuaded some of her crew to return to her, lashed himself to one side, and his escort an armed trawler the *Urania* to the other side, and started towing her in the fog inshore into shallow water and out of the traffic, meaning to take her to Barry.

Nearly two hours after the collision, and three-quarters of an hour after the towage began, the three vessels stranded in the fog on the Welsh shore and damage was done to the *San Onofre* and the *Melanie*. It has been found that the stranding was not due to any negligence on the part of the *San Onofre*. The question is whether the damage to the *San Onofre* by stranding is the direct consequence of the original negligence of the *Melanie* in colliding with her. Where a ship alone to blame for a collision does damage to another ship, which, while in her damaged condition, is subsequently lost, the *primâ facie* presumption in the Admiralty Court is that the subsequent loss is occasioned by the collision, the burden being on the ship in fault to displace that presumption by showing that the loss did not arise out of the collision, one example being where it is shown that the ultimate loss was caused by negligence on the part of the damaged ship (see per Mr. Lushington in *The Pensher* (1857, Swabey 211) and *The Mellona* (1847, 3 W. Rob. 7), and see also *The City of Lincoln* (*sup*). In all these cases, however, the ship ultimately lost has sustained damage in the original collision which may have contributed to the ultimate loss. The position would have probably be the same if, by breach of duty, a ship otherwise undamaged were left in a position of danger in which she would not have been had the duty been performed (see, however, the difficult questions raised in *Wilson* v. *Newport Dock Company* (1866, 14 L. T. Rep. 230; L. Rep. 1 Ex. 177). But in all these cases the ultimate damage must be a direct consequence of the collision, a wrongful act through the damage caused immediately by the collision.

In the present case, if a strange ship had come up and attempted to salve the *Melanie* going ashore without negligence while doing so, it would, I think, be impossible to recover her damages by stranding as the direct consequence of the *Melanie's* negligence in colliding. The *Urania* could not recover her stranding damages as damages by collision. The recompense for the stranding, if any, must be recovered in a salvage action in proportion to the value of the services rendered and as part of their cost. The *San Onofre* could only be in a better position than the strange salvor in two cases. First, if the

direct collision damage was the cause of the ultimate stranding damage, as in the case in *The City of Lincoln* (*sup*). But in the present case the actual slight collision damage to the *San Onofre* had nothing to do with the subsebuent stranding. Secondly, if the *Melanie's* negligence damaging herself, put the *San Onofre* under a legal duty to save her, and in carrying out that legal duty without negligence the *San Onofre* damaged herself, there might be a direct chain of causation between original negligence and ultimate damage. In support of this view sect. 422 of the Merchant Shipping Act was relied on, which imposes on the master of a vessel in collision a duty enforceable by prosecution to render to the other vessel such assistance as may be practicable. But this duty is only imposed if and so far as the master can do so without danger to his own vessel, crew and passengers. This restriction is obviously reasonable, for an owner whose ship is not to blame can hardly be required to endanger her as a matter of duty enforceable criminally to save a wrongdoer. In the present case there was obviously danger to the *San Onofre* in taking her in a fog towards shore, as is shown by the fact that she went ashore without negligence. In my view it would have been impossible successfully to prosecute the master of the *San Onofre* if, when he had taken the *Melanie's* crew on board, he had sailed away. His answer of danger to his owner's vessel would have been conclusive. The attempt to connect the stranding damage with the collision negligence by means of a legal duty imposed on the *San Onofre* therefore fails. I do not discuss the cases cited; they are numerous and bewildering, but the question whether damages is a sufficiently direct consequence of negligence to be recoverable is too remote, is rather a question of first impression. I am clear that if a negligent driver on the road injures himself in a collision with another vehicle, whose driver and a stranger thereupon take the injured man to hospital and meet with an accident in so doing, neither of them can recover damages for the accident from the negligent driver in consequence of his original negligence. The present case seems to me exactly similar. In my view the registrar came to an erroneous decision, and the President arrived at a correct result. The appeal should be dismissed with costs. Any remedy the *San Onofre* may have is in an action for salvage remuneration, on the prospects of success in which I express no opinion.

Atkin, L.J.—I have felt considerable doubt in this case in respect of both the points argued. I do not think it is possible to overrate the importance of maintaining the statutory duty, imposed by sect. 422 of the Merchant Shipping Act 1894, first enacted in the Merchant Shipping Act 1862, s. 33, an Act that attached a statutory obligation to a duty that has been recognised from time immemorial by British shipmasters. From 1862 to 1911 this appears to have been the only section dealing with an obligation to save life, and in my opinion the qualification without danger must be read in reference to the subject-matter, *i.e.*, the duty of saving life at sea. I should be very sorry to lay down that any degree of danger, however slight, in performing the contemplated duty would absolve the master from his statutory obligation. I should suppose that there must be an appreciable and real danger in excess of the peril to be anticipated under ordinary conditions of navigation attending a voyage at sea. It is true that in the Maritime Conventions Act 1911 the duty expressed in sect. 422 of the Merchant Shipping Act 1894 is re-enacted in a much wider form so far as relates to saving life. It is not confined to a duty arising in case of collision, and the words used are "without serious danger." I doubt whether the degree of danger which will excuse the duty is substantially modified by this addition. Nor in a civil case do I think it necessary for the purpose of determining whether there is a breach of duty to consider whether if a criminal charge were made against the master a jury would convict. It is because I should be very sorry to pay lip-service only to the importance of the statutory duty that I have been anxious to see in this case that it has not been too lightly negatived. I am moreover inclined to think that if a master establishes that he *bonâ fide* considered that the duty had arisen, and if the other ship takes the benefit of the assistance rendered in pursuance of the supposed duty the court should scrutinise carefully any suggestion by the assisted ship that the assistance was too dangerous and should not have been given. I agree, however, that the final determination of the question must turn on a question of fact, and in view of the opinion of the President and the agreement of the other members of the court I am not prepared to say that I am satisfied that the decision on this point was wrong.

Apart from the statutory duty I think that there is a great deal to be said for the view taken by the learned registrar. The emergency caused by a collision may be such as to compel any normal person to take a particular course of action; in the sense of affording such strong motives for that particular action that every reasonable person would be induced by them so to act. I see no reason why damage occasioned in the course of such action may not give rise to a claim for damages by the collision if the damage can be directly associated with the original wrongful act. For instance, the case put of a collision between motor cars where the wrongdoer was in danger of losing his life unless hurried to medical care, if the other party using the only reasonable means hurried him to hospital in the injured car, and the car in consequence incurred further injuries or the driver was in consequence injured, I think such injuries might well be the direct result of the original collision. And I should desire to reserve the case decided in the American Courts of injuries sustained by a passer-by in reasonably attempting to snatch a child or other person from the course of a negligently driven vehicle.

In this case there appears to me evidence that the stranding in the course of the joint voyage to refuge was directly connected with the collision. The voyage was in shallow waters because of the collision damage. The *Melanie* first stranded and the *San Onofre* might have escaped if she had not been necessarily bound to the crippled *Melanie*. But the plaintiff has to establish the claim, and I understand the President not to be satisfied that the expedition undertaken by the *San Onofre* was due to the impelling desire to assist the injured ship, but to be possibly due to a desire to earn salvage or some other motive. In this respect, as before, the question of direct cause is ultimately one of fact, and I am not prepared to dissent from the judgment below.

Solicitors : *Downing, Handcock, Middleton* and *Lewis ; Thomas Cooper* and *Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

March 24 *and* 27, 1922.

(Before McCardie, J.)

Dominion Coal Company v. Maskinonge Steamship Company Limited. (a)

Charter-party — Requisition — Time charter for seven consecutive seasons — Requisition for parts of the term—Requisition payment to shipowners exceeding the hire under the charter-party—Right of charterers to recover excess from owners.

By a charter-party made in Nov. 1909, *between the plaintiffs, as charterers, and Messrs. Roberts of Liverpool, the defendants' predecessors in title, as owners, the owners agreed to let and the charterers agreed to hire the steamship* M., *then being built, for seven consecutive St. Lawrence seasons, from the spring of* 1912, *she being then placed with clear holds at the disposal of the charterers at Sydney, Nova Scotia, each season not earlier than five days prior to the opening of the navigation on the St. Lawrence to Montreal, and not later than the* 15*th May, or the charterers to have the option of cancelling the charter-party ; but if cancelled any season, the cancellation to have effect for that season only. The hire at the rate therein specified was to be paid in cash monthly in advance to the owners' agents in New York. By an agreement of novation made in Oct.* 1915, *the defendants took over the rights and accepted all the obligations of Messrs. Roberts under the charter-party of Nov.* 1909, *and certain variations were made in the terms of the charter-party. Among other things it was agreed that "hire money shall be paid at the rate of* 2437*l.* 10*s. per month." The* M. *was operated under the charter-party in* 1912, 1913, *and* 1914. *In Feb.* 1915, *she was requisitioned by the Government under the Royal Proclamation of the* 3*rd Aug.* 1914. *The requisition operated from the* 22*nd May* 1915 *to about the* 20*th Sept.* 1915, *for which period the Government paid the defendants (the owners) about* 10,500*l. for the hire of the steamship, that sum being about* 4500*l. in excess of the rate of hire fixed by the charter-party. In the following year the vessel was again requisitioned, and the requisition operated from the* 9*th March* 1916 *to the* 2*nd June* 1916. *For that period the defendants received from the Admiralty about* 7300*l., which was about* 500*l. in excess of the amount which would be due for hire under the charter-party. The plaintiffs (the charterers) claimed to recover from the owners the amount by which the hire paid by the Government to the owners for the periods of the requisition exceeded the rate of hire fixed by the charter-party.*

Held, that the plaintiffs were entitled to recover the amount by which the hire paid by the Government for both years exceeded the hire due to the plaintiffs under the charter-party, together with interest in respect of the excess paid in 1916. *As interest was not claimed in respect of the excess payments made in* 1915, *none was awarded.*

Action tried by McCardie, J. without a jury in the Commercial Court.

The plaintiffs, the charterers, claimed to recover from the defendants, the owners, a sum of about 14,000*l.*, being the difference between the amount which the defendants as owners would have been entitled to receive from the plaintiffs as charterers of the steamship *Maskinonge*, and the amount paid by the Government to the owners for two periods while the ship in question was under requisition and employed by the Admiralty in Government service. The Government paid to the owners a considerable sum of money for hire of the steamship, in excess of the rate of hire due under the charter-party between the plaintiffs and defendants, and the question was whether the charterers or the owners were to have the benefit of that excess sum. The plaintiffs, as charterers, claimed the excess and interest.

The matter arose under a charter-party, dated the 4th Nov. 1909, whereby the plaintiffs hired from Messrs. Roberts of Liverpool, a steamship, the *Maskinonge*, for seven consecutive St. Lawrence seasons, commencing in the spring of 1912, with an option to the charterers to continue the charter for three more seasons on giving notice not later than 1917. In Oct. 1915, the ownership of the *Maskinonge* was transferred to the defendants together with Messrs. Roberts's rights and obligations under the plaintiffs' charter-party, which was then prolonged for a further period of six consecutive years. For a period during the summer of 1915 and again in 1916, the *Maskinonge* was under requisition to the Government and the plaintiffs were deprived

(a) Reported by T. W. Morgan, Esq., Barrister-at-Law.

of the use of her. During those two periods the Government paid to the defendants a sum of money which was in excess of the rate of hire fixed by the charter-party, and the plaintiffs contended that they were entitled to be paid by the defendants the excess over the sum payable under the charter-party. The defendants relied on the exception of restraint of princes contained in the charter-party, and said that owing to the requisition the charter for the season of 1915 could not be carried out and was frustrated. The defendants also counter-claim in respect of damage to the vessel.

R. A. Wright, K.C., *F. Hinde*, and *William Latey* for the plaintiffs.—On paying the agreed hire the charterers, the plaintiffs, became entitled to the whole beneficial user of the ship during the term fixed by the charter-party, and the beneficial user included the sum paid by the Government to the owners for the periods during which the ship was under requisition. See :

Dominion Coal Company v. *Roberts*, 36 Times L. Rep. 837 ;
Chinese Mining and Engineering Company v. *Sale*, 14 Asp. Mar. Law Cas. 95 ; 117 L. T. Rep. 32 ; (1917) 2 K. B. 599.

The plaintiffs are therefore entitled to recover from the defendants the excess payment made to them by the Government over and above the amount of hire due to them under the charter-party. That would leave the defendants just as well off as if the charter-party had gone on during the whole of its term without any interruption.

W. D. MacKinnon, K. C., *A. T. Miller*, K.C., and *R. E. Gething* for the defendants.—There was no out-and-out requisition in this case but a mere agreement for services to be rendered to the Government on the terms of the well-known form of charter-party described as T. 99. There was in this case no demise of the ship to the plaintiffs, and the plaintiffs obtained no property in the ship. There was only a mere agreement as to the use of the ship for a certain term on the charterers' behalf, subject to the exceptions (among others) of " restraint of princes." On the occurrence of such a restraint the contract was at an end. When the Government requisitioned the ship the charter-party was at an end for that season, and the owners were entitled to all they received as hire from the Government.

F. Hinde replied.

Cur. adv. vult.

March 27.—McCardie, J. read the following judgment : This action raises several questions as to the respective rights and obligations of charterer and shipowner in a case where a steamship under charter had been requisitioned by the Government.

Apart from details which can be adjusted between the parties, the facts are not in dispute. They are these : In Nov. 1909, a charter-party was made between the plaintiffs (charterers), of the one part, and Messrs. E. F. and W. Roberts, of Liverpool (as owners), of the other part. It related to the steamship *Maskinonge*, then being built. It provided (so far as material) : " Clause 1. The said owners agree to let and the said charterers agree to hire the said steamship for seven consecutive St. Lawrence seasons, commencing with the spring 1912, she being placed with clear holds at the disposal of the charterers at Sydney, Nova Scotia, each season, not earlier than five days prior to opening of navigation on the St. Lawrence to Montreal, and not later than the 15th May, or the charterers to have option of cancelling this charter-party, but if cancelled any season said cancellation to apply to that one season only. . . ." " Clause 2. That the owners shall provide and pay for all the provisions and wages for the captain, officers, and engineers, firemen, and crew, also consular and shipping fees, and shall pay for the insurance of the vessel and for all the . . . stores, and maintain her in a thoroughly efficient state in hull and machinery for the service with a full complement of officers, seamen, engineers, and firemen," &c. " Clause 4. That the charterers shall pay for the use and hire of the said vessel at the rate of 4*s*. per ton . . . per calendar month . . . until her redelivery to the owners (unless lost)," &c. " Clause 6. Payment to be made in cash monthly in advance at New York to owners' agents by bankers' sight draft on London or in cash at current rate of exchange for same at owners' option, and in default of such payment or payments as herein specified to owners' agents the owners shall have the faculty of withdrawing the steamer from the service of the charterers without prejudice to any claim they, the owners, may otherwise have on the charterers in pursuance of this charter." The charter contained the usual exceptions, including " restraints of princes, &c., mutually excepted."

In Oct. 1915, an agreeent of novation was made between Messrs. Roberts of the first part, the defendants of the second part, and the plaintiffs (the Dominion Coal Company) of the third part. By this agreement the defendants took over the rights and accepted all the obligations of Messrs. Roberts under the charter party of 1909. Messrs. Roberts were released from all liability. The agreement also varied the terms of the charter-party. It provided : " That instead of trading for consecutive seasons the steamer shall, after delivery at Sydney, Nova Scotia, trade for the Dominion Coal Company Limited, for six consecutive years, and in consideration of the Maskinonge Steamship Company Limited, having consented to this, the Dominion Coal Company Limited, agree to vary the conditions of the charter-party in the following respects (*inter alia*) : (*a*) Hire money shall be paid at the rate of 2437*l*. 10*s*. per month." Such are the agreements.

The broad facts, as they call for present statement, are these : The *Maskinonge* was

only operated under the charter-party in 1912, 1913, and 1914. On the 27th Feb. 1915, the Director of Transports wrote to Messrs. Roberts to state that it had become necessary to requisition the *Maskinonge* under the Royal Proclamation of the 3rd Aug. 1914, for use on urgent Government service under the conditions of the well-known form of charter-party, T.99. The requisition actually operated as from the 22nd May 1915. It lasted till about the 20th Sept. 1915. For this period, about four months, the amount payable by the plaintiffs to the defendants under their charter-party would be about 6000*l.* The amount actually paid by the Government to the defendants under the Admiralty rate of hire was about 10,500*l.* The plaintiffs claim the difference, about 4500*l.*, from the defendants. During the above four months of requisition the plaintiffs did not in fact pay any charter-party hire to the defendants. So much for 1915.

In the year 1916 there was another requisition of the vessel by the like authorities under the like powers. The requisition operated as from the 9th March 1916, to the 2nd June 1916. The hire under the charter-party during this period would be about 6800*l.* The defendants actually received from the Admiralty about 7300*l.* The difference between these two sums, amounting to about 500*l.*, is claimed by the plaintiffs against the defendants. There is a further claim by the plaintiffs for interest in respect of the sum received by the defendants in 1916. This and another minor point I will deal with separately later on. The statement of claim, by par. 5, puts the matter in this way: "During the said periods the vessel was under Government requisition and the defendants were paid by the Government hire for the said vessel. Such hire was in excess of the sum which would have been payable by the plaintiffs to the defendants under the charter-party and agreement, and the plaintiffs say they are entitled to be paid by the defendants in excess of such hire for the period the vessel should have been in their use and at their disposal." Par. 6 claims from the defendants a return of the whole 6800*l.* paid by the plaintiffs to the defendants for the requisition period of 1916.

The case was fully discussed before me. In the course of his luminous argument counsel for the defendants disputed the right of the plaintiffs to recover any part of the sums received by the defendants from the Government. This is the main point at issue. Certain dicta in the House of Lords in *Tamplin Steamship Company* v. *Anglo-Mexican Petroleum Products Company* (13 Asp. Mar. Law Cas. 467; 115 L. T. Rep. 315; (1916) 2 A. C. 397) were challenged, together with several decisions of the King's Bench Division. It will be necessary briefly to consider those dicta and decisions with respect to the right of the plaintiffs to recover. It is also necessary to consider the ratio upon which they rest in order to test the plaintiffs' claim to interest and to decide one or two other minor points in the case.

Are the plaintiffs entitled to recover excess over charter hire; and if yes, upon what legal ground? In view of counsel's able argument, I confess my humble opinion that the legal position has drifted into some confusion; yet there is a body of authority which the defendants have to meet. Some broad features may be noticed in analysing the legal questions. For the 1915 requisition period, as I said, the plaintiffs paid no hire at all. Two reasons existed for this—first, the legal effect of requisition was uncertain; and secondly, the defendants were naturally not anxious to demand hire, inasmuch as they were getting a far larger rate from the Admiralty. But although the plaintiffs paid no hire, yet the defendants did not exert any power of cancellation they may have possessed. For the 1916 requisition period the plaintiffs did pay the charter-party hire. In view of the fact, however, that the charter-party continued through and after 1915, there seems to be no importance in the above-mentioned distinction between the two periods, except that, as to the former, the plaintiffs give credit to the defendants for the hire which fell due, but was not paid.

It is well to remember that the decision in *Tamplin's* case (*sup.*) was not announced by the House of Lords till the 24th July 1916. Till that was delivered, no decision existed of a supreme and authoritative character as to the doctrine of frustration in connection with requisition of ships. It might well have been found by the House in *Tamplin's* case (*sup.*) that, in view of the great change of circumstances created by the requisition and by the transformation of the tank steamer into a troopship, frustration had taken place. But the majority of the House held otherwise. There was no real difference of opinion as to the principle of law applicable, but a striking variation of view as to the application of the principle to the facts. The law of frustration has since been illustrated by the cases cited in *Blackburn Bobbin Company* v. *Allen and Sons Limited* (119 L. T. Rep. 215; (1918) 2 K. B. 467), in *Metropolitan Water Board* v. *Dick, Kerr, and Co.* (117 L. T. Rep. 766; (1918) A. C. 119), and in *Bank Line Limited* v. *Capel* (14 Asp. Mar. Law Cas. 370; 120 L. T. Rep. 129; (1919) A. C. 435). If there was no frustration in the *Tamlin* case (*sup.*), there certainly was no frustration in the present case, in view of the very long period of the charter-party and the shortness of the periods of requisition.

In view of the facts here, and inasmuch as all parties treated the charter-party as subsisting, no question of complete frustration now arises. In view of counsel's able contentions, however, I desire to state that, in my view, there is no such thing as "partial frustration" in the sense of the recognised "frustration" doctrine. A contract either exists or it does not exist. If it is not destroyed, it survives as a whole, and with a continuance of mutual rights and duties, as stated by

Rowlatt, J. in *Dominion Coal Company* v. *Roberts* (*sup.*). As Lord Sumner put it in *Bank Line Limited* v. *Capel* (14 Asp. Mar. Law Cas. 370, at p. 374; 120 L. T. Rep. 129; (1919) A. C. 435, at p. 455), when referring to the time at which the fate of a contract falls to be decided: "That fate is dissolution or continuance, and, if the charter ought to be held to be dissolved, it cannot be revived without a new contract." Therefore, in the present case, I must treat the charter-party of 1909 and the agreement of 1915 as existent and operative at all times. It is true that this charter-party contained the usual restraint of princes clause. But such a clause was also in the charter-parties in question in *Tamplin's* case (*sup.*) and the other decisions cited in this judgment. Now, if this be so, it follows that month by month over the contract period the obligation rested on the plaintiffs of making the agreed monthly payments. It was their contractual burden; they were bound to discharge it. If they failed to do so, they could have been sued as for a debt, and the owners, moreover, could have exerted their right of withdrawing the ship.

Such being the legal position, what is the ratio upon which the shipowners can be asked to pay over to the charterers the moneys which they, the shipowners, have received from the Government for a period of requisition? It is to be observed that the requisition does not spring from any act or default of the shipowner. It arises from the exertion of extrinsic authority; it is imperative, overriding, and irresistible.

Now in *Tamplin's* case (*sup.*), the arguments of counsel, as is well-known, were directed only to the question of frustration. Counsel were not asked to, nor did they, deal with such a question as that now before me. When the opinion of the House of Lords was delivered it was found that two of the majority (Lords Loreburn and Parker) pronounced dicta of great importance upon the point not argued before them. Having held that no frustration had taken place, Lord Parker said (13 Asp. Mar. Law Cas. 467, at p. 475; 115 L. T. Rep. 315; (1916) 2 A. C., at p. 428) that the word "owners" in the Royal Proclamation of the 3rd Aug. 1914, must include "all parties interested." He further said: "It cannot in the present case mean the owners exclusive of the charterers or the charterers exclusive of the owners. Both are entitled to compensation, and if such compensation be not agreed with either separately, but with both together, the amount so agreed will be divisible between them according to their respective rights and interests."

Now this was, say the defendants here, a mere dictum upon an unargued point. It was uttered, however, by a great lawyer. I venture most respectfully to think that it perhaps rested upon a misconception as to the nature of an ordinary charterer's interest. The charter-party in *Tamplin's* case (*sup.*) was not a demise. Nor is the charter-party in the case before me a demise. This seems reasonably clear from the wording of several clauses: (see Scrutton and MacKinnon on Charter-parties, 10th edit., art. 2). A requisition is directed against the ship, not the charter-party. A charterer, if there be no demise, has no property in the ship; nor has he even possession—see per Scrutton, L.J. in *Elliott Steam Tug Company* v. *Shipping Controller* (15 Asp. Mar. Law Cas. 78; 126 L. T. Rep. 158; (1922) 1 K. B. 127). Most clearly was this point put by Bailhache, J., in the very recent case of *Federated Coal and Shipping Company* v. *The King* (15 Asp. Mar. Law Cas. 604; 127 L. T. Rep. 303; (1922) 2 K. B. 42). I need not read the words of his judgment. There is no definition of the word "owners" in the Proclamation of Aug. 1914, nor anything to show that it includes time charterers, or, for example, bills of lading holders or the like. I observe that Lord Parker does not expressly say that the shipowner is to be a trustee for the charterer and himself of any requisition moneys he may receive. The matter was put in somewhat different fashion by Lord Loreburn in *Tamplin's* case (13 Asp. Mar. Law Cas. 467, at p. 468; 115 L. T. Rep. 315; (1916) 2 A. C., at p. 405). He said: "The owner will continue to receive the freight he bargained for so long as the contract entitles him to it, and if, during the time for which the charterer is entitled to the use of the ship, the owner received from the Government any sums of money for the use of her, he will be accountable to the charterer. Should the upshot of it all be loss to either party—and I do not suppose it will be so—then each will lose according as the action of the Crown has deprived either of the benefit he would otherwise have derived from the contract."

Counsel for the defendants contends that these dicta are erroneous, both in ratio and substance. I feel, as already indicated, that the ratio of Lord Parker is open to question. The dictum of Lord Loreburn, however, rests, I think, on a broader basis. It is certainly equitable in result. It would be curious and regrettable if the law allowed an owner to take and keep the whole hire from the charterer, and also the whole requisition money from the Government. Common law principles are wide. They can be applied to many unforeseen circumstances. They are now imbued with the principles of equity. The action for money had and received is still a living, and, I think, pliable, form of claim, though it is interesting to compare pp. 70 and 71 of the third edition of Leake on Contracts with pp. 55 and 56 of the sixth edition. In view, however, of many passages in the opinion of the House of Lords in *Sinclair* v. *Brougham* (111 L. T. Rep. 1; (1914) A. C. 398), and in spite of the criticism of Lord Sumner in that case, I still believe that the action for money had and received is one which, as Lord Mansfield foresaw, must be applied to many new and unanticipated sets of facts. It is a useful, just, and flexible form

of claim. I believe that it lay at the root of the observations of Lord Loreburn and Lord Parker in the *Tamplin* case (*sup.*).

Quite apart from the just-mentioned dicta in *Tamplin's* case (sup.), there is a substantial body of decisions which supports the plaintiffs' claim in this action. It is of interest to observe that each of these decisions was given by Rowlatt, J. It is to be noted that there had been no appeal in any one of the cases.

It is worthy of remark that in a case decided more than a year before the *Tamplin* decision (*sup.*), Rowlatt, J. applied the principle of money had and received to a case where a motor lorry (in which both plaintiff and defendant had a species of property) was impressed by the Government: (see *British Berna Motor Lorries Limited* v. *Intertransport Company* (31 Times L. Rep. 200).

I now turn to the decisions since *Tamplin's* case (*sup.*). In *Chinese Mining and Engineering Company* v. *Sale* (*sup.*), Rowlatt, J. held that the hire paid by the Admiralty for the use of a ship, whether more or less than the charter-party hire, was divisible between owner and charterer in proportion to their respective interests in the ship. The learned judge discussed the principle of division on grounds both commercial and equitable. He fully recognised the duty of the charterer to pay hire during the contract period. In *London American Maritime Trading Company* v. *Rio de Janeiro Tramway, Light, and Power Company* (14 Asp. Mar. Law Cas. 101; 116 L. T. Rep. 725; (1917) 2 K. B. 611) the same learned judge applied the same principles to a novel set of facts. He incidentally observed (14 Asp. Mar. Law Cas. 101, at p. 103; 116 L. T. Rep. 725; (1917) 2 K. B. 611, at p. 615) that the "parties must share the benefit or compensation according to their interests." In *Elliott Steam Tug Company* v. *Charles Duncan and Sons* (38 Times L. Rep. 583) be held, on the circumstances before him, that the question whether the owners were entitled to a share of the sum received by the charterers for hire was a matter for a referee to decide. In *Elliott Steam Tug Company* v. *John Payne and Co.* (15 Asp. Mar. Law Cas. 406; 123 L. T. Rep. 619; (1920) 2 K. B. 693, at p. 703) Rowlatt, J., said: "The result of the decisions as they at present stand appears to be that when during the continuance of a charter-party the vessel has been requisitioned by the Admiralty, both the charter-party hire and the Admiralty hire are brought into account and an adjustment is made between the owners and the charterers." It is interesting to note the broad basis of the equitable adjustment principle in the decisions of Rowlatt, J., which I have cited. Apportionment, of course, is a familiar principle in the Chancery Division. Finally, I may mention the case of *Dominion Coal Company* v. *Roberts* (*sup.*), where the charter-party was substantially similar to the one now before me. There the plaintiffs asked for a declaration that they were entitled to such sums received by the defendant from the Government as exceeded the sums payable by the plaintiffs to the defendant under the charter. The learned judge (Rowlatt, J.) again followed the dictum of Lord Parker in the *Tamplin* case (*sup.*), and granted the declaration as asked.

In view of the body of authority I have mentioned, embracing not merely weighty dicta of the House of Lords, but also express decisions of the King's Bench Division which are untouched by appeal, I must hold that the plaintiffs are here entitled to recover from the defendants the excess of Government payments over charter-party hire for both 1915 and 1916. In my view, the dicta and decisions are right in their substantial result. No evidence was given and no point made before me that any special facts here existed to enable the defendants to seek a deduction from that excess by reason of particular loss resulting to the defendants from the requisition; see the observations of Rowlatt, J. in *Chinese Mining and Engineering Company* v. *Sale* (*sup.*). It was ingeniously contended by counsel for the defendants that, as to the 1915 requisition period, the plaintiffs were estopped from now making a claim. He relied on the propositions as to estoppel stated in *Carr* v. *London and North-Western Railway Company* (31 L. T. Rep. 785; L. Rep. 10 C. P. 307). He pointed to the fact that the requisition period in 1915 preceded the novation agreement of Oct. 1915; that the plaintiffs did not then claim excess hire; that E. F. and W. Roberts and the defendants acted on the footing that no such claim would be made; and that the plaintiffs did not put forward their claim for 1915 till the early part of 1921. So be it. I see, however, no adequate ground in those circumstances for applying estoppel as against the plaintiffs. In 1915 and 1916 the legal position was, as all parties knew, uncertain. The charter-party was still running. At no time did the plaintiffs do anything to renounce their claim. Things were left for future settlement. The defendants, by the Oct. 1915 agreement, took over all the contract obligations of Roberts. There is no acquiescence by the plaintiffs upon any point which would indicate an abandonment of their claim. There were no laches. Even if laches had existed, that fact would not of itself be enough. In *Archbold* v. *Scully* (5 L. T. Rep. 160; 9 H. L. C. 360, at p. 383), Lord Wensleydale said: "So far as laches is a defence, I take it that, where there is a Statute of Limitations, the objection of simple laches does not apply until the expiration of the time allowed by the statute." See, too, Darby and Bosanquet on the Statutes of Limitation (2nd edit., p. 266). I must decide against the defence of estoppel.

This leaves two other questions for decision. I take them separately. The first is whether the plaintiffs can claim any, and what, interest from the defendants upon the sums found due. Now as to the 1915 requisition period, the statement of claim does not ask for interest, nor did counsel ask for it in argument. I

therefore say no more as to 1915, except that, upon the circumstances of the case and in view of the plaintiffs' delay, I should see no ground for allowing an amendment. But as to the 1916 requisition period, what happened was that, in view of the doubts existing as to the legal position, the defendants, upon receipt of the charter hire from the plaintiffs, placed it on deposit at a bank until a definite decision was arrived at. Upon this sum a substantial amount of interest has accrued. The mode in which the plaintiffs put their claim in the set of particulars handed to me at the trial is somewhat obscure. I do not want to analyse them. It will suffice if I state my views as to the legal position. The figures can then be adjusted. In my view, the position is this: The plaintiffs cannot recover any interest upon the money paid by them as charter hire to the defendants. To this money the defendants were, and are entitled under the charter. I see no ground on which the plaintiffs can recover back the money to which the defendants were in law entitled. It was the defendants' money, and not the plaintiffs' money. I therefore see no ground upon which they can recover any interest on it. The claim, in my view, is based on a misconception. On the other hand, they are entitled, as I have said, to the difference between the charter hire and the Government rate for the 1916 period. This difference is, roughly, 500*l.* This sum the plaintiffs are entitled to recover from the defendants. Such sum of 500*l.*, however, was not put on deposit at the bank. All moneys received by the defendants from the Government were used by them in their business in the usual way. Unless, therefore, the plaintiffs can recover interest upon some principle of law applicable to the 500*l.*, they will fail. As to this 1916 period, I should allow any necessary amendment to the statement of claim. The plaintiffs' claim, I think, is clearly limited to this excess sum of 500*l.* Now the right to demand payment of interest is often a matter of doubt. The law is not, perhaps, so clear as it used to be—compare Leake on Contracts (3rd edit., p. 945) with Leake (6th edit., p. 806). I do not discuss the authorities cited in Leake, except, first, to say that I agree with the statement in the third edition, p. 945, that "interest is not allowed upon the debt implied by law from money received to the use of another unless the special circumstances of the receipt render interest payable"; and secondly, to mention that if an agent or other person be in a fiduciary relation he may have to pay interest: (see *Burdick* v. *Garrick* (22 L. T. Rep. 502; L. Rep. 5 Ch. App. 233). The principle was applied by the Court of Appeal in the case of *Harsant* v. *Blaine* (56 L. J. Q. B. 511). The phrase "fiduciary relation" is a somewhat broad one. Here the defendants were, I think, upon the balance of authority, in the position of quasi-trustees for the plaintiffs of the 500*l.* excess, and I think that I ought, in the circumstances to give the plaintiffs 5 per cent. interest on that sum as from the end of 1916. Such an allowance for interest, moreover, is, I think, properly to be made upon any equitable apportionment of the respective rights of the parties.

The final question arises on clause 6 of the charter-party. Under that clause the charterers have to pay hire monthly in advance at New York to the agents of the owners. Under the bargain between owners and agents the agents were entitled to 4½ per cent. commission upon it. The defendants now claim that they are entitled to credit for that sum as against the plaintiffs. In my opinion, this contention is wrong. The arrangement between the defendants and their agents did not concern the plaintiffs. If, as I have held, the defendants were entitled to the charter hire, they must bear the burden of their agents' rights. To hold otherwise would give the defendants a greater net sum during the requisition period in respect of a charter hire than they would have received if there had been no requisition at all. I therefore hold that the defendants are not entitled to credit for the 4½ per cent. commission of their agents.

These are all the points which call for decision. I regret the length of this opinion, but in view of the importance of the defendants' contention, and of the convenience of having the relevant decisions brought together in one judgment, I deemed it proper to deal somewhat fully with the matter. The figures can be adjusted by counsel, or by the parties. There will be liberty to apply in case of difficulty. Judgment will be for the plaintiffs for the amount found due.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *William A. Crump* and *Son*.

Solicitors for the defendants, *Ince*, *Colt*, *Ince*, and *Roscoe*, for *Weightman*, *Pedder*, and *Co.*, Liverpool.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Feb. 21 *and April* 6, 1922.

(Before Sir Henry Duke, P.)

The Joannis Vatis (No. 2). (*a*)

Collision — Damages — Arrest under foreign jurisdiction—Bail—Agreement for bail in sum equal to value of the steamer—Damages exceeding such amount—Limitation of liability—Interest on damages—Costs—Claim for such interest and costs—Re-arrest of steamer—Seizure of ship by sheriff—Writ of fi. fa.*—Order XLII., rr.* 3, 16*—Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 503.

In order to prevent the arrest of their steamer in a collision action, owners agreed to give bail in a certain sum or the value of the

(a) Reported by Geoffrey Hutchinson, Esq., Barrister-at-Law.

steamer, whichever should prove the less. By the law of the port in which the steamer then was the liability of her owners was limited to the value of the ship. Bail was eventually given in the sum named in the agreement, and it was further agreed that the question of blame for the collision should be decided in England by the Admiralty Court. At the trial the Admiralty Court apportioned liability, but the Court of Appeal held the steamer alone to blame. The House of Lords affirmed their decision. The amount of the damages for which the steamer was held liable then exceeded the amount for which bail had been given. It was admitted that by reason of the terms of the agreement the bail exhausted the liability of the owners for damages; but the other parties to the agreement (the owners of the innocent steamer and her cargo) claimed interest on damages, costs, and interest on costs in excess of the amount of the bail, and threatened proceedings against the steamer when she came again within the jurisdiction, either by re-arrest by the marshal, or by seizure by the sheriff under a writ of fi. fa.

Held (i.) that the intention of the agreement being to limit the liability of the owners of the steamer for damages, their liability for damages was limited to the amount of the bail; (ii.) that costs and interests on damages being matters outside the scope of the agreement might be proceeded for in addition to the amount of the bail; (iii.) that such interest at the rate of 4 per cent. ran from the date of the decision of the Court of Appeal until their decision was affirmed by the House of Lords, since the owners, by their appeal, had prolonged the litigation by this period; (iv.) the appropriate procedure for recovering costs and interest was not re-arrest by the marshal, but seizure of the vessel by the sheriff under a writ of fi. fa.

MOTION arising out of an action by the owners of the British steamer *Worsley Hall* and her cargo against the owners of the Greek steamer *Joannis Vatis.* In Aug. 1917, the vessels were in collision in the Mediterranean. After the collision both ships put into Bizerta, where they were under the jurisdiction of French courts. The owners of each vessel threatened to arrest the other, and it was finally agreed that bail should be given for each ship in a sum of 100,000*l.* or the value of the vessel, whichever should prove to be the less when a valuation of the steamers could be made, and that the question of liability should be determined by the English Admiralty Court. Bail was given in respect of the *Joannis Vatis* for 100,000*l.* Under the law of France the value of the steamer at the conclusion of the voyage is the limit of the liability of her owners.

At the trial in the Admiralty Court the *Joannis Vatis* was found one-third to blame, but this decision was varied by the Court of Appeal, who held her alone to blame. The decision of the Court of Appeal was affirmed by the House of Lords. The judgment of the Court of Appeal was dated the 13th Feb. 1919 and that of the House of Lords the 19th Dec. 1919.

At the reference, disputes arose between the owners of the *Worsley Hall* and some of the underwriters on her cargo in which the defendants were not concerned and took no part: (see *The Joannis Vatis*, 126 L. T. Rep. 718; (1922) P. 92). Claims were ultimately proved amounting to 146,000*l.* in respect of damages. No part of the costs, and no interest on damages or on costs were paid by the defendants, who considered that their liabilities were confined to the sum in which they had given bail, *i.e.*, 100,000*l.* When the *Joannis Vatis* again came within the jurisdiction the plaintiffs threatened to re-arrest her in respect of their unpaid costs and interest, and obtained bail, under protest, for 15,606*l.*

The plaintiffs moved for a declaration that (i.) the defendants were liable to pay to them (*a*) the amount of the plaintiffs' taxed costs of the action, including the costs of appeals in the action and of the reference to assess the amounts of the plaintiffs' damages, and the costs of the present motion, and (*b*) interest at the rate of 5 per cent. per annum on the amount of the said damages ascertained and recoverable by the plaintiffs from the date of the said damages or assessment to the date of payment; (ii.) that the defendants were liable to pay to them sums by way of costs and interest in addition to the sum of 100,000*l.*, being the amount of the bail provided in the action; (iii.) that the *Joannis Vatis*, then situated within the jurisdiction of the courts, was amenable to seizure and arrest under the appropriate process issuing from the court for the purpose of enforcing payment of the sums for costs and interest.

Butler Aspinall, K.C. and *A. T. Bucknill* for the plaintiffs.—If there had been no agreement the plaintiffs would have been entitled to proceed *in personam* for the balance of the damages due to them:

The Gemma, 8 Asp. Mar. Law Cas. 585; 81 L. T. Rep. 379; (1899) P. 285;
The Dictator, 7 Asp. Mar. Law Cas. 251; 67 L. T. Rep. 563; (1892) P. 304;
The Dupleix, 12 Asp. Mar. Law Cas. 122; 106 L. T. Rep. 347; (1912) P. 8.

See also Williams and Bruce, Admiralty Practice, 3rd edit., p. 305, where the view of Bruce, J. is expressed. Bail was given, and the plaintiffs had, therefore, no maritime lien, since the bail superseded the maritime lien which they once had. Although any claim for damages in excess of 100,000*l.* is precluded by the terms of the agreement, the plaintiffs are not prevented from maintaining claims for interest on damages, costs, and interest on costs, since these are matters outside the scope of the agreement. The facts here are comparable with:

The Freedom, 1 Asp. Mar. Law Cas. 136; 25 L. T. Rep. 392; L. Rep. 3 A. & E. 495;
The Temiscouata, 2 Spinks, 208;

The Wild Ranger, Bro. & Lush. 84 ;
The Lorena, unreported ; but see the reference in Roscoe's Admiralty Practice, 4th edit., at p. 240 ;

The plaintiffs are entitled to interest at 5 per cent. per annum from the time when they became entitled to judgment, *i.e.*, the 13th Feb. 1919 :

The Gertrude, 6 Asp. Mar. Law Cas. 315 ; 59 L. T. Rep. 251 ; 13 Prob. Div. 105.

Bateson, K.C. and *Lewis Noad* for the defendants.—Under the law of France the plaintiffs can obtain nothing beyond the value of the vessel, which was here greatly in excess of the amount to which their liability is limited by English law. Under English law they may be entitled to interest and costs in excess of the limited liability provided by the statute ; but here the plaintiffs have received the value of the steamer under the law of France, and they cannot have, in addition, sums to which they may be entitled under the English law. Bail is only liable to the value of the steamer, and not to the full extent of the damages :

The Duchesse de Brabant, Swa. 267.

As to *The Gemma* (*sup.*), the law has not been changed by that decision. When bail was given the plaintiff's maritime lien was expunged, and therefore the marshal has no power to re-arrest. There is no case in which the marshal has been directed to re-arrest a vessel. In *The Gemma* (*sup.*) the ship was seized by the sheriff ; moreover, in that case, bail was given in the value of the ship, but it does not appear whether such value exceeded the limit of the owners' liability under the Merchant Shipping Act. The intention of the agreement in the present case was to provide a sum to which the liability of each party was confined. The defendants would admittedly have been liable *in personam* for the excess of damages beyond the value of their ship had not this agreement operated to confine their liability to the sum in which they provided bail. As to the interest, that is in substance a claim for further damages.

Butler Aspinall, K.C. in reply.

Cur. adv. vult.

April 6.—Sir HENRY DUKE, P.—This is a motion in a damage action *in rem* made on the part of the plaintiffs with a view to enforcement of a judgment for damages and cost which the plaintiffs obtained four years ago against the defendants. The questions which arise have their origin in the fact that the amount of the judgment *in rem* greatly exceeds the value of the defendants' ship, and that the plaintiffs now claim process of execution against the vessel, as being now the property of the defendants, in order to recover certain unsatisfied items of their judgment debt. There are peculiar circumstances in the case which led, in the course of the argument before me, to a close examination of the conditions necessary to be established in order to entitle a plaintiff *in rem* in the Admiralty jurisdiction to maintain against the defendant in an action, in addition to his claims *in rem*, claims *in personam.*

The plaintiffs brought their action as owners of an English steamship, the *Worsley Hall*, and the cargo which was laden in her on a voyage in the Mediterranean in Aug. 1917, in course of which she came into collision with the *Joannis Vatis*, a Greek steamship whose owners under the usual collective description were made defendants in the action. The action was brought in this jurisdiction as the result of correspondence between the solicitors for the parties carried on while both ships were within the jurisdiction of French courts in the port of Bizerta. Each party was threatening arrest of the ship of the other ; and there was controversy as to the power of the plaintiffs to arrest the *Joannis Vatis*, the limits of the liability for damage, and the amount for which bail might be exacted. In the event the parties agreed upon—to quote the words they themselves used : " The exchange of unconditional undertakings for bail up to 100,000*l.* provided that if the present value of either steamer upon valuation by approved valuer be less than above amount, the bail for such steamer shall be the amount of such valuation."

The reference to unconditional undertakings arose out of a dispute as to whether the *Joannis Vatis*, as a requisitioned ship, was subject to arrest. The agreement as to amount and reservation of a right to reduce the bail from the named maximum to the amount of ascertained values was, no doubt, referable to the fact that at Bizerta the actual values of the vessels would have determined the amount of the bail security possible to be enforced. No valuation appears to have been made by either party. It was a condition of the agreement as to bail that the liabilities of the parties should be determined here. The plaintiffs, the owners of the *Worsley Hall* and her cargo, accordingly issued their writ in this court in the usual form and against the defendants under the usual style in an action *in rem.* The defendants so impleaded duly appeared, and the litigation proceeded upon claim and counter-claim on the ordinary footing of proceedings in an action *in rem.* In proper course, the defendants provided a bail bond whereby the bondsmen consented that : " If the defendants, the owners of the *Joannis Vatis*, shall not pay what may be adjudged against them in the said action, with costs, execution may issue forth against us, our heirs, executors, and administrators, goods and chattels, for a sum not exceeding one hundred thousand pounds."

At the trial of the action on the 25th Oct. 1918, both parties were held to blame ; and there was the usual reference as to damages with no order as to costs. On appeal the plaintiffs were successful. On the 18th Feb. 1919, the Court of Appeal pronounced the collision to have been occasioned solely by fault or default on the part of the *Joannis*

Vatis, and for the plaintiffs' claim for damages in consequence thereof, condemned the defendants in the said damages and in costs as well in the court below as on the appeal, and referred the damage to the registrar, assisted by merchants to assess the amount thereof. In the House of Lords on the 19th Dec. 1919, the judgment of the Court of Appeal was affirmed with costs.

Pending the reference it apparently became known to the defendants' advisers that the claims in respect of the *Worsley Hall* and her cargo exceeded the 100,000*l.* secured by the defendants' bail. The defendants accordingly took no part in the proceedings before the registrar and merchants. The damages were there ascertained at 146,953*l.* The 100,000*l.* secured by bail the defendants have paid. They have not paid the costs in this Court and the Court of Appeal. The plaintiffs at the hearing before me intimated that they do not claim as damages more than the 100,000*l.* they have received. They claim, however, a sum for interest on their judgment debt, costs and interest on costs; and they have estimated the total claims at between 15,000*l.* and 16,000*l.*

On the 25th Jan. 1922, the *Joannis Vatis* was about to come within the jurisdiction, and the plaintiffs notified defendants that in default of an undertaking by them to pay the unpaid costs of the cause the plaintiffs would arrest the vessel on her arrival in an English port. The defendants under protest undertook to find sureties for 2500*l.* in respect of any liability of theirs for the costs. The plaintiffs then gave further notice of their claim for interest, and stated that they would issue execution for such interest unless the defendants should forthwith furnish security for the same. The plaintiffs' solicitors added this: "Our principals wish us to point out that they are in a position to issue execution for the damages remaining unpaid: but they agree that your clients should be entitled to limit liability upon payment of 100,000*l.* with interest at five per cent. from the date of the collision."

Bail for 15,606 was provided by the defendants "under protest and without prejudice to all questions." The plaintiffs' contention before me was that the judgment recovered by them ought to be enforced by any process of execution which is at the disposal of the court, and that arrest and sale under the jurisdiction in Admiralty and seizure and sale by the sheriff are complemental means of recovering payment of the debt established by the decree.

The right to issue new process of execution after complete realisation of the *res* in an action *in rem* was based in the main upon the judgments in this court in *The Freedom* (1 Asp. Mar. Law Cas. 136; 24 L. T. Rep. 452; 3 P. C. 594), and in *The Dictator* (7 Asp. Mar. Law Cas. 251; 67 L. T. Rep. 563); (1892) P. 304), and in the Court of Appeal in *The Gemma* (8 Asp. Mar. Law Cas. 585; 86 L. T. Rep. 379; (1899) P. 285). Reliance was also placed on the judgment of Sir Samuel Evans in *The Dupleix* (12 Asp. Mar. Law Cas. 122; 106 L. T. Rep. 347; (1912) P. 8), where the principles laid down in *The Gemma* were applied to a case closely resembling the present. Counsel for the defendants disputed the applicability in this case of the decisions I have mentioned and claimed to treat some important passages in the judgments as not being of binding authority. They adopted an argument from a standard work on Admiralty practice, Williams and Bruce's Admiralty Practice, 3rd edit., pp. 304–305, in terms which I will cite therefrom: "An appearance in an action *in rem* which admittedly is entered to prevent judgment being given in the absence of the defendant does not alter the nature of the action or enlarge the relief to which the plaintiff would be entitled if there had been no appearance; and any dicta to the contrary in the case of *The Gemma* (*sup.*), where the actual decision was merely that the registrar's report in the action—confirmed by the Admiralty Division without objection—was conclusive as to the amount for which an execution could be levied, are not such as to preclude the defendant in an action *in rem*, where bail has been given in the full value of the property proceeded against, from obtaining a reduction of the damages claimed in the action to the amount of the bail and costs, provided proper application be made either at the reference . . . before the registrar, or to the court on objection to the registrar's report."

The opinion set forth in the passage I have cited, assuming it to be that of Sir Gainford Bruce, a learned judge who was very conversant with the jurisdiction in Admiralty, commands, as of course, my respectful attention and I have taken it into account in considering the judgment which it purports to explain or define.

The first answer of the defendants to the claim of the plaintiffs was founded on the agreement of the parties as to bail. The limit of the liability of the defendants under French law being the value of their vessel, and the English statutory limit a less sum, the defendants contended that in its true effect the agreement before action precluded the plaintiffs from any larger claim than for 100,000*l.* This sum, they urged, was not only the sole subject of a contest in which no additional claim could be introduced; it was also the equivalent of a fund paid into court under decree in an action for limitation of liability.

In the correspondence from which the agreement between the parties is to be deduced, neither party proposed in express terms a limitation of liability which should operate generally, though the defendants' solicitors wrote with regard to the proposed amount of bail "We think the figure should cover either side's claim." The plaintiffs apparently were not aware at the outset that all claims of cargo owners were included in this action; and it seems that until a late period both sides thought the total claims against the *Joannis Vatis*

or her owners would be substantially less than in fact they proved to be. I am satisfied, however, of the intention of both parties that the provision of bail for each ship in 100,000*l*. should place the ship in the same position as though her full value had been brought into court.

What is the effect of the agreement I find to have been made, in view of the fact that the jurisdiction to be invoked for determination of the disputes between the parties is by consent the jurisdiction of this court? Sect. 503 of the Merchant Shipping Act 1894, provides that beyond the limit there prescribed owners of any ship, British or foreign, shall not be liable in damages for collision caused by improper navigation. It was assumed, if not expressly admitted in the argument, that the 100,000*l*. secured on behalf of the *Joannis Vatis* as her appraised value, was substantially more than the limited amount of the liability of her owners under sect. 503. Reading the correspondence in the light of these considerations, I think that as between the plaintiffs and the defendants, their agreement operated to limit the liability in damages of the defendants. No reason was assigned for the admission of the plaintiffs which was made during the argument that they could not claim more than 100,000*l*. of damages. I think the reason is probably that which I have indicated. The agreement, however, while it excludes any claim *in personam* or *in rem* for damages beyond 100,000, does not appear to me to have any operation with regard to the plaintiffs' claim for interest and for costs. The right to these depends on considerations not governed by the agreement.

The second principal contention of the defendants was that the enforcement by the plaintiffs of their remedies *in rem* is a bar to further proceedings. This argument I have considered, though I think it is inconsistent with the principle laid down in *The Gemma* (*sup.*). It was founded in the main on a class of decisions in the Court of Admiralty, of which those most favourable to the defendants are, perhaps, *The Hope* (1 Wm. Rob. 154), *The Volant* (1 Wm. Rob. 383), *The Kalamazoo* (15 Jur. 885), and *The Duchesse de Brabant* (Swa. 264). In *The Hope* judgment *in personam* for damages in excess of the proceeds of the ship was refused. Dr. Lushington stated in general terms in *The Volant* (*sup.*) that in an action *in rem* the court could do no more than sell the ship for the benefit of the plaintiffs. In *The Kalamazoo* (*sup.*) the same learned judge held that a second arrest in respect of the same damage cannot be sustained, and declared that the court cannot "engraft a personal action on an action *in rem*." Bail had been taken there for 3502*l*., the damages proved to be 4810*l*.; a second action *in rem* was brought, and Dr. Lushington decided that no such action could be maintained: "It would be perfectly absurd," he said, "to contend that you could arrest a ship, take bail to any amount, and afterwards arrest her again for the same cause of action. The bail represents the ship; and when a ship is once released upon bail, she is altogether released from that action." Read as a declaration of principle, these observations of Dr. Lushington in *The Kalamazoo* (*sup.*) appear to support the contentions of the defendants.

To appreciate their true significance it is necessary, however, to see what must have happened in 1851 in the case of *The Kalamazoo* (*sup.*) before the then plaintiffs could be said to have exhausted the legal remedies. An action *in rem* carried to its conclusion did not preclude a subsequent action *in personam*, and a previous action *in personam* with judgment and execution would not have precluded a subsequent action *in rem*. For the latter proposition *The John and Mary* (Swa. 471), and *The Bengal* (Swa. 468) are authorities, both being decisions of Dr. Lushington. The former proposition is made good by the decision of the Court of Common Pleas in *Nelson* v. *Couch*; 33 Law Jour. C. P. 46), that an Admiralty action *in rem* is no bar to a subsequent action *in personam* for the same cause, unless the proceeds of the vessel and freight are at least equal to the amount of the damage suffered. Sir James Shaw Willes said with regard to a case like *The Kalamazoo* (*sup.*): "I think the rule of the Admiralty Court . . . depends on forms peculiar to that court and not upon any principle of law which prevents a man recovering from the owner personally the excess of damage which the ship is insufficient to pay."

The judgment of the Privy Council in *Yoe* v. *Tatem*; *The Orient* (1 Asp. Mar. Law Cas. 108; 24 L. T. Rep. 918; L. Rep. 3 P. C. 696), is an illustration of the principle laid down in the three cases I have last cited.

The authorities to which I have referred show that as between persons subject to the jurisdiction of the English courts claims such as are now in question would, before the Judicature Acts, have been enforceable by successive actions *in rem* and *in personam*. Since the Judicature Acts, these cumulative rights are enforceable in the High Court of Justice in one action. This I take to be a principal ground of the decision in *The Gemma* (*sup.*). The objection is made that the defendants, brought into the jurisdiction only by proceedings *in rem*, cannot, with due regard to their rights as subjects of a foreign state, be made amenable in what has become substantially a second action. *The Gemma* (*sup.*) and *The Dupleix* (*sup.*) are authorities to the contrary. In *The Gemma* (*sup.*), foreign owners of a foreign ship were, under like circumstances, held in an action like the present, where the ship had been bailed in its full value, liable to process of execution in respect of the amount by which the judgment recovered in the action exceeded the amount of the bail. As to any alleged hardship upon foreign defendants, there is less pretence for complaint here than there was in the case of *The Gemma* (*sup.*). Before action the parties in this case agreed that the contest between them should be decided in

this court. I will only add that if any just ground existed for exempting the defendants from the jurisdiction, or for applying any exceptional rule of law in their favour, they might have appeared under protest and argued the question of jurisdiction, or have pleaded in the action every defence on which it is said they are entitled to rely.

I must proceed to determine what sums are due and unpaid under the plaintiffs' judgment, and what process of execution is available to the plaintiffs. The claim of the plaintiffs for interest on their judgment debt, as it was pressed, is for 5 per cent. on 100,000*l.* since the date of the judgment in the Court of Appeal, which date it bears. Under the ordinary practice of the High Court a judgment debt carries interest from its date at 4 per cent. (1 & 2 Vict. c. 110. R. S. C., Order XLII., r. 16). That the plaintiffs' damages had to be assessed before the judgment could be completed by the court's confirmation of the assessment might—but I do not pause to determine whether it would—have been immaterial in an action in the King's Bench Division.

Here two special matters are to be considered. In this jurisdiction a rule exists with regard to interest upon damages which is well established and proper to be taken into account. The registrar and merchants include, in their computation of damage by collision, interest upon the items of claim from the time of accrual of the damage until the date of the assessment. This practice was discussed and confirmed in *The Kong Magnus* (6 Asp. Mar. Law Cas. 583 ; 63 L. T. Rep. 715 ; (1891) P. 223), and is in conformity with what was said long since by Lord Stowell in *The Dundee* (2 Hagg. 137). The sum so calculated is given, not as interest on a debt, but as part of the damages. During recent years interest as damages has been reckoned in this way at 5 per cent., which perhaps explains the plaintiffs' use of a 5 per cent. rate in their claim. Not only is this practice material for consideration as to the date from which interest can be held to run. It is necessary to remember also that—as the plaintiffs concede—the damages payable by the defendants are limited to 100,000*l.* Interest upon items of damage down to the assessment of the loss would have been recovered out of this amount if the total claims had not exceeded 100,000*l.* It is really a claim for damages. There was no allegation of defendants' default of payment of 100,000*l.* after that sum had been found to be due ; and I have come to the conclusion that the only time in respect of which interest can properly be awarded is the period between the judgment of the Court of Appeal—the 13th Feb. 1919—and the judgment of the House of Lords—the 19th Dec. 1919. The defendants by their appeal to the House of Lords postponed the settlement of the claims of the plaintiffs by 309 days ; and they must pay interest on 100,000*l.* at 4 per cent. for that time, 3386*l.* 6*s.*

The claim of the plaintiffs to recover the costs of their action and interest thereon, in addition to the amount for which bail was given, was admitted, in the argument of the case for the defendants, to stand on a different footing from the claim to recover interest upon the amount of the award in respect of damages. Having regard to the state of the authorities, some such admission was inevitable. The case of *The Dundee* (*sup.*) raised questions of the allowance of claims for interest on damages, cost, and interest on costs, in a damage action, where the statute of limitation 53 Geo. 3, c, 159 was applied, and the sums in question were outside the statutory limit and the amount of the bail. Lord Stowell held the plaintiff to be entitled to recover under both heads. "Beyond the limited liability," he said, "the claimant is entitled to remuneration for the costs to which he is driven to recover his loss." and he added that the statute would otherwise be chargeable with gross injustice, and the immunity of the defendant "would encourage unjust and persevering litigation." The Court of Queen's Bench in *Ex parte Rayne* (1 Q. B. 982), decided in prohibition that, beyond the limit of liability provided by the statute, a defendant held liable for damages in a damage action in the Court of Admiralty might properly be monished to pay the costs, notwithstanding that he had been brought within the jurisdiction only by the arrest of his ship. In *The Volant* (1 Wm. Rob. 383) and in 1863 in *The Europa* (Bro. & Lush. 89), Dr. Lushington applied the same rule ; and in *The Freedom* (*ubi sup.*), Sir Robert Phillimore said that the Court of Admiralty could always issue a monition for the payment of costs which have exceeded the amount in which the suit was instituted, and that he thought in that case that under the old law, "if necessary the court would have ordered the re-arrest of the ship" for the payment of the costs. Without considering whether the last observation I have cited is to be explained by the fact that *The Dictator* (*sup.*) was a case of a ship which had been bailed for less than her full value, it is enough to say that under the Admiralty practice before the Judicature Acts, defendants *in rem* were liable personally for unpaid costs after the full value of the *res* had been recovered by the plaintiff. So also at the present time they are liable for costs in addition to the full amount payable for damages by collision under the limitation enacted in the Merchant Shipping Act 1894, s. 503.

As to the costs of the reference to the registrar and merchants to assess the plaintiffs' damages, the defendants took no part in the proceedings ; and the only matters contested were those which arose between the plaintiff shipowners and the plaintiff cargo owners. The plaintiffs cannot recover their costs of this contest, but are, I think, entitled to be paid such costs as are payable by defendants in damage actions where the amount of the plaintiffs' claim is not disputed. Under the Rules of the Supreme Court, the sums due by the defendants for costs due and unpaid bear

interest at 4 per cent. from the respective dates on which they were decreed to be paid.

There remains to determine what process of execution is available to the plaintiffs as against the defendants. Under the Rules of the Supreme Court (Order XLII., r. 3), a judgment for recovery by, or payment to, any person of money may be enforced by any of the modes in which a judgment or decree for the payment of money of any court whose jurisdiction is transferred to the High Court by the Judicature Act of 1873, might have been enforced at the time of the passing of that Act. The plaintiffs are not entitled to re-arrest the *Joannis Vatis* unless they could have done so formerly by a warrant from the Court of Admiralty.

On consideration of the authorities, including *The Dictator* (*sup.*) I am satisfied that, after receiving the full value of the ship, they have not in this case any right of re-arrest. They must rely on process of execution *in personam.* What was claimed in default of a warrant to the marshal was a writ of *fieri facias*, and the Admiralty Court Act of 1861 (24 & 25 Vict. c. 10) was relied upon. Such a writ was ordered to issue in the case of *The Gemma* (*sup.*) and in other cases relied on by the plaintiffs, and it is warranted by the rules of the Supreme Court. I do not think, though, that a writ of *fi. fa.* could be issued as of course in an action constituted as the present action is. Under the practice of the High Court, as to the issue of such a writ, there must be identification in the writ of judgment debtor whose effects are to be seized. Special provision exists for the case of a partnership; but the defendants here are not sued as, or shown in the proceedings to be, a partnership. They are only described in the action as "The owners and parties interested in the steamship *Joannis Vatis*." In order to ascertain whether this is more than a technical difficulty, I have caused inquiry to be made of the parties through the registry, and have learned that the *Joannis Vatis* was, when bail was given in February last, still owned by the defendants, who appeared to the plaintiffs' writ in 1917. This being so, the plaintiffs are entitled to a declaration that the amounts I have already indicated remain due to them on their judgment, and that the same were at the date when bail was given by the defendants, and now are, enforceable by seizure and sale of the *Joannis Vatis* by a sheriff under a writ of *fi. fa.*

The plaintiffs will have the costs of this motion.

Leave to appeal.

Solicitors: *Thomas Cooper* and *Co.*, agents for *Hill, Dickinson*, and *Co.*, Liverpool; *W. A. Crump* and *Son.*

Nov. 14, 1921, *March* 1, *and June* 15, 1922.

(Before HILL, J.)

THE BYZANTION (*a*)

Mortgage Agreement — Unregistered mortgage —Agreement to treat mortgage "as if the ship had been registered in England by a statutory mortgage"—Jurisdiction—Construction of the Agreement—Position of interveners —Admiralty Court Act 1840 (3 *&* 4 *Vict. c.* 35), *s.* 3; *Admiralty Court Act* 1861 (24 *Vict. c.* 10), *s.* 11.

The Admiralty Court has jurisdiction under sect. 3 *of the Admiralty Court Act* 1840 *to take cognisance of mortgage claims relating to a ship if the ship or proceeds are under arrest of the court at the time when the proceedings are instituted, notwithstanding that the mortgage is not a legal mortgage.*

A party who intervenes in, and defends an action in rem *cannot set up defences which the owners of the ship could not have set up had they appeared and defended.*

By a mortgage agreement the owners of a Greek steamer agreed "that the mortgagees (British subjects) as far as the law allows shall, in addition to the benefits conferred by the Greek mortgage and mortgage agreement, be entitled to enforce the Greek mortgage and mortgage agreement in the English Courts in a similar manner as in the Greek Courts, and so long as the said vessel is within the jurisdiction of the English Courts the security shall, so far as the mortgagees desire, be dealt with in precisely the same way as if the ship had been registered in England by a statutory mortgage with a collateral mortgage agreement containing the same terms and conditions as those contained in the mortgage and these presents." The steamer was never registered in Greece, and the owners were therefore unable by the law of Greece to register the mortgage. At Hull she was arrested and judgment and an order for sale recovered against her in a necessaries suit by a firm of ship repairers. The mortgagees then began an action, in which no appearance was entered by the owners, but an appearance was entered by the ship repairers as interveners. It appeared that by the law of Greece an unregistered mortgage is invalid.

Held that if the plaintiffs had a mortgage, the court had jurisdiction to entertain the suit.

Held, further, that, notwithstanding the invalidity of the mortgage, the mortgage agreement must be construed as giving the plaintiffs as against the owners of the steamer the same rights as if the steamer was registered in England and there was a registered statutory mortgage upon it, whenever it was within the jurisdiction. The plaintiffs enjoyed the same rights against the interveners although the interveners were not parties to the agreement, since the position of an intervener is, as to his defence, the same

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

as that of an owner who appears under protest, and the intervener cannot therefore set up defences which the owner could not set up. The intervention therefore failed.

ACTION OF MORTGAGE.

The plaintiffs were the Graham Joint Stock Shipping Company of Glasgow, who claimed to be mortgagees of the Greek steamer *Byzantion*, and asked for judgment pronouncing for the validity of their mortgage. No appearance was entered by the owners of the *Byzantion*, but an appearance was entered by the Hull Central Dry Dock Company, who had previously obtained judgment in a necessaries suit in which the *Byzantion* had been sold, and who now contested the validity of the plaintiffs' mortgage.

Raeburn, K.C. and *G. P. Langton* for the plaintiffs.

Dunlop, K.C. and *J. R. Ellis Cunliffe* for the interveners.

The facts and arguments of counsel sufficiently appear from the judgment.

The Admiralty Court Act 1840 (3 & 4 Vict. c. 65), s. 3, provides :

Whenever any ship or vessel shall be under arrest by process issuing from the said High Court of Admiralty, or the proceeds of any ship or vessel having been so arrested shall have been brought into and be in the registry of the said court, in either such case the said court shall have full jurisdiction to take cognisance of all claims and causes of action of any person in respect of any mortgage of such ship or vessel and to decide any suit instituted by any such person in respect of any such claims or causes of action respectively.

The Admiralty Court Act 1861 (24 Vict. c. 10) provides by sect. 11 :

The High Court of Admiralty shall have jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act 1854 whether the ship or the proceeds thereof be under arrest of the said court or not.

Cur. adv. vult.

June 15.—HILL, J. :—The plaintiffs in this action are the Graham Joint Stock Shipping Company Limited, of Glasgow. The defendants are the owners of the steamship *Byzantion*. The owners are in fact a Mr. Mango, a Greek subject, who carried on business in London. The action was begun by writ *in rem* dated the 22nd July 1921, served on the *Byzantion* in Alexandra Dock at Hull on the 23rd July 1921. The *Byzantion* was at the time of service under arrest of this court in an action (Folio 218, 1921, No. 886), in which the plaintiffs were the Hull Central Dry Dock Company Limited. No appearance was entered to Folio 218 and in that action the Hull Central Dry Dock Company Limited, claiming in respect of repairs, recovered judgment and an Order for sale ; a reference has been held, and the report made on the 25th July 1921 was confirmed on the 29th July 1921. Under that judgment there is due to the Hull Central Dry Dock Company Limited £22,000 and interest and costs. In the present action (Folio 523), no appearance was entered by the owners. The Hull Central Dry Dock Company Limited on the 10th Oct. 1921 entered an appearance as interveners. On the same day the plaintiffs, the Graham Joint Stock Shipping Company Limited, filed their statement of claim and notice of motion for judgment by default. In their statement of claim they allege that they are mortgagees under a mortgage to secure account current dated the 17th Sept. 1919, and a mortgage agreement dated the 30th July 1919, and they allege that there is presently owing to them as mortgagees a sum in excess of £105,000. The following facts have been proved or admitted. The *Byzantion* was formerly a British ship, the *Calonne*, belonging to the Esquimaux Steamship Company Limited of London. On the 30th July 1919 an agreement was entered into between the Graham Company and Mr. Mango for a loan by the Graham Company to Mr. Mango upon mortgage of a ship therein described as "the *Byzantion* (formerly *Calonne*) registered at Piræus in the Kingdom of Greece." On the same date, Mr. Mango, by a separate document, guaranteed what he had already undertaken in the agreement, repayment of the instalments referred to in the agreement and due performance and observance of all the covenants, agreements, and stipulations on the part of the owner therein contained. The purpose of the loan was to enable Mr. Mango to purchase the ship.

On the 17th Sept. 1919 a bill of sale was executed by the Esquimaux Steamship Company Limited to Mr. Mango on the steamship *Calonne* to be renamed *Byzantion*. On the same date a mortgage in the form of the Merchant Shipping Act mortgage to secure account current and expressed to be of the *Byzantion* formerly steamship *Calonne* was executed by Mr. Mango to the Graham Company. It recited the agreement of the 30th Sept. 1919. The mortgage to secure account current and the agreement of the 30th Sept. 1919 were executed or acknowledged before a notary public and bear his note upon them. On the 22nd Sept. 1919 the Registrar of Shipping, London, entered on the register of the ship : "Registry closed 22nd Sept. 1919, vessel sold to foreigners (Greek subjects)." The bill of sale and the mortgage in statutory form each bear an indorsement by the Greek Consul General dated 17th Sept. 1919. In translation these indorsements contain the following : on the bill of sale "Seen the present bill of sale of the steamship *Byzantion* to be registered in Piræus . . . and on which there is a mortgage in favour of the Graham Joint Stock Shipping Company in accordance with mortgage in England £135,000," and on the mortgage "Seen the present documents of granting a first mortgage for £135,000 by Mr. J. A. Mango to the Graham Joint Stock Shipping Company." The agreement of the 30th July 1919 provides for a loan upon "a first mortgage under the law of Greece and bearing date the 17th Sept. 1919 on the

Byzantion registered at Piræus." The owner undertakes that the ship shall sail under the Greek flag, and be kept registered as a Greek ship and at a port of registry in Greece. The agreement provides for the method of the advance and of the repayment, insurance and so forth, and for foreclosure or sale upon default, including a right to foreclose if the ship be arrested and not freed from arrest within three months. Clause 15 is as follows: "The owner agrees that the mortgagees as far as the law allows shall in addition to the benefits conferred by the Greek mortgage and mortgage agreement be entitled to enforce the Greek mortgage and mortgage agreement in the English courts in a similar manner as in the Greek courts, and so long as the said vessel is within the jurisdiction of the English courts the security shall so far as the mortgagees desire, be dealt with in precisely the same way as if the ship had been registered in England by a statutory mortgage with a collateral mortgage agreement containing the same terms and conditions as those contained in the mortgage and these presents."

The only other document to be referred to is what is in translation headed "Temporary Document of Nationality." It was given at Malta and signed by the Greek Consul. It is dated 12th Sept. 1919, which I apprehend to be the old style. It recites the English measurement and says, "This steamer having been measured by the Consul with increased No. 3 belongs to the owner, Greek subject, John A. Mango, of London. He therefore is permitted to fly the Greek flag."

The interveners who have a judgment *in rem* against the *Byzantion* contend that the Graham Company have no right *in rem*. That is the only question with which I am now concerned. By consent it has been tried on the Graham Company's motion for judgment. I am not directly concerned with the liability *in personam* of Mr. Mango. No judgment *in personam* can be pronounced against him, for he is not sued *in personam* and has not appeared to the writ *in rem*. I am only concerned with his personal liability in that there can be no right *in rem* unless there is a personal liability of the owner of the *res*. Of Mr. Mango's personal liability there is no doubt upon the agreement and the guarantee of the 30th July 1919. To an action of debt or covenant he would have no defence. But to succeed in the present action the Graham Company must prove a right *in rem*, and such a right *in rem* as is within the jurisdiction of this court. The court has no original jurisdiction *in rem* in respect of mortgages. The court has no jurisdiction under sect. 11 of the Act of 1861, for that section applies only to mortgages registered under the British Acts. By sect. 3 of the Act of 1840 the court has jurisdiction to take cognisance of all claims and causes of action of any person in respect of any mortgage, if the ship is under arrest or the proceeds are in court. The *Byzantion* was under arrest and the proceeds are in court. The court has therefore jurisdiction to take cognisance of the Graham Company's mortgage, if it be a mortgage. The interveners contend that the documents put forward by the Graham Company have no validity as a mortgage. Sect. 3 is not confined to legal mortgages. But the interveners say that the documents have no validity as a mortgage at all, for they say that by Greek law no mortgage can be enforced or give any right *in rem* until it is registered in the register at the ship's port of registry. The Graham Company contend that in the circumstances of this case the mortgage, though unregistered, is enforceable, and they further contend that the effect of clause 15 of the mortgage agreement is that the mortgage and mortgage agreement are at their option to be construed according to English law, the ship being at the date of writ and arrest within the jurisdiction of the English courts, and they are entitled to enforce a mortgage as if the ship and the mortgage were registered in England. I will consider these points in order.

(1) Apart from the special agreement, the law to be applied is Greek law. The ship, whether registered or not in Greece, is owned by a Greek owner and is a Greek ship, and the validity of a mortgage upon a Greek ship is a question of Greek law. The interveners contended that this question was a question of remedy, and therefore of *lex fori*. I do not agree. The facts as to the ship are not in dispute. She has never been registered as a Greek ship in accordance with the law of Greece. Registration can only be made when the ship is in a Greek port. The ship was at Malta at the time of the transfer in Sept. 1919, and has never since been in a Greek port. The endorsement of the Consul-General in London was merely a *visa*, and had no legal effect. The temporary certificate of nationality granted at Malta was not a registration of the ship; it was merely a recognition of the temporary right to fly the Greek flag. It was granted under a Royal Decree of the 10th July 1910, art. 41, which in terms requires the ship to be registered at a Greek port. "In the case of a foreign steamer acquired by a Greek subject and its nationality register having been cancelled (she) must be registered at a Greek port and the Greek Consul at the port from which the steamer sails shall deliver to the steamer in addition to the documents permitting the vessel to sail a provisional certificate of nationality . . . After the registration of the steamer at its port of registry the provisional certificate of nationality is to be deposited in the archives of the officer who has registered the steamer and will be replaced by a definite certificate of nationality." It is not disputed that until the ship was registered in a Greek port no mortgage upon her could be registered. It was suggested in evidence that there could be a provisional registration of a mortgage indorsed upon the provisional certificate of nationality by the Consul, but it was admitted that in no other way could a mortgage be registered otherwise than in a Greek port. There is no indorsement of the mortgage upon the provisional certificate of nationality issued at Malta. It is therefore

common ground that there is no registered mortgage in the present case.

The question then is whether by Greek law a mortgage or mortgage agreement, though unregistered, is nevertheless valid so as to be the foundation of an action *in rem* or give any right against the ship. I was peculiarly unfortunate in the way in which the evidence of Greek law was presented to me. The plaintiffs called a member of the Athens Bar. The defendants called a lawyer of Greek nationality, a member of the French Bar and legal adviser to the Greek Legation in Paris. Their evidence was translated by a gentleman who stated that he was not a lawyer and who manifestly had no familiarity with the terms of either Greek or English law. Translations of articles of the Greek codes were put before me, but they also were manifestly made by some one unfamiliar with legal terms and unable to appreciate or express the nice distinctions of legal language. I have done the best I could with this evidence and the codes. The most important Articles are 243 & 246 of the Commercial Code. By art. 243 it is provided that the agreement for a maritime mortgage is made *ὑποθηκη συνομολογεῖται* by notarial deed and a maritime mortgage is acquired *αποκτᾶται* by registration *δια εγγραφος* in the register of mortgages. By art. 246 it is provided that the agreement for a maritime mortgage upon a Greek ship is made abroad *ὑποθηκη συνομολογεῖται* by a public document but a maritime mortgage is acquired *ἀποκτᾶται* from the registration *ἀπὸ τῆς ἐγγραφῆς* in the proper register of mortgages, even though it be agreed upon a ship which happens to be abroad. A consideration of these and other articles, in the light of the evidence, leads me to the conclusion that the agreement for a mortgage gives indeed a right to register but is not itself enforceable as a mortgage, and that registration is a condition precedent to the enforceability of a mortgage as a mortgage. I was referred to art. 256 of the Civil Code and art. 991 of the Code of Civil Procedure, but it was explained that that article relates to the distribution of certain parts of an insolvent estate; it refers in a list of priorities to existing but unregistered titles to a mortgage. That does not in my view make the title a mortgage. It is significant that, as appears from a footnote to the text, the present words *ὁ πρὸς ἀπόκτησιν ὑποθηκης ὑπάρχων ἀλλὰ μὴ εγγεγραμμενος τίτλος* are a substitution for repealed words *αἱ μὴ εγγεγραμμεναι ὑποθῆκαι* unregistered mortgages. The Greek law makes a clear distinction between mortgages and agreements for mortgage. A mortgage is acquired by registration. Until registration it is not a mortgage, and the grantee has not the right of a mortgagee. The Greek law in my opinion does not recognise equitable mortgages. This decision makes it unnecessary to consider points against the mortgage which were made and based upon other articles of the Greek Civil Code. Apart from special agreement, I hold that the documents relied on by the Graham Company, being unregistered, are not enforceable as a mortgage. There is in existence no mortgage, but merely a right to acquire a mortgage, and by Greek law, which is the governing law, the Graham Company are not mortgagees of the *Byzantion*.

(2) But then comes the question on clause 15 of the mortgage agreement. The first part of that clause does no more than provide for what would be the law applied in these courts without any express agreement. It is with the second part that we are concerned. The first question is when does it apply? "So long as the said vessel is within the jurisdiction of the English courts." Does that mean "So long as the vessel remains" or "provided the vessel is" or "whenever it is" within the jurisdiction of the English courts? There is no evidence as to where the ship was on the 30th July 1919. It might be supposed that the intention was to provide for the application in English law until the ship and the mortgage were registered in Greece, and thereafter for the application of Greek law, but if that was the intention, no provision was made for the time intervening between the ship's leaving an English port and her arriving and being registered in a Greek port. The clause is inserted for the protection of the mortgagee. I hold that it means that whenever the ship is within the jurisdiction of the English courts, then the mortgagees, if they desire, are entitled to the benefits given them by the second part of clause 15. The words "as if the ship had been registered in England by a statutory mortgage" are not very apt, but I think the meaning is that the mortgagees are entitled to have their security dealt with as if the ship were registered in England, and there was a registered statutory mortgage upon it. The result is that, whatever the Greek law, and whether the mortgagees have in fact a mortgage upon the ship or not, they, by agreement, are to have the same rights as against Mr. Mango as if they had a registered mortgage on an English ship. Mr. Mango, by contract, agrees to submit to the jurisdiction *in rem* or *in personam* given to the court by sect. 11 of the Act of 1861 as if the ship and mortgage were registered in England. The effect is twofold: (1) as to jurisdiction, there is jurisdiction by contract; (2) as to rights, as between the Graham Company and Mr. Mango, the Graham Graham Company are to be treated as if they were registered mortgagees of a British ship, and as if entitled to sue *in rem*. The interveners contend that they cannot be prejudiced by this agreement between the mortgagees and mortgagor, and that as against them the agreement must be disregarded. In my view this contention confuses the rights of an intervener. Intervention may be for either or both of two purposes: (1) to defend the action either as to liability or as to quantum or both, and (2) to establish a prior claim to the *res* without defending the action. But where the intervener defends, he defends an action not against himself but against the *res* and, as there can be no liability of the *res* unless there is a personal liability of the owner, he defends an

action against the owner. The questions on such a defence are, Is the owner liable to the plaintiff, and has the plaintiff a right *in rem* against the ship? It follows that the intervener cannot set up defences unless they are defences which the owner could set up. If the suit is one which the plaintiff could, if the owner appeared, maintain *in rem* against the ship, because the owner was liable in a suit *in rem*, the plaintiff can maintain it *in rem* against the intervener. The position of the intervener is, *quâ* defence, the same as that of an owner who appears under protest, and the issue to be tried is the same as on a petition in protest. If by the agreement the Graham Company have a good cause of action *in rem* and if by the agreement the court is given jurisdiction as between the Graham Company and Mr. Mango, the interveners as defending the action cannot stand in any better position than Mr. Mango.

In my judgment the intervention has failed in showing that the Graham Company have no right of action *in rem* against the *Byzantion* in respect of the so-called mortgage and mortgage agreement. When the question of priority arises different considerations will present themselves, and I express no opinion as to the conflicting rights of a necessaries man who has obtained a judgment *in rem* and a creditor who has not a mortgage in fact but who by agreement between himself and the owner of the ship is to be treated as if he had a mortgage.

It remains to consider the form of the judgment. The plaintiffs pray a decree pronouncing for the validity of the mortgage and condemning the proceeds in the amount due to the plaintiffs and their costs, charges, and expenses as mortgagees. I cannot pronounce for the validity of the mortgage; I can only declare that the agreements of the 30th July 1919 and the 17th Sept. 1919 are agreements binding Mr. Mango. But I give judgment for the plaintiffs, condemning the proceeds in the amount due to the plaintiffs and their costs, charges, and expenses under these agreements. I reserve all questions of priority. As to the costs of this motion, as each has failed in part, I make no order, except that plaintiffs be entitled to add the sum of £20 for costs to their claim.

Solicitors, *W. A. Crump and Sons*; *Pritchard and Sons*, agents for *Andrew M. Jackson and Co.*, Hull.

Monday, July 10, 1922.

(Before HILL, J.)

THE ILE DE CEYLAN. (a)

Maritime lien—Master's wages—Sheriff—Fees and expenses of seizure of vessel under a writ of fi. fa.*—Priority of claims.*

The claims of the holder of a maritime lien enjoy priority over the claims of a sheriff for his fees and expenses incurred in seizing the vessel under a writ of fi. fa.

MOTION for judgment in default of appearance by the master of the French auxiliary schooner *Ile de Ceylan* suing for his wages.

About two months before the issue of the writ in the master's action the *Ile de Ceylan* had been seized by the Sheriff of Glamorganshire under a writ of *fi. fa.* issued at the instance of execution creditors who had obtained a judgment against the owners of the *Ile de Ceylan* in the King's Bench Division. The vessel was subsequently sold by the marshal, and the fund in court amounted to 290*l.* 9*s.* The master claimed 962*l.* 0*s.* 9*d.*

E. Aylmer Digby for the master.—The master has a maritime lien, and he is entitled to the whole fund. The sheriff cannot obtain his costs of seizing the vessel, since he could only seize it subject to the maritime lien of the master. See

The James W. Elwell, 15 Asp. Mar. Law Cas. 418; 125 L. T. Rep. 796; (1921) P. 351.

Rayner Goddard for the Sheriff of Glamorganshire. The sheriff's claim for costs ought to be preferred to the master's claim, since his action brought the vessel within the jurisdiction. Had the sheriff not seized her, she would have sailed before the writ in the master's action had been issued.

HILL, J.—In this case the action is by the master of the *Ile de Ceylan*, suing for wages and disbursements. He issued his writ on the 4th Aug. 1921, and the ship was arrested in his action by the marshal on the 16th of that month. Before that date in June the sheriff had seized the vessel and was in possession of her at the time of the arrest by the marshal. The seizure by the sheriff was in execution of a judgment obtained by Messrs. Moxey, Savon, and Co. in the King's Bench Division.

On the 14th Nov. I made an order for the appraisement and sale of the vessel, and reserved the rights of the execution creditors who were in possession by the sheriff under a writ of *fi. fa.* The execution creditors do not appear to-day, but the sheriff does appear, and asks that the first charge on the proceeds shall be his fees and expenses, in priority to the claim of the master. The total claim of the master considerably exceeds the net proceeds, which amount to 290*l.* 9*s.* 11*d.* But for the activities of the marshal and the readiness of the dock company to fall in with his suggestion to reduce their dues, there would not have been any fund at all.

The master asks for judgment, and that he must have. In ordinary course the judgment would be subject to a reference, but in the circumstances I understand it is agreed that that is not necessary. But then comes the question of who, in priority, has the first claim upon the fund. The plaintiff master had a maritime lien in respect of his claim, and his claim, to an amount more than sufficient to

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

exhaust the whole of the proceeds, had arisen before the sheriff took possession under his execution. The master, therefore, to that amount had a maritime lien at the time the sheriff seized. A sheriff put in by an execution creditor can only seize that which is the property of the execution debtor. Therefore he could seize the ship subject only to any maritime lien which was attaching to it.

Now, to allow the sheriff to have first charge on the fund would be, it seems to me, to say that the sheriff is entitled to disregard the maritime lien on the property seized, and, in effect, to say that the sheriff's expenses are to be paid not by the execution creditor, but by the master, who has a maritime lien on the property of the execution debtor. The sheriff, in my opinion, has no such right. It is said that his expenses ought to be allowed as a first charge against the proceeds, because it was by reason of his seizure that the fund was brought into court or the ship kept in this country so that she could be arrested in the master's action. I cannot find that any act of the sheriff or execution creditors has resulted in creating the fund for the benefit of the maritime lien holder in this case. The sheriff, of course, is not without his remedy. He was employed by the execution creditors, who will remain liable for his costs and charges, but I cannot allow those costs and charges to be paid out of the fund belonging to the maritime lien holder.

There will be judgment for 962*l.* and costs and an order for payment out to the plaintiff master of the fund in court.

Solicitors for the plaintiffs, *Downing, Middleton*, and *Lewis*, agents for *Downing* and *Handcock*, Cardiff.

Solicitors for the Sheriff of Glamorganshire, *Peacock* and *Goddard.*

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Monday, July 3, 1922.

(Before HILL, J.)

THE RENE (*a*)

Necessaries—Sale by court—Ballast—Priorities.

In distributing the proceeds of a vessel sold under the order of the Court, the claims of a necessaries man who has supplied ballast to the ship will not be preferred to other necessaries claims, notwithstanding that the vessel could not have been discharged or sold had not the ballast been supplied.

MOTIONS to confirm reports of the Admiralty Registrar, to determine priorities, and for payment out of court of the proceeds of the French barque *René.*

The claimants against the fund were:

The master and crew of the *René* for wages and master's disbursements.

Louis Dreyfus and Co., at whose suit the vessel was sold, for necessaries.

Mr. Manning, for ballast supplied to the *René* after her arrest, when her cargo was discharged.

Mr. Palmer, for food supplied to the crew before and after arrest.

Digby for the master and crew.

Langton for Louis Dreyfus and Co.

D. H. Leck for Manning and Palmer.

The arguments of counsel appear in the judgment.

HILL, J.—I confirm all the reports of the registrar and declare in regard to priorities as follows: Messrs. Louis Dreyfus and Co. will have first claim in respect of their costs up to and including appraisement and sale of the *René.* They are entitled to those costs because it was in their action that the ship was arrested and the order for sale obtained. The next in priority will be the crew in respect of wages, and the master for wages and disbursements. These claims, with the addition of interest and costs, will probably exhaust the fund in court, but there may be a small balance, as to which there are three competitors. They are Messrs. Louis Dreyfus and Co. in respect of necessaries supplied to enable the ship to come to England; Mr. Manning, who, subsequent to the vessel's arrest, supplied ballast to enable her cargo to be discharged; and Mr. Palmer, who supplied food for the crew over a period which in part includes the period when the ship was under arrest.

Primâ facie, all these necessaries claims would come in and rank on the same footing. But it is suggested that the ballast claim should be given priority, and the same is said about the food claim. I do not see my way, however, to so order. It might have been that the ballasting was a necessary operation in the preservation of the ship by the marshal under arrest, and if it had been shown that the ballasting was done at the instance of the marshal he would have been entitled to include the cost of ballasting in his expenses. But it was not done in that way.

The ballasting was done by Mr. Manning at the request, I suppose, of the master or owners and it was, therefore, at the outside, a supply of necessaries; and no man can obtain priority over other necessaries men by supplying something which does not give him a maritime lien, nor can he be regarded as spending money on behalf of the marshal without the authority of the court.

Therefore, though I regard it as rather hard against Mr. Manning, he must stand as an ordinary necessaries man. The same applies with reference to Mr. Palmer, who supplied food for the crew. If the crew had put in a claim for sustenance they might have included it in their claim for wages, which was covered by a maritime lien, but Mr. Palmer, having supplied the food without the sanction of the court he, too, must rank as an ordinary necessaries man. Therefore, Messrs. Louis Dreyfus and Co. will rank first in respect of their costs, which I have mentioned, and then will come the master

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

and crew; and Messrs. Dreyfus, Mr. Manning. and Mr. Palmer, in respect of necessaries, will come in on an equal footing as to any balance of the fund.

I cannot help thinking that it would be very reasonable for the master and crew to consent to the ballast claim being paid, because without ballast the vessel could not have been moved out of dock. She was in fact moved and, as a result, a very large sum for dock dues were saved. However, all I have to do is to apply the law.

Solicitors: *Rowe* and *Maw*; *Lowless* and *Co.*; *Constant* and *Constant.*

House of Lords.

Thursday, March 30, 1922.

(Before Lords Buckmaster, Dunedin, Atkinson, and Carson.)

Commissioners for Executing the Office of Lord High Admiral *v.* Owners of the Steamship Valeria (No. 2). (a)

on appeal from the court of appeal in england.

Collision—Damage—Vessel in service of Government—Chartered ship—Measure of damages.

In 1917 *a vessel which was chartered to the appellants, the Admiralty Commissioners, who traded with her and earned freight, was damaged in collision with the respondents' vessel, and in consequence detained for seven days whilst repairs were being executed, upon which days no freight was earned. The amount of hire paid by the appellants exceeded the amount of freight earned by the use of the vessel.*

Held (affirming the decision of the Court of Appeal reversing Rowlatt, J.), that the amount of freight which the vessel was prevented from earning whilst repairs were being executed, together with the expense of working the vessel during that time, and not the amount of hire and working expenses which they paid in respect of her, was the true measure of the damage which the appellants had sustained. The former and not the latter represented her true value to the appellants.

The Argentino (6 *Asp. Mar. Law Cas.* 433; 61 *L. T. Rep.* 706; 14 *App. Cas.* 519) *applied.*

The Greta Holme (8 *Asp. Mar. Law Cas.* 317; 77 *L. T. Rep.* 231; (1897) *A. C.* 596); The Mediana (9 *Asp. Mar. Law Cas.* 41; 82 *L. T. Rep.* 95; (1900) *A. C.* 113); *and* The Marpessa (10 *Asp. Mar. Law Cas.* 232; 97 *L. T. Rep.* 1; (1907) *A. C.* 241) *distinguished.*

Observations by Lord Dunedin on the meaning of the expression restitutio in integrum.

Decision of the Court of Appeal affirmed.

(a) Reported by W. C. Sandford, Esq., Barrister-at-Law.

Appeal by the commissioners for executing the office of Lord High Admiral from a judgment of the Court of Appeal reversing the judgment of Rowlatt, J., who confirmed an award made in favour of the appellants by an arbitrator in the form of a special case.

The appellants were the charterers by demise of the Dutch steamship *Rijsbergen*, which was damaged by collision with the respondents' steamship *Valeria* owing to the negligent navigation of the *Valeria*. In consequence of the collision the *Rijsbergen* had to be repaired, and she was kept idle whilst under repair for a week.

The question in the appeal was whether the appellants were entitled to recover as damages from the respondents the expenses they incurred in connection with the ship during the week when she was idle, including the hire which they had to pay to the owners of the ship in respect of such week. The arbitrator found as a fact that the expenses incurred and paid by the appellants, including the hire, for the week in question in connection with the ship, were fair and reasonable and, subject to the opinion of the court, he decided that the appellants were entitled to be reimbursed such expenses by the respondents as part of the damages due to the collision for which the respondents were responsible. Rowlatt, J. confirmed the decision of the arbitrator, but the Court of Appeal reversed it, and decided that the appellants were not entitled to reimbursement of all their expenses, but only to the freight they would have earned if the ship, instead of being rendered idle in consequence of the collision for a week, had completed her voyage without such delay, and in addition the expenses incurred by the appellants in connection with the ship during such week other than the hire paid by them to the owners.

The facts proved or admitted at the reference were that in 1917, when during and in consequence of the War the British nation was suffering from the scarcity of ships, the appellants took over a number of Dutch merchant ships, including the *Rijsbergen*, under an agreement with the Government of the Netherlands. The terms on which the *Rijsbergen* was taken over were that the appellants were to pay to the owners hire amounting to 342*l.* 0*s.* 10*d.* per day, and were to provide and pay for the crew and bear all risks of loss or damage to the ship. The hiring operated as a demise of the ship to the appellants. There was no cesser of hire clause in the event of the ship being disabled by accident. The appellants used the ship when in their service for carrying goods between Canada and England, and for that purpose they employed Messrs. Furness, Withy, and Co. Limited, the usual Government agents employed in connection with merchant ships owned or chartered by the Government during the War, to manage the ship on their behalf for the carriage of goods required by the nation during the War. On the 20th Sept. 1917, whilst the *Rijsbergen* was on her second voyage to Canada in the service of the British

Government, she was run into by the *Valeria*, belonging to the respondents, and was damaged. Owing to the collision she had to be sent to Ardrossan for repairs to enable her to proceed on her voyage and in consequence she was idle for a week. On the 3rd Aug. 1918 the arbitrator made, by consent, an interim award on the question as to which ship was to blame for the collision, and he pronounced that the *Valeria* was alone to blame and that the respondents were liable for the damage thereby suffered by the appellants. The damage claim of the appellants was afterwards delivered to the respondents. The claim consisted of the cost of repairing the injuries caused to the *Rijsbergen* by the collision and the cost of the vessel to the appellants during the week she was idle in consequence of the collision. All the items in the claim were subsequently agreed except the claim in respect of the cost of the ship and her crew to the appellants whilst she was under repair, and it was further agreed that seven days was the period of her detention in consequence of the collision. The particulars of the disputed items consisted of the daily cost of the ship and her crew to the appellants during the period of her detention, namely, the hire paid by them to the owners of the *Rijsbergen* under the said agreement, the cost of wages and victualling of the crew paid by the appellants, the cost of stores consumed and the cost of management.

The respondents did not call any witnesses, but they put in two voyage accounts rendered to the appellants by Messrs. Furness, Withy, and Co. as managers of the *Rijsbergen*. The accounts showed that on the 25th July 1917 the *Rijsbergen* arrived in London, and on the 27th July she proceeded on her first voyage for the appellants in ballast to Canada and brought back to Liverpool a general cargo, the discharge of which she completed on the 14th Sept. On the 15th Sept. she began her second voyage, proceeding from Liverpool to Canada. On the 20th Sept. the collision with the *Valeria* occurred, and, in consequence, *Rijsbergen* had to go to Ardrossan for repairs. On the 28th Sept., after being sufficiently repaired to resume her voyage, she proceeded to Canada, and from there she returned with cargo to London, where she arrived on the 22nd Nov. The accounts showed that on both voyages freights had been received on the goods carried, and that the difference between the freights received and the disbursements made by Messrs. Furness, Withy, and Co. amounted on the first voyage to an average of 151*l.* 14*s.* 0*d.* per day, and on the second voyage on which the collision occurred, with the consequent detention and repairs, the difference amounted to 134*l.* 5*s.* 7*d.* per day. The accounts did not include the hire, amounting to 342*l.* 0*s.* 10*d.* per day paid by the appellants to the owners of the *Rijsbergen*. The result therefore was that by charging freight on goods carried the appellants reduced the cost of the ship to the nation; but during the week on the second voyage, when, in consequence of the collision, the ship was idle, there was no freight earned to set off against the cost of the week's hire or against the cost of the crew and stores during such period.

The Court of Appeal accordingly reduced the damages from 366*l.* per day awarded by the arbitrator to 143*l.* per day for loss of freight and 23*l.* 19*s.* 4*d.* per day for expenses during the seven days' detention.

The appellants appealed on the grounds that (1) a wrongdoer who has deprived another person of the use of a chattel for a certain time is liable to reimburse the expenses which the latter incurred in connection with the chattel during such time if they were fair and reasonable; (2) the appellants, as charterers by demise of the steamship *Rijsbergen*, were entitled to recover from the respondents, by whose tort they were deprived of the ship for a week, the fair and reasonable cost of the ship to them during such week; (3) the arbitrator found as a fact that such cost amounted to 366*l.* per day and was fair and reasonable; (4) the cost of the ship to the appellants during the week they were deprived of her consisted of the reasonable cost of hire of the ship and the reasonable cost of hire of the crew; (5) the amount of the actual loss of the appellants owing to being deprived of the ship for a week was not freight, which they did not in fact lose, but was the reasonable expense of the ship to them during such week; (6) the detention of the ship for a week increased the cost of the voyage by the amount of the expense of the ship incurred by the appellants during such week; (7) the hire payable by the appellants as time charterers was reasonable, and fairly represented the net profit which the ship was capable of earning at the time of the collision.

The respondents supported the decision of the Court of Appeal on the grounds that: (1) the appellants having been damnified by the collision were entitled to *restitutio in integrum* and nothing more; (2) the appellants were not entitled to be put into a better position by reason of the collision than that in which they would have been if the collision had not occurred; (3) if the collision had not occurred the *Rijsbergen* would have been used as a trading vessel, and would have earned for the appellants a daily profit of 143*l.* only, and this sum, plus the actual running expenses, was all that the appellants lost by being deprived of the use of the vessel; (4) if the collision had not occurred the appellants would still have been obliged to pay the hire to the Dutch Government and their position in this respect was in no way altered by reason of the collision.

Dunlop, K.C. (Sir *Ernest Pollock*, A.-G. with him) for the appellants, referred to:

The Greta Holme, 8 Asp. Mar. Law Cas. 317; 77 L. T. Rep. 231; (1897) A. C. 605;

The Mediana, 9 Asp. Mar. Law Cas. 41; 82 L. T. Rep. 95; (1900) A. C. 117;

The Argentino, 6 Asp. Mar. Law Cas. 433; 61 L. T. Rep. 706; 14 App. Cas. 519;
The City of Peking, 6 Asp. Mar. Law Cas. 572; 63 L. T. Rep. 722; 15 App. Cas. 438;
The Marpessa, 10 Asp. Mar. Law Cas. 232; 97 L. T. Rep. 1; (1907) A. C. 241.

Raeburn, K.C. and *Dumas*, for the respondents were not called upon.

Lord BUCKMASTER.—The question which is raised for determination upon this appeal is simple and interesting. In 1917 the British Government hired from the Dutch Government a steamer known as the *Rijsbergen*, the rate of hire being 342*l*. a day. In Sept. 1917 she was damaged by collision with the *Valeria*, and it has been found that for that collision the *Valeria* was solely to blame. The damage was capable of repair, the vessel was in fact repaired, and the voyage completed, but, owing to her injuries, she was detained from the 20th Sept. 1917 to the 29th Sept. 1917, and in their claim for the damage caused by the collision the Admiralty put down a sum in respect of her disability during that period of time. This sum was made up in the following way: They took the hire per day of the vessel which they had agreed to pay to the Dutch Government, and added certain items for wages, thus bringing the total up to 366*l*., which, multiplied by seven for the period of time between the two dates, which were not inclusive, amounted to a total sum of 2,562*l*. The claim came before an arbitrator, and he held that the Admiralty were entitled to recover the full amount. Rowlatt, J., before whom the award came on appeal, supported this view, but the Court of Appeal have unanimously differed from his judgment, and from the Court of Appeal the matter has been brought before your Lordships' House.

The appellants' contention is that as the sum which they claim was the actual out-of-pocket expense to which they were put during the period of time for which the vessel was incapacitated, and they could not obtain anything from its use, that sum is the clear measure of their loss, and in support of this view they have referred to cases such as *The Greta Holme*, *The Mediana*, and *The Marpessa* (*sup.*). I think that it will be found upon examination that these cases do not support the contention. It was laid down as long ago as 1889, in the case of *The Argentino* (*sup.*), that in assessing damages caused by a collision a ship is to be considered merely as a thing by the use of which money may ordinarily be earned; and the only question is, to use the words of Bowen, L.J., in the Court of Appeal (6 Asp. Mar. Law Cas., at p. 351; 59 L. T. Rep., at p. 917; 13 Prob. Div., at p. 201): "What is the use which the shipowner would, but for the accident, have had of his ship, and what . . . the shipowner, but for the accident, would have earned by the use of her?" The other cases which have been referred to by counsel are each and all of them cases in which the subject-matter of the suit was a vessel which, in the ordinary course, would have earned nothing at all, as, for example, a dredger or a lightship; and it should be remembered that, until the decision in *The Greta Holme* (*sup.*), it had always been held that nothing but nominal damages were recoverable for an injury to such a craft upon the ground that there was no other use to which she could be put, and that there was no actual out-of-pocket expense during the period for which she was incapacitated. *The Greta Holme* (*sup.*) altered those views, and established that the loss of the use of the vessel was a thing which was capable of being measured even although the vessel was not capable of being let for hire in the ordinary way.

In the present case the facts which have been found are these: that this vessel had in fact made two voyages, and that during those voyages she had earned a profit freight, over and above expenses, in the one case of 151*l*. a day, and in the other of 134*l*. It is important to remember that the finding is that those freights represent a profit balance, and of course in determining that profit the actual amount of hire which was being paid under the charter was not included. It was the average of the sum of those two items, together with the ship's expenses, which the Court of Appeal allowed as the damage in the present case. Although at first counsel challenged the principle that the amount of what was to be earned could ever be made the true measure of the damage, in substance his objection to the figure was this, that the arbitrator had found that the amount which was being paid by the British Government under the agreement by which the vessel was taken over was, in fact, a fair sum, and that it necessarily followed that the amount of value, tested by the freights which had been earned on the two voyages, must have been assessed by making a depreciation of the amount, due to the fact that this country was at war, and that ordinary market conditions would not have been regulating the trade.

In the first place the answer to this is that no such finding was ever made by the arbitrator, and in the next place it has been pointed out quite fairly by counsel that if this matter went back to the arbitrator for reconsideration he would not be able to show more than the fact that if the vessel was once more let in a time charter it would be possible to let her for a larger sum. The comparison with the hire in a time charter does not appear to me to be a fair means of considering this question. What has to be considered is this: What would this vessel have earned for the period of seven days during which she was incapacitated owing to the accident? That amount is the true measure of the damage which the vessel which was to blame is called upon to pay, and it can only be ascertained by considering what she had earned under similar conditions. I desire particularly to emphasise that in each

of the judgments of the lords justices in the Court of Appeal the case has been based upon an assumption that the matter to be dealt with was an ordinary commercial venture, and that the standard of damages applicable was the standard proper in such a case. Having regard to the statement which I have made, I think that this assumption was correct, and upon that assumption the conclusion at which the judges in the Court of Appeal arrived is, to my mind, one which cannot be controverted. For this reason I am of opinion that the appeal should fail.

Lord DUNEDIN.—I concur. I agree with the lords justices in the Court of Appeal, but I cannot refrain from a slight criticism upon the use of the phrase *restitutio in integrum.* It is a phrase which is properly applied when you wish to express the condition which is imposed upon a person seeking to rescind a contract. I do not think that it can be properly applied to questions of tort, and the illustration which I give is a very simple one. If by somebody's fault I lose my leg and am paid damages, can anyone in his senses say that I have had *restitutio in integrum?* The true method of expression, I think, is that in calculating damages you are to consider what is the pecuniary sum which will make good to the sufferer, as far as money can do so, the loss which he had suffered as a natural result of the wrong done to him. The loss which was suffered in this case was a loss of freight. I put this case in the course of the argument. Suppose a man had a house at a certain rent and sublet it at a smaller rent, if it were taken from him he would not get more, I take it, than the smaller rent which he had received; but if he had shown that he had let it to some member of his family at a fanciful rent, then there would have to be an enquiry as to what rent he could have got in the open market. In this case the whole question has been decided upon the assumption that the freight here was a commercial freight. If that had got to be displaced I think that it fell upon the appellants to displace it; they have not done so, and, as their counsel has very candidly said, even if they get a remit to the arbitrator they would not be able to do it.

Lords ATKINSON and CARSON concurred.

Appeal dismissed.

Solicitor for the appellants, *Treasury Solicitor.*

Solicitors for the respondents, *Thomas Cooper and Co.*, for *Hill, Dickinson*, and *Co.*, Liverpool.

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Nov. 27 *and* 28, 1922.

(Before Lords CAVE, L.C., FINLAY, ATKINSON, and SUMNER.)

AMBATIELOS *v.* ANTON JURGENS MARGARINE WORKS. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party—Exceptions clause—Construction—General words followed by particular words—"Et cetera"—Ejusdem generis *rule.*

Where general words in an exceptions clause in a charter-party are followed by particular words, the ejusdem generis *rule should not be applied.*

A charter-party contained the following exceptions clause: "Should the vessel be detained by causes over which the charterers have no control, viz., quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo has been taken over, etc., no demurrage is to be charged and lay-days not to count." The chartered vessel was detained for a number of days beyond the lay-days by a strike of dock labourers at the port of discharge. Upon a claim for demurrage,

Held (Lord Sumner dissenting), that the governing words of the clause were "causes over which the charterers had no control," the particular causes mentioned being merely instances to which, as they followed the general words, the ejusdem generis *rule ought not to be applied, and that the words "et cetera" only meant "and so on," and had not the effect of getting rid of the preceding general words.*

Decision of the Court of Appeal (15 Asp. Mar. Law Cas.; 127 *L. T. Rep.* 345; (1922) 2 *K. B.* 185) *affirmed.*

APPEAL by the owner from a decision of the Court of Appeal (reported 15 Asp. Mar. Law Cas.; 127 L. T. Rep. 345; (1922) 2 K. B. 185) upon a case stated by an arbitrator. The point arose under two charter-parties, one of a ship called the *Ambatielos*, the other of the *Panaghis*, of both of which the appellant was the owner. Both vessels were chartered from ports in the East to Amsterdam or Rotterdam. The charter of the first vessel provided that the cargo should be loaded and discharged in fourteen weather-working days, reversible, and in the case of the second in twenty weather-working days, reversible. Both charters contained the following clause: "Time at loading and (or) discharging port to count twenty-four hours after steamer's arrival at or off the port whether in berth or not or in harbour or roads or as near the port as the authorities will allow notwithstanding any custom of the port or law of the country or anything contrary in this charter. Should the vessel be detained by causes over which the charterers have no control; viz., quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo is taken over, etc., no demurrage is to be charged and lay-days not

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

to count." The charter-party of the *Ambatielos* allowed twenty days' demurrage at 500*l.* per day, and that of the *Panaghis* provided that she should be allowed twenty days' demurrage at 350*l.* per day. The *Ambatielos* arrived in Rotterdam early in 1920 and was there detained for forty and a half days beyond the lay-days allowed by the charter-party. The *Panaghis* also arrived at Rotterdam and was there detained for forty-six days beyond the lay-days. The claims for demurrage having been referred to arbitration, the arbitrator found as a fact that the sole cause of the detention of each steamer was a general strike of dock labourers at Rotterdam which prevailed from the 14th Feb. to the 28th April 1920, and he further found as a fact that the said strike was a cause over which the charterers had no control and that but for the said strike the said steamships could and would have been discharged within their lay-days. The charterers contended that they were protected by the clause above referred to, but the arbitrator found against them and awarded that they should pay the owner 43,450*l.* demurrage and damages for detention.

The Court of Appeal held, reversing the decision of McCardie, J., that the governing words of the exception clause in the charter were "causes over which the charterers have no control," the particular causes mentioned being merely instances to which, as they followed the general words, the *ejusdem generis* rule ought not to be applied, and that the words "et cetera" only meant "and so on" and had not the effect of getting rid of the preceding general words.

The owner appealed.

Dunlop, K.C. and *S. L. Porter* for the appellant.

Sir *John Simon*, K.C. and *Jowitt*, K.C. for the respondents.

The following cases were referred to:

William Alexander and Sons v. *Aktieselskabet Dampskibet Hansa and others*, 14 Asp. Mar. Law Cas. 493; 122 L. T. Rep. 1; (1920) A. C. 88;

Northfield Steamship Company Limited v. *Compagnie L'Union des Gaz*, 12 Asp. Mar. Law Cas. 87; 105 L. T. Rep. 853; (1912) 1 K. B. 434;

Larsen v. *Sylvester and Co.*, 11 Asp. Mar. Law Cas. 78; 99 L. T. Rep. 94; (1908) A. C. 295;

Allison and Co. v. *Rose Richards*, 20 Times L. Rep. 584;

Owners of Steamship Knutsford v. *E. Tillmanns and Co.*, 11 Asp. Mar. Law Cas. 105; 99 L. T. Rep. 399; (1908) A. C. 406;

Price and Co. v. *Union Lighterage Company Limited*, 9 Asp. Mar. Law Cas. 398; 88 L. T. Rep. 428; (1903) 1 K. B. 750;

Postlethwaite v. *Freeland*, 42 L. T. Rep. 845; 5 App. Cas. 599;

Price v. *Griffith*, 1 De G. M. & G. 80;

Parker v. *Marchant*, 1 Y. & C. C. C. 290;

Burton and Co. v. *English and Co.*, 5 Asp. Mar. Law Cas. 84, 187; 49 L. T. Rep. 768; 12 Q. B. Div. 218;

Elderslie Steamship Company v. *Borthwick*, 10 Asp. Mar. Law Cas. 25; 92 L. T. Rep. 274; (1905) A. C. 93;

Thorman v. *Dowgate Steamship Company Limited*, 11 Asp. Mar. Law Cas. 481; 102 L. T. Rep. 242; (1910) 1 K. B. 410;

Re An Arbitration between Messrs. Richardson and Samuel and Co., 8 Asp. Mar. Law Cas. 330; 77 L. T. Rep. 479; (1898) 1 Q. B. 261;

Glynn v. *Margetson*, 7 Asp. Mar. Law Cas. 148, 366; 69 L. T. Rep. 1; (1893) A. C. 351;

Thames and Mersey Marine Insurance Company v. *Hamilton, Fraser, and Co.*, 6 Asp. Mar. Law Cas. 200; 57 L. T. Rep. 695; 12 App. Cas. 484;

Cullen v. *Butler*, 5 M. & S. 461;

Nelson Line Limited v. *James Nelson and Sons Limited*, 10 Asp. Mar. Law Cas. 544, 581: 97 L. T. Rep. 812; (1908) A. C. 16;

Stukeley v. *Butler*, Hobart 168;

Dakin's Case, 2 Wm. Saund. 678;

Timewell v. *Perkins*, 2 Atk. 102;

Owners of Steamship Magnhild v. *McIntyre Brothers and Co.*, 15 Asp. Mar. Law Cas. 230; 124 L. T. Rep. 771; (1921) 2 K. B. 97;

Aktieselskabet Frank v. *Namaqua Copper Company Limited*, 15 Asp. Mar. Law Cas. 20; 123 L. T. Rep. 523;

Rosin and Turpentine Import Company v. *B. Jacob and Sons*, 11 Asp. Mar. Law Cas. 231, 260, 363; 102 L. T. Rep. 81;

Anderson v. *Anderson and another*, 72 L. T. Rep. 313; (1895) 1 Q. B. 749;

Cambridge v. *Rous*, 8 Ves. Jun. 12;

Sandiman v. *Breach*, 7 B. & C. 96;

Reg. v. *Cleworth*, 4 B. & S. 927;

Gover v. *Davis*, 29 Beav. 222;

Dean v. *Gibson*, L. Rep. 3 Eq. 713;

Mudie and Co. v. *Strick*, 11 Asp. Mar. Law Cas. 235; 100 L. T. Rep. 701;

Hulthen v. *Stewart and Co.*, 9 Asp. Mar. Law Cas. 285, 403; 88 L. T. Rep. 702; (1903) A. C. 389;

Herman v. *Morris*, 35 Times L. Rep. 574;

Scrutton on Charter-parties and Bills of Lading, Article 131.

Lord Cave, L.C.—This case has been fully and ably argued and I have come to the conclusion that the decision of the Court of Appeal is right. The case turns upon the meaning of a particular clause which is contained in each of two charter-parties. By each of these charter-parties the respondents chartered from the appellant a vessel to carry a cargo, to put it shortly, from the East to Rotterdam. Each charter-party stipulated that the cargo should be loaded and discharged in a fixed number of weather-working days, reversible, and provided for demurrage, and each document contained this clause upon which the whole matter turns,

"Should the vessel be detained by causes over which the charterers have no control, videlicet"—spelt "viz."—"quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo is taken over, etc., no demurrage is to be charged and lay-days not to count." Now the discharge of each vessel was delayed by a general strike of dock labourers at Rotterdam. The matter was referred to arbitration, and the finding of the umpire upon that point is this: "I find as a fact that the sole cause of the detention of each steamer as aforesaid was a general strike of dock labourers at Rotterdam which prevailed from the 14th February to the 28th April 1920. I further find as a fact that the said strike was a cause over which the charterers had no control, and that but for the said strike the said steamships could and would have been discharged within their lay-days." On that the question arose whether the charterers were liable for demurrage and damages for detention, which in this case would have amounted to a very large sum, exceeding 50,000*l.*, or whether they were excused by the clause which I have read. The umpire decided against the charterers and stated a case for the opinion of the court, and McCardie, J. agreed with the umpire, and his decision was reversed by the Court of Appeal who gave judgment for the charterers, hence the present appeal.

It is desirable first to look at the frame of the clause in question. It begins with a general hypothesis, "Should the vessel be detained by causes over which the charterers have no control." There is no question that if the condition stopped there this case would fall within it, for it is found that the general strike which detained the vessel in each case was something over which the charterers had no control, but these words are followed by the other words which I have cited beginning at "viz." and ending at "etc.," and the question is whether that addition is sufficient to cut down and limit the preceding general words and to confine the effect of the clause to the particular cases stated in the added words, and to cases of a similar kind. In other words, are the added words defining and limiting words, or are they simply added in order to provide examples of what is meant by the general words, but not to cut them down? I find myself very much in agreement with what was said by the learned Master of the Rolls, which was repeated in the argument of Sir John Simon here to-day. It is not right to consider first the effect of the word "videlicet" by itself, and then to consider whether that effect is altered by the later occurrence of the expression "etc." You must consider the two together, and if you do that I think the effect of what I have called the added words is this: that the draftsman shows an intention, first, of giving examples of what the general words mean and cover, and secondly, and this is equally important, of showing to those who read the clause by the use of the word "etc." that those examples are not intended to cover the whole ground, that they are not intended to be exhaustive, but that the general expression is still to include all the other cases which fall within its general terms. In other words, the clause must be read as referring to all causes over which the charterers have no control; in particular to the five causes specified but also to all other cases which fall within the general words, and that is the reading which for myself I should give to the clause.

Certain arguments were put forward very forcibly on behalf of the appellant. First it was said that the dominant purpose of the charter-party is that there shall be no delay, that the vessel shall be loaded and unloaded within the time specified, and that you must not cut down the words which have that effect by this clause of exception. I cannot agree with that. The very purpose of the exception is to limit and cut down the earlier provisions of the charter-party, and all one has to see is whether in fact they have that effect. Then it is said that the added words, as I have called them, are limiting and not explanatory words. I have dealt with that. Then it is said that assuming that they be such limiting words they cut down the clause to the five cases specified with other cases of a similar kind, and we have to say whether for that purpose the well known rule of *ejusdem generis* applies. I know of no authority for applying that rule to a case of this kind, a case where to begin with the whole clause is governed by the initial general words; secondly, where the expression to be so construed is the expression "etc."; thirdly, where, as in this case, there is no genus to which anyone can point which comprises all the five cases specified. With great respect to the learned judge who heard the case I cannot think that he was successful in finding such a genus. I therefore come back to the general proposition, and I am of opinion that the exception applies in all cases where the ship is detained by causes over which the charterers have no control and accordingly applies to the present case. I do not refer to authorities, many of which have been cited. Perhaps the most instructive one of all is *Stukely* v. *Butler* (*ubi sup.*) where some very valuable observations were made by the learned judge, but there is no single case, no case in the whole list, which is anything like this case, which can be said to govern this case, and therefore I do not think it necessary to refer to them in detail. For these reasons I think this appeal fails and I move your Lordships that it be dismissed.

Lord Finlay.—I am also of opinion that this appeal fails. The facts are very concisely stated and all that is material for the present purpose is to be found in the appendix where the award is set out. Par. 7 finds: "That the sole clause of the detention of each steamer as aforesaid was a general strike of dock labourers at Rotterdam which prevailed from the 14th Feb. to the 28th April 1920. I further find as a fact that the said strike was a cause over which the charterers had no control, and that but for the said strike the said steamships could and would have been discharged within

their lay-days." In par. 8 the umpire further says this: "He further claimed," that is the owner further claimed, "that notwithstanding the strike the charterers could by reasonable diligence have discharged the steamers earlier, but on this issue which is an issue of fact, I find in favour of the charterers," so that you have got this found on the award that the strike was a matter over which the charterers had no control and that the delay which took place was entirely unavoidable and due to the strike. Of course there might be circumstances, although there were a strike, which would not necessarily entail delay in the loading. Labour might be got from the crew itself, or elsewhere, or some not very extravagant payment might have induced the men who were on strike themselves to return to work. We are not concerned with any such case as that because it is quite clear on the findings of the umpire in the present case that it was perfectly unavoidable and that nothing the charterers could do would have avoided the consequences.

Now we come to consider as to whether, under these circumstances, demurrage is payable. The amount is very considerable, but the determination of this large amount of money depends upon the construction to be put upon a very few lines in the charter-party. The provision as to the time for loading and discharging is as follows: "The cargo to be loaded and discharged in twenty weather-working days, reversible." Now something has been said about the history of this charter-party which is in a printed form. It was a great deal altered, words in print were struck out, words in writing were inserted and it was said that tracing the history of these alterations made it improbable that the construction for which the respondents contend should be the true one. I think that all we are concerned with is the charter-party as it finally stands. We must construe the clause with which we have to deal according to the form which the charter-party ultimately assumed. All the particulars we have had may be very interesting as matters of history. I do not think they really affect the construction which ought to be put upon the charter-party now that we have got it.

After that clause, which makes it clear that twenty weather-working days are to be allowed for loading and discharging, we have further down the clause upon which the present dispute arises, "Should the vessel be detained by causes over which the charterers have no control, viz., quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo is taken over, etc., no demurrage is to be charged and lay-days not to count." To my mind the frame of that clause is this: The initial lines lay down a general principle and state the ground of exemption; that is, if the detention arises from causes over which the charterers have no control, no demurrage is to be charged and the lay-days are not to count, but then, after the initial words to which I have referred as laying down the general principle, you find this: "viz., quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo is taken over, etc.," and it is said that these words show th t you cannot deal with it merely on the general principle, but that the operation of the general principle, which was contained in the initial lines, taken by themselves, is controlled by the particulars which follow, so that the result will not be attained unless the particular cause, which here was a strike, can be found in the particulars enumerated, or is in some way, not very clearly defined, characterised by some feature in common with the things which are defined. The only common feature that I can find here is that all these things are things which detain the vessel and constitute the causes over which the charterer has no control. I do not think that the attempt made by the learned judge, McCardie, J., to establish common features apart from that general principle is successful. I refer to the passage in his judgment where he says: "Now, applying that test to these words it is, I think, reasonably plain that there is a common or dominant feature. Quarantine is an act of a local authority, ice is a force of nature, hurricane is a force of nature, blockade is an act of authority, and the clearing of the steamer is obviously, I think, an act of the local authority in respect to points of clearance. Therefore you do get a dominant feature, in the sense of over-riding powers, whether by nature or local authority; whereas a strike in its essence is really and substantially different, because there is no question of authority imposed upon the ship, the ship-owner, or the charterer. There is simply a voluntary abstention from work by a number of men which happens to interfere with the loading or causes a cessation so far as the work of loading is concerned. In its essence the thing is different from the exertion of a local authority's powers and therefore I think that applying, if it can be applied here, the *ejusdem generis* rule, that a strike would not fall within the genus or species, or whatever it may be, which is indicated by the preceding words." I am not able to assent to the reasoning in that passage, or to the conclusion which the learned judge draws from what he says.

It appears to me that the common feature which these various things enumerated have, is that they constitute causes beyond the control of the charterers, and that those caused the detention of the vessel. That seems to me the real substantial feature in common, and if there is a class it is the class of things which will have the effect upon the vessel of detaining it without the charterers' being in fault. I confess I am quite unable to appreciate any theory based on the view that a hurricane is due to a law of nature, quarantine to the act of the local authority, and the clearing of the steamer to the local law of the port about loading. I do not think that is the true way of looking at it at all. It seems to me that the common feature is the detention of the vessel without fault on the part of the charterers. Looking again and looking more narrowly at the words which follow which state the general

and governing principle, as I think, they are these: "viz., quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo is taken over, etc." Now I go so far with the appellant in his argument that I think that the word "videlicet," in the correct sense of the word, does not denote and is not equivalent to "for instance" or "for example." I think "videlicet" is correctly rendered in English by "to wit" or "that is to say." That is the force of the word standing by itself, but then "videlicet" does not stand by itself here. Although these interposed lines begin with "videlicet" they end with the word "etc." and it appears to me that the effect of these interposed lines, taken as a whole, is to provide that if there is any cause beyond the control of the charterer which occasions delay the charterer is not to be liable. Of course one cannot treat a charter-party as a work to which literary skill is an essential. It is, of course, obvious to say: Why do they go and set to work in such a circuitous way? They begin by stating very clearly the general principle. Then they propose to make their meaning clear by giving particular cases. They put them in, and then, if one may conjecture, they think: "But after all there may be other cases, and so we put in 'etc.'" What are the other cases? "Etc." is absolutely different from "et alia." That subject was discussed in McCardie J.'s judgment below. It means "and all the rest." All the rest of what? I regard it here as being all other cases in which detention is caused by causes which are beyond the control of the charterer. On the finding of the umpire this strike was entirely beyond the control of the charterers and the results could not have been avoided by them; therefore it appears to me that this appeal fails.

Lord ATKINSON: I entirely concur with the construction which has been put upon the clause in dispute here by my two noble and learned friends who preceded me, and I do not think it necessary to add anything.

Lord SUMNER.—To my unfeigned sorrow I find myself unable to agree with the opinions which your Lordships have just expressed and with the judgment of the Court of Appeal. The general framework of this charter-party renders but little assistance in construing the particular clause before us, nor is anything to be gained by pointing out in detail that it is a quite unusual, unartificial document. It is true that it was originally printed to provide for a charter-party of that type which, at the port of discharge, instead of having fixed lay-days, has despatch in accordance with the custom of the port and that is reasonable despatch under the circumstances, and it has been converted by drastic alteration into a charter-party with fixed lay-days even at the port of discharge, but that does not put it beyond the power of the parties, if they have done so, to make a provision in a class of exceptions by which, if the number of lay-days are exceeded by the charterers through causes over which they have no control, they may be excused from liability in that event.

What is important, however, to observe is that in this case the charterers clearly failed to discharge within the fixed time. They are therefore in default and must pay unless they can find words in the charter-party which exempt them from liability to pay. They point to the words which your Lordships have read. It is also clear that this being a clause inserted for the benefit of the charterers and to the prejudice of the shipowner, it is incumbent upon the charterers to express the words that relieve him with such reasonable clearness as to make it possible for the shipowner to know where he stands, and if he speaks in that clause with two voices it is not for him to say that because one part of his clause achieves his object the conflict produced by the other part of the clause has no materiality. The principle laid down by your Lordships in *Elderslie Steamship Company* v. *Borthwick* (*ubi sup.*) has now completely settled that. Another thing I think may be pointed out, and that is that this charter-party is so worded that one need not be surprised, although it is a business document, if they have arrived at the result of saying a good deal to which no meaning is to be attached at all, because redundancy is the feature of this charter-party. In this very clause, for example, the words "and lay-days not to count" are, in my view of this matter, I think, unnecessary, because all that the clause has to effect is to provide that no demurrage is to be charged, whether it be fixed demurrage or general damages for detention, and to say that the lay-days are not to count is to contradict another clause which has already said what the lay-days are to be and what lay-days are to count. I therefore do not feel myself much impressed by the comment which undoubtedly arises that upon the construction which I think is the right one, several words in this particular clause might just as well not have been there; in fact it would have been very much better if they had not been there, and then no more should we have been here. Take the words as they stand, translate the two Latin abbreviations into English, and I take it they run thus: "Should the vessel be detained"—that is beyond the lay-days provided—"by causes over which the charterers have no control, that is to say, quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo is taken over, and the rest—no demurrage is to be charged." What does that mean? I accept that one must not take one word in isolation from the other words which accompany it, and, having determined its isolated meaning, refuse to allow that to be influenced by the meaning of the words in the company in which it is found; but with very great respect I cannot see that that really alters the construction. I think "videlicet" means "that is to say," whether you take it by itself or whether you follow it at a respectful distance by the words "etc." It still means "that is to say." I admit at once that if it meant "exempli gratia" for

example, there would be an end of the whole matter and the appeal would fail, but the words are "videlicet," "that is to say," certain things which are specified and the rest which are not specified. The rest of what? We are not told. I do not think there is any question here of what is called the *ejusdem generis* rule and I will not pursue that subject. The words are not "et alia"; they are "etc."; but the word "videlicet" introduces two lines which consist as to one part of specified matters and as to the other part, of an omnibus reference to a residue of things, the totality of which is unknown to us, and was not expressed by the person whose business it was to express it, namely, the charterer. When you say "that is to say" following upon the general words, I think you inevitably limit and define the words that you have previously used. It is not merely an illustration, it is an explanation, a precise statement of what is meant by the general words with which the sentence begins, and therefore I recognise that upon this construction the causes over which the charterers have no control and with which the clause deals are: "quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo is taken over" whatever that may mean and "etc." whatever that again may mean. Now if you have once found that these specific matters are substituted for the general phrase: "Should the vessel be detained by causes over which the charterers have no control," I do not think that the words "etc." either undo that effect and prevent "videlicet" from having a defining and limiting effect; nor are they so far self explanatory as to add to these enumerated and specially named things such an exception as strikes. It may be there, or it may not, but it was for the charterers to say so and as the charterers have not chosen to say so I do not think that they can claim to have exempted themselves from a liability which, in the absence of an exemption, undoubtedly rests upon them.

My Lords, the point is an extremely narrow one. It may seem paradoxical that between 40,000*l.* and 50,000*l.* depend upon two Latin abbreviations, "viz." and "etc." but I do not find that this consideration either daunts or helps me.

I think the appeal ought to succeed upon this short ground.

Appeal dismissed.

Solicitors for the appellant, *Holman, Fenwick, and Willan.*

Solicitors for the respondents, *Slaughter and May.*

Nov. 27 and Dec. 14, 1922.

(Before Lords CAVE, L.C., FINLAY, DUNEDIN, ATKINSON, and SUMNER.).

PENINSULAR AND ORIENTAL BRANCH SERVICE v. COMMONWEALTH SHIPPING REPRESENTATIVE. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision—Vessel requisitioned by Admiralty—Loss of vessel—Removal of ambulance wagons from one military base to another—Warlike operation—War risk or marine risk.

In 1916 *a vessel which had been requisitioned by the Admiralty collided with and was sunk by another vessel, that had also been requisitioned by the Admiralty, and at the time of the collision was carrying ambulance wagons between two war bases. Both vessels were travelling without lights, in accordance with Admiralty instructions.*

Held, that the latter vessel was carrying out an operation of war at the time of the collision and that the loss of the former vessel was due to a war risk and not to a marine risk.

Decision of the Court of Appeal (15 *Asp. Mar. Law Cas.* 522; 127 *L. T. Rep.* 133; (1922) 1 *K. B.* 706) *affirmed.*

Per Lord Cave, L.C. The court is entitled to take judicial notice of the existence of a state of war between this country and another, but the date of a particular event in the war, such as an engagement or a withdrawal, however important in itself, will not be accepted without proof.

APPEAL from the decision of the Court of Appeal (Lord Sterndale, M.R., Warrington and Scrutton, L.JJ.) (reported 15 Asp. Mar. Law Cas. 522; 127 L. T. Rep. 133; (1922) 1 K. B. 706) on a case stated by an arbitrator.

The facts as stated in the case by the arbitrator were as follows:

(1) On or about the 17th April 1915, the *Geelong*, belonging to the claimants, was requisitioned and taken for use by the Australian Government for transport purposes in connection with the War.

(2) The terms of the requisition provided (*inter alia*) as follows: "The Commonwealth Government accepts full war risks, and will indemnify owners against any claim arising from the requisition in this connection, but owners must take all ordinary sea risks which could be covered by an ordinary marine policy in ordinary times of peace."

(3) It was agreed before the arbitrator, and the case was argued on the basis, that the effect of the foregoing clause was to make the Australian Government responsible only for such risks of war as would be excluded from an ordinary marine policy by the presence therein of the usual f. c. and s. warranty, including in such warranty all consequences of hostilities or warlike operations.

(4) On the 1st Jan. 1916 the *Geelong*, whilst under requisition as aforesaid, collided with the

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

British steamship *Bonvilston* in the Eastern Mediterranean, and as a result of such collision was sunk and totally lost.

(5) At the time of the said collision the *Geelong* was bound from Port Said to Gibraltar for orders. She had come from Australia via the Suez Canal and had discharged some troops at Suez. She was laden at the time of the collision with a part cargo of general goods, laden on Government account, in accordance with a term of the requisition whereby cargo might be carried for stability purposes, and the profitable utilisation of such space as might not be required to accommodate troops, horses, stores, etc., the freight received by the owners for the carriage of such cargo to be credited to the Commonwealth Government.

(6) At the time in question the Mediterranean was the scene of considerable activity on the part of enemy submarines, and the *Geelong* was being navigated in accordance with confidential instructions received from the naval authorities at Port Said, with a view to minimising the risk of submarine attack. These instructions prescribed the courses to be followed, and in addition provided that the vessel was, at night, to be navigated at best speed continuously and without showing any lights.

(7) The *Bonvilston* at the time of the collision was proceeding from Mudros to Alexandria. She was under requisition by the British Government and was carrying ambulance wagons and other Government stores from one war base (Mudros) to another war base (Alexandria). In accordance with the orders of the Naval authorities given for the purpose of minimising the risk of submarine attack she was steaming at her best speed and was showing no lights.

(8) The collision occurred about 7.25 p.m. on the 1st Jan. 1916 in approximately latitude 32° 46′N., long. 30° 5′E., the vessels being in fact on crossing courses, with the *Bonvilston* on the starboard side of the *Geelong*.

(9) In an action in the Admiralty Division between the claimants and the owners of the *Bonvilston* arising out of the said collision, Sir Samuel Evans, P., held that in the circumstances, there was no negligence in the navigation of either vessel. This finding was not disputed before the arbitrator, and accordingly he found that the said collision occurred without negligence on the part of either vessel, and was solely due to the fact that both vessels were navigating at night, under naval orders, at full speed and without lights.

(10) The claimants contended : (*a*) That the service upon which each of the said steamers was engaged at the time of the collision was of a warlike character, or at any rate that the *Bonvilston* was engaged on a service of a warlike character, and that the operation of navigating on such service was a " warlike operation." (*b*) That given a warlike operation, and the combination of circumstances causing the loss being unimaginable without the war, the loss was a consequence of hostilities or warlike operations.

(11) The Australian Government contended that the loss of the *Geelong* was caused by a marine peril, viz. : collision, and not by any consequence of hostilities or warlike operations. [Having set out the facts and the contentions of the parties, the arbitrator proceeded :]

(12) " In so far as it a question of fact I find, and in so far as it is a question of law (and in such case subject to the opinion of the court) I hold that the loss of the *Geelong* was caused by a marine peril and not by a war peril.

(13) " I accordingly award, subject to the opinion of the court that the respondents are under no liability to the claimants in respect of the said loss.

(14) " The question for the opinion of the court is whether I am right in law in holding that the loss of the *Geelong* was, in the circumstances hereinbefore stated, caused by a marine peril and not by a war peril

(15) " If the court should answer this question in the affirmative, my award in par. 13 hereof shall stand. If the court should answer the said question in the negative then I award that the claimants are entitled to be indemnified by the respondents in respect of the loss of the *Geelong*."

The Court of Appeal held (affirming the decision of Bailhache, J.) that the court was entitled to take judicial notice of the circumstances surrounding the date at which the collision occurred ; that the latter vessel was carrying out an operation of war at the time of the collision, and that the loss of the former vessel was due to a war risk and not to a marine risk.

The Australian Government appealed.

R. A. Wright, K.C. and *Claughton Scott* for the appellant.

Sir *John Simon*, K.C., *MacKinnon*, K.C., and *G. P. Langton* for the respondents

The following cases were cited :

Attorney-General v. *Ard Coasters Limited ; Liverpool and London War Risks Insurance Association Limited* v. *Marine Underwriters of Steamship Richard de Larrinaga*, 15 Asp. Mar. Law Cas. 353 : 125 L. T. Rep. 548 ; (1921) 2 A. C. 141 ;
Harrisons Limited v. *Shipping Controller*, 15 Asp. Mar. Law Cas. 270 ; 124 L. T. Rep. 540 ; (1921) 1 K. B. 122 ;
Britain Steamship Company Limited v. *The King ; Green* v. *British India Steam Navigation Company Limited ; British India Steam Navigation Company Limited* v. *Liverpool and London War Risks Insurance Association Limited*, 15 Asp. Mar. Law Cas. 58 ; 123 L. T. Rep. 721 ; (1921) 1 A. C. 99 ;
Taylor v. *Barclay*, 2 Sim. 213 ;
Rex v. *De Berenger*, 3 M. & S. 68 ;
Dolder v. *Lord Huntingfield*, 11 Ves. 283 ;
Read and others v. *Bishop of Lincoln*, 67 L. T. Rep. 128 ; (1892) A. C. 644 ;

British and Foreign Steamship Company Limited v. *The King*, 14 Asp. Mar. Law Cas. 121, 270; 118 L. T. Rep. 640; (1918) 2 K. B. 879;

Adelaide Steamship Company Limited v. *The King*, 15 Asp. Mar. Law Cas. 525; 128 L. T. Rep. 258; (1923) 1 K. B. 59.

The House took time for consideration.

Dec. 14, 1922.—Lord CAVE, L.C.—This appeal raises once more a question which has already been several times debated in this House, viz., the question of the meaning to be given to the expression "all consequences of hostilities or warlike operation" when contained in a policy of marine insurance.

The respondents were the owners of a steamship called the *Geelong* which, in the year 1915, was requisitioned by the Government of the Commonwealth of Australia for transport purposes in connection with the War. The requisition was made upon the terms of the well-known form of charter known as T. 99, which included a provision that the Commonwealth Government should accept full war risks, an expression which was understood and agreed by all parties to make the Government responsible for such risks of war as would be excluded from an ordinary marine policy by the usual f. c. and s. warranty, including in that warranty all consequences of hostilities or warlike operations.

On the 1st Jan. 1916 the *Geelong*, which was not at the moment required for the transport of war material, was carrying a general cargo on Government account, and was bound from Port Said to Gibraltar for orders; and at about half-past seven in the evening of that day, when she was a few miles off Alexandria and was sailing (in accordance with the Admiralty instructions) at best speed without showing any lights, she was run into by another steamship called the *Bonvilston*, which was also sailing at full speed without lights, and was sunk. The *Bonvilston* was under requisition by the British Government, and at the time of the collision was carrying ambulance wagons and other Government stores from Mudros to Alexandria. There was no negligence on the part of either vessel.

The respondents having made a claim against the appellant on the ground that the loss of the vessel was due to a war risk, and their claim being disputed, the matter was referred to the arbitration of Mr. Raeburn, K.C., who made his award in the form of a special case for the opinion of the court. By that case he found the above facts, his findings as to the purpose for which the *Bonvilston* was being used at the time of the collision being in the following terms:

"The *Bonvilston* at the time of the collision was proceeding from Mudros to Alexandria. She was under requisition by the British Government and was carrying ambulance wagons and other Government stores from one war base (Mudros) to another war base (Alexandria). In accordance with the orders of the naval authorities given for the purpose of minimising the risk of submarine attack she was steaming at her best speed and was showing no lights."

Upon the above facts the arbitrator found that the loss of the *Geelong* was caused by a marine peril and not by a war peril, but submitted the question whether he was right in law in so doing, for the opinion of the court. The case was argued before Bailhache, J., who held that the *Bonvilston*, being engaged in carrying ambulance wagons and other Government stores from one war base to another war base, was engaged in a warlike operation, and accordingly gave judgment for the respondents. Upon the matter being taken to the Court of Appeal, that court (consisting of Lord Sterndale, M.R., Warrington and Scrutton, L.JJ.) unanimously affirmed the decision of the learned judge, but upon somewhat varying grounds. Warrington, L.J., while declining to express a definite opinion as to whether upon the facts found by the arbitrator he would have come to the same conclusion as Bailhache, J. had done, held that the court was entitled to take notice of the historical fact that Mudros was the advance base for the British operations in the Gallipoli Peninsula, and that the collision happened in the middle of the operation connected with the evacuation of the Peninsula; and from these facts he inferred that the *Bonvilston* was at the time of the collision carrying warlike equipment from Mudros in connection with the evacuation, and for that reason was engaged in a warlike operation. On the other hand, Scrutton, L.J., while holding that the court was at liberty to take from *The St. Oswald* case (*British and Foreign Steamship Company Limited* v. *The King*, 14 Asp. Mar. Law Cas. 121, 270; 118 L. T. Rep. 640; (1918) 2 K. B., p. 79) the fact that Gallipoli was being evacuated on the 31st Dec. and the 1st Jan. and to conclude that the voyage of the *Bonvilston* from Mudros to Egypt on the 1st Jan. was part of that warlike operation, was prepared, apart from that circumstance, to hold that carrying ambulance wagons and Government stores from one war base to another in time of war, was a warlike operation. The Master of the Rolls, while he would have preferred to have from the arbitrator a more complete finding as to what the *Bonvilston* was doing at the time of the collision, did not dissent from the opinions of his colleagues. Thereupon the present appeal was brought.

I am inclined to think that, in taking notice of the dates of the evacuation of Suvla Bay and Helles in the Gallipoli Peninsula, and in inferring from those dates (without any finding by the arbitrator) that the *Bonvilston* was taking part in that evacuation, the Court of Appeal carried too far the doctrine of judicial notice. There is no doubt that judicial notice may be taken of the existence of a state of war between this country and another (see per Lord Eldon in *Dolder* v. *Lord Huntingfield*, 11 Ves. 283, at p. 292, and per Lord Ellenborough in *Rex* v. *De Berenger*, 3 M. & S., at p. 69); and it was said in

Taylor v. *Barclay* (2 Sim. 213, at p. 220) that "it is the duty of the judge in every court to take notice of public matters which affect the Government of the country." Further, where it is important to ascertain ancient facts of a public nature, the law permits historical works to be referred to (per Lord Halsbury, L.C. in *Read and others* v. *Bishop of Lincoln*, 67 L. T. Rep. 128; (1892) A. C., at p. 653). But I know of no authority for the proposition that the date of a particular event in a modern war, such as an engagement or a withdrawal, however important in itself, may be stated without proof, and an inference based upon it; and in any case I do not understand how such an inference can be drawn for the first time in a Court of Appeal, when the opportunity of rebutting the inference has passed by.

I therefore put on one side this element in the decision of the Court of Appeal, and proceed to consider the effect of the findings in the award; and first it is necessary to determine what those findings mean. Your Lordships were invited by counsel for the appellant to proceed on the footing that the ambulance wagons and other Government stores referred to in the award were being transported by the *Bonvilston* for some perfectly peaceful purpose, that they may never have been landed at Mudros at all, and that they may have been intended for use in connection with some civil hospital at Alexandria, or for some other non-combatant purpose. It appears to me that any such assumption would do less than justice to the language of the award. When the arbitrator found that the *Bonvilston* was under requisition by the British Government, and was carrying "ambulance wagons and other Government stores from one war base (Mudros) to another war base (Alexandria)," he must assuredly have intended the court to understand that the cargo consisted of war material of the above character which was being transported from one war base—that is to say, from a point behind a fighting front from which the forces engaged on that front might be fed with men, munitions, and supplies—to another war base for war purposes. At all events I so read the finding, and am satisfied that if anything else had been intended very different language would have been used. This, then, was the duty in which the *Bonvilston* was engaged at the time of the collision; and the question to be determined is whether this was a warlike operation within the meaning of the warranty.

I do not propose to attempt to define the expression "warlike operations." It is composed of ordinary English words in common use, and to define them by other like words might only produce a call for further definition. But it is possible to go some way in considering what is or is not included in the expression. Plainly it does not include all operations in War, or even all operations for the purposes of war. For instance, the *Petersham* which was carrying iron ore to be used in the manufacture of munitions, and the *Matiana* which was carrying cotton which might well have been intended to be used for the clothing of troops, were held by all the members of your Lordships' House who heard the appeals in those cases not to be engaged in warlike operations (*Britain Steamship Company Limited* v. *The King*, 14 Asp. Mar. Law Cas. 121, 270; 123 L. T. Rep. 721; (1921) 1 A. C. 99). On the other hand, the expression is not confined to actual combatant operations against the enemy, whether by way of attack or of defence; for in the case of *The Richard de Larrinaga* (*Liverpool and London War Risks Insurance Association Limited* v. *Marine Underwriters of the Steamship Richard de Larrinaga*, 15 Asp. Mar. Law Cas. 58; 125 L. T. Rep. 548; (1921) 2 A. C. 141) a warship on her way to pick up a convoy was held by this House to be engaged in a warlike operation. Indeed, it has been said that almost any movement of a warship in the course of her duties may be included in the phrase "warlike operations." Probably the phrase includes all those operations of a belligerent power or its agents which form part of or directly lead up to those processes of attack and defence which are of the essence of war. Thus, as was said by Lord Atkinson in *The Petersham* case, the transfer of the combative forces of a belligerent power from one area of war to another for combative purposes would be a warlike operation; and the same may, I think, be said of the transport in like manner of guns or munitions of war. Nor, in my opinion, can any valid distinction be drawn in this respect between munitions of war and the materials for equipping a fighting force, such as saddles for the cavalry, field kitchens for the infantry, or ambulance wagons for the wounded in battle. All these things are an essential part of the equipment of an army in the field, and to transport them to an area of war is a part of the warlike operations conducted in that area not less essential than the provision of men, guns, rifles, or ammunition.

If this be—as I think it is—the true meaning of the expression to be construed, then the finding of the arbitrator in this case (interpreted as I have interpreted it) contains ample material on which to support the decisions of Bailhache, J. and the Court of Appeal. The *Bonvilston* was a vessel in the service of the British Government and engaged in the warlike operation of transporting war material from one base to another, and while so engaged and sailing at full speed without lights, to avoid submarine attack, she without any negligence struck and sank the *Geelong*; and, if so, it follows, according to the decisions already given in this House, that the loss of the *Geelong* was a direct consequence of a warlike operation, and accordingly that the respondents are entitled to succeed. For these reasons I move your Lordships that this appeal be dismissed with costs.

Lord Finlay.—This case arises upon an award and special case, and the question is whether the loss of the steamship *Geelong* was due to war risks or to ordinary marine risks.

In April 1915 the *Geelong* was requisitioned by the Commonwealth Government for transport purposes in connection with the War. The terms of the requisition provided as follows: "The Commonwealth Government accepts full war risks and will indemnify owners against any claim arising from the requisition in this connection, but owners must take all ordinary sea risks which could be covered by an ordinary marine policy in ordinary times of peace."

For the purposes of this case, however, it was agreed that the effect of this special definition was to make the Commonwealth Government responsible only for such risks of war as would be excluded from an ordinary marine policy by the presence therein of the usual f. c. s. warranty, including in such warranty all consequences of hostilities or warlike operations. The form of this warranty is not stated in the case, but the parties agreed at the Bar of your Lordships' House that it is as follows: "Warranted free of capture, seizure and detention and the consequences thereof, or on any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after the declaration of war." It follows that any risk excluded by this warranty will be a war risk for the purposes of this case. It is alleged by the claimants that the risk in the present case would be excluded from an ordinary policy by the words "from all consequences of hostilities or warlike operations."

It is settled by decision that the mere fact that a collision between merchantmen caused by navigating at full speed at night without lights in obedience to regulations in force during wartime does not by itself make the loss one resulting from a war risk within the meaning of this clause. But if one or both of the vessels were engaged at the time in a warlike operation it becomes a war risk as being a consequence of a warlike operation. The case therefore resolves itself into the inquiry whether either or both of two merchant vessels, the *Geelong* and the *Bonvilston*, were on the facts of this case engaged in a warlike operation. The facts appearing upon the special case are the following:

The *Geelong* was totally lost by a collision between her and the British steamship *Bonvilston* in the East Mediterranean in latitude 32° 46′ N., longitude 30° 5′ E., at 7.25 p.m. on the 1st Jan. 1916. There was no negligence on the part of either vessel. The *Geelong* was bound from Port Said to Gibraltar for orders, and was laden with a cargo of general goods. The *Bonvilston* was under requisition by the British Government, and was carrying ambulance wagons and other Government stores from Mudros to Alexandria. Both Mudros and Alexandria were war bases. The Mediterranean at that time was the scene of considerable activity on the part of enemy submarines, and in obedience to the instructions of the naval authorities both vessels were, when the collision took place, being navigated at best speed and without showing any lights. It has not been alleged that the *Geelong* was engaged in a warlike operation. She was proceeding with a cargo of general goods to Gibraltar for orders.

The question is whether the *Bonvilston* was so engaged.

The question was referred to Mr. Raeburn, K.C., as arbitrator. Mr. Raeburn in his award and special case, after stating the contentions of the parties, finds as follows: "In so far as it is a question of fact, I find, and in so far as it is a question of law (and in such case subject to the opinion of the court), I hold that the loss of the *Geelong* was caused by a marine peril, and not by a war peril."

The learned arbitrator does not state the grounds on which he arrived at this conclusion. Personally I should have been very glad to have had the help, which might have been afforded by a statement from so able and experienced an arbitrator, of the path by which he arrived at his conclusion. The award states his conclusion, subject to the opinion of the court upon the case, and adds in par. 12: "The question for the opinion of the court is whether I am right in law in holding that the loss of the *Geelong* was in the circumstances hereinbefore stated caused by a marine peril and not by a war peril."

The question, therefore, is whether upon the facts stated in the case, the loss of the *Geelong* was as a matter of law a loss by war peril.

Bailhache, J. held that the *Bonvilston* was engaged in a warlike operation. He says: "Now in my opinion, a vessel engaged, as the *Bonvilston* was, in carrying Government and British stores and ambulance wagons from one war base to another war base is engaged in a warlike operation.

He refers to the opinion expressed by Lord Atkinson in the case of *The St. Oswald* that a vessel engaged in the business of carrying some of the forces of the Crown from Gallipoli upon its evacuation to some other destination, was engaged in a warlike operation. Bailhache, J. then proceeds: "Now, if it be a warlike operation to take troops from one place to another, I am unable to see myself that it is not equally a warlike operation to take other munitions of war, or ambulance wagons for the use of wounded soldiers, or to convey these things from one place to another." And on this ground he answered the questions in the special case in favour of the claimants.

The decision of Bailhache, J. was confirmed in the Court of Appeal, but not precisely upon the same ground.

The Master of the Rolls, referring to the porposition laid down by Bailhache, J., which I have already quoted, says; "I am not prepared myself to assent to such a broad proposition as that. I can quite conceive that a merchant vessel may be carrying ambulance wagons and other Government stores from one war base to another war base and still in certain circumstances may not be engaged in a warlike operation, and I think, if left to myself, I should have said we have not sufficient findings of fact to determine whether the learned judge is right in

his decision or not." He goes on to say that personally he should have desired further information, but as his colleagues thought this unnecessary he would not dissent from their affirmance of Bailhache, J.

Warrington, L.J. thought the court was at liberty to take notice of the dates of the evacuation of Gallipoli and of the fact that Mudros was notoriously the advanced base for the operations in Gallipoli, and so to infer that the carriage of wagons and stores by the *Bonvilston* was part of the process of evacuation, and therefore a warlike operation.

Scrutton, L.J. put his decision on two grounds. In the first place he said: "I am prepared to hold that carrying ambulance wagons and Government stores from one war base to another in time of war was a warlike operation." But he went on to say: "I also think, though, of course, it is not necessary for my decision on the view I take, that we are at liberty to take from *The St. Oswald* case the fact that Gallipoli was being evacuated on the 31st Dec. and the 1st Jan., and to conclude that this voyage from Mudros to Egypt on the 1st Jan. was part of the warlike operation of the evacuation of Gallipoli, which, of course, if correct, makes the case much stronger." Possibly some error has crept into the transcript of this passage, and I am not prepared to accept as correct the proposition that we may add to this special case additional facts which happen to have been proved in another case.

The question must be decided simply upon the facts stated in the special case itself. The precise dates and details of particular warlike operations cannot be regarded as matters of which the court can take judicial notice. If they are material they should be found by the arbitrator.

But, in my opinion, enough is stated in the case itself to enable us to answer the question.

Par. 1 states that the *Geelong* was requisitioned by the Commonwealth Government for transport purposes in connection with the War, but there is nothing to show that at the time of the collision she was engaged in any warlike operation. She was simply proceeding to Gibraltar for orders and was carrying a part cargo of general goods laden on Government account.

It is otherwise in the case of the *Bonvilston*. The material facts with regard to her, as stated in the seventh paragraph of the case, are these: "The *Bonvilston* at the time of the collision was proceeding from Mudros to Alexandria. She was under requisition by the British Government, and was carrying ambulance wagons and other Government stores from one war base (Mudros) to another war base (Alexandria)."

That the Mediterranean was the scene of considerable activity on the part of enemy submarines is stated in the sixth paragraph of the case, and this is illustrated by the fact that both vessels when the collision occurred were, in accordance with naval regulations, proceeding at night at their best speed and showing no lights.

In the absence of any circumstances tending to put a different colour upon the transaction, the carriage in time of war of ambulance wagons and other Government stores from one war base to another war base is carriage for the purposes of the war. It is immaterial whether the wagons and stores are being taken to a base for the purpose of warlike operations to be conducted from that base, or are being fetched away from a base because the warlike operations conducted from it have ceased. In either case the carriage is part of a military operation.

It is possible that, as the Master of the Rolls said, there may be circumstances which would prevent such carriage in time of war of Government stores from one war base to another from being in the nature of a military operation. Such circumstances must be of a special character, and it cannot be supposed that if any such circumstances existed in the present case they would not have been stated by the arbitrator.

In the absence of all explanation the only rational inference is that the carriage by the *Bonvilston* of the ambulance wagons, and the other Government stores formed part of a warlike operation, and was therefore a war risk under the test on which the parties agreed.

I think that the same result would have followed under the clause contained in the terms of requisition, as a collision caused by the fact that the two vessels were, under war regulations, proceeding in the dark at full speed in time of war without lights, hardly falls within the category of "ordinary sea risks." This, however, is immaterial.

Lord DUNEDIN.—I concur with the Lord Chancellor and would not add anything were it not that this question has been raised how far it is legitimate to take judicial notice of certain facts. I should not feel I was justified in resting any conclusion which I formed on such things as the particular dates when certain operations of war were begun or were in progress when those dates had not been proved, but had to be supplied from my own private knowledge.

On the other hand it is settled by authority that a judge may be aware that there is a state of war, and by that I do not understand a vague consciousness, such as may have been felt by an ancient Roman when he noticed that the temple of Janus was open, but an intelligent apprehension of the war as it is and the theatre of the operations thereof. Knowing then that there was a war in the Levant, and that the Dardanelles and Syria were the scenes of naval and military operations, and that it is found as a fact by the arbitrator that the vessel which caused the loss by collision was carrying stores of a character to be employed in active warfare from one war base, Mudros, to another war base, Alexandria, I consider I have sufficient to warrant me in agreeing with the Court of Appeal that the risk was a war risk in the sense of the indemnity in question.

Lord ATKINSON.—Any difficulty which arises in this case is due to the fact that some of the most important facts were not elicited at the arbitration. The collision took place on the 1st Jan. 1916. The *Bonvilston* was then engaged in carrying some ambulance wagons and some other Government stores from Mudros to Alexandria. The arbitration took place about five years later. Nothing would have been easier than to have ascertained and proved in the arbitration what was the condition of things at Mudros when the ship *Bonvilston* was loaded there; whether the evacuation of Gallipoli was or was not proceeding; what aid the island of Mudros lent to the process of evacuation, if any; for what purpose were these ambulances sent to Alexandria; was it an order that they should be destroyed, and so put out of the reach of the enemy, or were they sent home to England or to some peaceful depot, or was it that they should be used in aid of combative operations then being actively carried on, or about to be instituted by His Majesty's military forces against the military forces of the Turkish Empire, with which His Majesty was then at war.

It is much to be regretted that these matters were not inquired into. It is well established that the courts of law in this country, can take judicial notice of the fact that a state of war exists between this country and some foreign enemy, but I am not at all sure that the courts of law in this country can take judicial notice of the fact that any particular operation, such as a battle or a siege, an advance or retreat, or the evacuation of a particular field of action actually took place, and much less when such an operation began or ended.

Whether the *Bonvilston*, when carrying these ambulance wagons to Alexandria, was or was not engaged in a "warlike operation" will depend very much, if not entirely, on the purpose for which they were carried there.

In the judgment which I delivered in *Britain Steamship Company Limited* v. *The King* (*ubi sup.*), which I would not have alluded to but that it has been so often referred to, I clearly indicated that this purpose is in such cases a vital matter to be considered. I said: "The transfer of the combative forces of a power from one area of war to another, or from one part of an area of war to another for combative purposes, would, I think, be a warlike operation."

I adhere to that opinion, and I think the principle applies to the carriage of wagons, ammunition, guns, or other material things carried to and discharged at a particular place for the purpose of being used by the forces of the Crown operating in a field of action in which the landing place is situated, in attacking their enemy, or defending themselves against his attacks. I think the words "attacking" and "defending" in this sentence must be taken to include the providing of ancillary things such as beds to lie on, or food to eat, which are necessary to fit the combatants for attack and defence.

Sir John Simon most ingeniously argued that the words "war base" as used in the following passage of the case stated: "She (the *Bonvilston*) was under requisition by the British Government and was carrying ambulance wagons and other Government stores from one war base (Mudros) to another war base (Alexandria)" indicated with sufficient clearness the purposes these things fulfil at the place from which they were taken, and those they were designed and intended to fulfil at the place to which they were carried. For the purposes of this argument he distinguished between a "war base" and a "base of supply." A base of supply, he said, is a place where war stores are accumulated and preserved ready to be drawn upon when occasion may require for the needs of the war; but it may be far distant from the field of war. In that sense the stores in London and elsewhere in this country containing clothes and boots, rifles and ammunition, &c., were in the Great War bases of supply, but he said, as I understood him, that a "war base" meant a place with which the combative forces actually carrying on the war were, as it were, in touch, that it was a place so near to the fighting lines that the goods collected there could be made available to supply the daily needs of the combative forces, whatever position they might hold or occupy in the whole field of war. It was a place to which nothing was brought not deemed to be necessary to supply these needs.

If that be so, then it may fairly be inferred that everything brought to such a base is dedicated to the use I have mentioned, and is brought there for the purpose of being available for that use.

I have thought much over this argument, and have come to the conclusion that it is sound and may be acted upon with safety. In my opinion, therefore, the respondents have been enabled by relying on these words "war base" to discharge the burden of proof that lay upon them. I think they established that the voyage of the *Bonvilston* from Mudros to Alexandria was a warlike operation, that it was the proximate cause of collision, and that the appeal fails and should be dismissed with costs.

Lord SUMNER.—When the *Geelong* and the *Bonvilston* came into collision, both ships were navigating at best speed at night without lights under imperative Admiralty orders, and the *Geelong*, having the *Bonvilston* on her starboard hand, was the give-way ship. Sir Samuel Evans, P., however, found that neither ship was guilty of negligence, and this finding is accepted. The only cause of the collision, therefore, was that the *Geelong* did not give way and so avoid the collision, because the *Bonvilston* had made herself invisible, She was carrying Government property, so described as to show that, *primâ facie*, it was material of war, transported from one "war base" to another "war base" both in the Levant, and was doing so with lights out for fear of enemy submarines. This operation was the direct cause of the

collision. The question is whether it was "warlike" within the agreed effect of the contract.

Had this case been the first of its class to be decided, instead of being the latest, I can understand that some difficulty might have been felt in saying that the operation was warlike, for in itself it was peaceable enough. It was unaggressive; it was unobtrusive, not to say furtive; and the *Bonvilston* would have behaved in exactly the same way, if she had been carrying a purely commercial cargo between exclusively mercantile ports. The difficulty is to distinguish this case, if not from previous decisions, for none quite cover the point, at least from dicta more or less closely involved in them.

It is not quite satisfactory to say that, if the operation of carrying troops would be warlike, at any rate when they are in fighting trim, the operation must be also warlike in carrying one or more of those appurtenances without which it would be inhuman to send them into battle. This is, after all, only an argument from analogy, and analogy is often deceptive.

"Warlike operations" is an expression deliberately wide, and, incidentally, rather vague, but it has been held that a mere operation during war is not warlike, if it is not also an operation of war. On the other hand, what is more like war than doing with the indispensable equipments of an army such things as have to be done, in order that the army may itself engage the enemy with proper provision for those who fall? I think that the real question is, whether the learned arbitrator found the facts sufficiently to bring the case within this consideration, when he said "she was under requisition by the British Government and was carrying ambulance wagons and other Government stores from one war base (Mudros) to another war base (Alexandria)."

It is certainly legitimate to consider what is implied in this finding as well as what is expressed in it. "War base" is a term which the special case does not define. I doubt if it has a definition for the present purposes. A war base is evidently a place used for certain purposes of military supply in a time and in an area of war. The term is an administrative one and, whatever it may connote in a textbook on the theory of war, in practice it is simply the place chosen by the competent military authority on which to base other operations of war. A place is, therefore, not a war base, because nature made it so, or owing to the fitness of things, but because those directing the war chose it for that purpose. I think that a court of law may with propriety, and I hope with substantial conformity to the fact, presume, till the contrary is shown, that Government material of war is not idly shifted from war base to war base, or transported at great cost otherwise than for war purposes. If so, it seems to me to be implicit in the facts found, that this transportation of these stores was a warlike operation. This appears to have been the view of Scrutton, L.J., and, subject to some comment on the language which he used, it was the view of Bailhache, J. also. The learned judge says: "if it be a warlike operation to take troops from one place to another, I am unable to see myself that it is not equally a warlike operation to take other munitions of war—ambulance wagons for the use of wounded soldiers—to take those things from one place to another." I do not think that the learned judge meant to say, at any rate with reference to the transport of chattels, that transport of munitions of war from any place to any other place is necessarily a warlike operation. Possibly there may be some difference in the case of the transport of troops, of which it may be said that any transportation of them in time of war is warlike, but in the case of chattels, I assume that his remark was intended to be directed to the case in hand as found in the special case.

The objection is made, that some connection must be shown between the voyage with its termini on the one hand and the chattels transported on the other, and that, if this is not shown, the claimant has not proved his case. If, for example, the Government property was neither taken on board at Mudros nor was intended to be discharged at Alexandria; if it had never belonged to the Mudros stock and was not to belong to the Alexandria stock, then the transport from war base to war base was purely fortuitous and had no connection with the property transported, at least none which would colour the transportation with the quality of being a warlike operation. In certain circumstances it may be that this objection would be valid. If the stores had been shipped in England for Hong Kong, and the calls at Mudros and at Alexandria had been made for ship's purposes or in connection with other cargo, so that they were mere incidents in a prolonged voyage, or if the goods formed but a small part of the lading of the ship, which otherwise consisted of ordinary merchandise, different considerations, I dare say, would arise. It seems to me, however, that we should be imputing to the learned arbitrator a finding equally irrelevant and misleading, unless we read it as implying a material connection between the termini of the voyage and the object and character of the transportation. I can have no doubt myself that his finding means that, for good reasons connected with the war, the military authorities in the course of their duty depleted a stock at one war-base with the object of increasing that at another, where presumably it would be of more use for the military purpose for which it was primarily designed.

It is further suggested that the Court of Appeal considered the findings of the arbitrator insufficient in themselves to warrant the conclusions drawn by Bailhache, J., without the introduction of facts, which had not been found but which might be supplied on appeal by taking what is called judicial notice of them. These facts appear to have been (1) that the voyage of the *Bonvilston* synchronised with the evacuation of the Dardanelles, and (2) that Mudros was so intimately connected with the

operations in the Dardanelles, that the evacuation of stores from Mudros might be regarded as part of the evacuation of some of the positions in the Gallipoli Peninsula.

To require that a judge should affect a cloistered ignorance of facts which every other man in court is fully aware of, and should insist on having proof on oath of that, which, as a man of the world, he knows already better than any witness can tell him, may easily become pedantic and futile. Least of all would it be possible to require this detached and blindfold attitude towards facts, which the course of the late War has burnt into the memories of us all. It does not, however, seem to me, as at present advised, that the month and day at or about which a particular military movement was carried out, or that the existence between the Gallipoli Peninsula and Mudros Bay of the relation of active front to supply base, are matters as to which everybody can be deemed to be fully and accurately informed or of which judges can be required, in the legal sense of the words, to take judicial notice; still less is the fact—which is a matter of expert military training—that, in such a relation and about such a time, the simultaneous removal of such things as ambulance wagons from the base would have any particular connection with the operations going forward at the active front. At any rate, I have not found any authority which goes nearly so far, and there are many which, surprising as they are in any case, would be absurd, if the rule really went to this extent.

I do not, however, think that this is a true case of taking judicial notice, for that involves that, at the stage when evidence of material facts can be properly received, certain facts may be deemed to be established, although not proved by sworn testimony, or by the production, out of the proper custody, of documents, which speak for themselves. Judicial notice refers to facts, which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer. In the present case the opportunity for introducing new evidence had passed. The question was one of law, namely, what was implicit in the facts stated by the learned arbitrator, who was the judge of fact, selected by the parties. As it seems to me, all that the Court of Appeal obtained by noticing historical facts, whether from general recollection or from the report of the case of *The St. Oswald*, was equally to be got by considering that this transportation took place in time of war from one "war base" to another "war base," both situated in the Eastern Mediterranean, and both more or less infested by enemy submarines, and referred to articles, which are not primarily subjects of ordinary commerce, but are naturally provided for use in warlike operations, at any rate, when they are at a war base. If so, and without more, I think it is right to hold, that in the absence of any contradiction or modification of these facts, this transportation itself was a warlike operation also. Those who carried it out were not indeed combatants, but they were ministering to combatant needs, and were themselves exposed to risk of attack and destruction from combatants on the other side. If not an actual operation of war, this was a warlike operation, and I think it falls outside the class which is properly described as being merely operations during war. I therefore think that the appeal fails.

Appeal dismissed.

Solicitors for the appellant, *Parker, Garrett, and Co.*

Solicitors for the respondents, *Ince, Colt, Ince, and Roscoe.*

Judicial Committee of the Privy Council.

Wednesday, July 5, 1922.

(Before Lords Sumner, Parmoor, Wrenbury, and Sir Arthur Channell.)

Atychides v. Secretary of State for India; The Kara Deniz. (a)

on appeal from the high court of bombay in prize.

Prize—Ship—Owner residing and carrying on business in enemy state—Naturalised in neutral state—Ship documented as enemy ship—Seizure—Condemnation as prize.

The owner of the K. D. *was born in Turkey, and resided and carried on business in Turkey. He had been naturalised as a Persian subject about the year* 1912. *The* K. D., *shortly before the outbreak of war between the United Kingdom and Turkey, entered the port of Bombay flying Turkish colours, and documented as a Turkish ship. Shortly afterwards she hoisted neutral colours. On the outbreak of war between this country and Turkey, while the owner was at the Piræus, the* K. D. *was seized at Bombay and condemned as lawful prize.*

Held, that the K. D. *must be regarded as an enemy ship, and that she was rightly condemned.*

Decision of the High Court at Bombay in Prize affirmed.

Appeal by the claimant from a judgment and decree of Macleod, C.J. by which the steamship, the *Kara Deniz*, was condemned as good and lawful prize, the ground of condemnation being that her owner, the appellant, had at all times material a commercial domicile in Turkey, and that the vessel, though flying, and entitled to fly, the Persian flag, must be treated as an enemy vessel.

The appellant, Socrates Atychides, was by parentage an orthodox Greek Christian. He was born in Constantinople, and was ordinarily resident there till the year 1914. In the year 1911 he, while continuing to reside in Constantinople, became a Persian subject, the

(a) Reported by W. C. Sandford, Esq., Barrister-at-Law.

immediate purpose of such change of nationality being to free his children from the obligation to serve in the Turkish army. Persian law permits nationalisation without residence in Persia. He carried on business as a shipowner in Constantinople, in which business he had been engaged for upwards of ten years, and was the owner, or part owner, of seven steamships. These vessels all flew the Persian flag, and were named after towns in Persia, their port of registry being Bunder Abbas. They were chiefly employed in trade between Batoum and Constantinople, and, among other things, carried mails for the Russian Government; they also carried pilgrims to Jeddah. The appellant had a partner in his business, one Bachrato, a Greek, and the partnership managed the business of the ships. There were Turkish and German shareholders in most of the ships, but as regards the *Kara Deniz*, the appellant, when he bought her, purchased her for himself, and there were no other shareholders in her.

Mirza Khan for the appellant.

Sir *Leslie Scott* (S.-G.) and Hon. *G. Lawrence* for the respondent, were not called upon.

Their Lordships' judgment was delivered by

Lord Sumner.—Although their Lordships do not find it necessary to call upon the Crown for any argument, they must not be understood to cast the smallest slight upon the argument which has been advanced to them on behalf of the appellant in so doing. Indeed, they wish to say that great assistance has been rendered to them by the brevity, the clearness, and the good judgment which counsel for the appellant has displayed on behalf of his client; but their Lordships have come to the conclusion that there is no ground made out upon which they can interfere with the condemnation which was pronounced in the court below.

The case is a claim in prize for the condemnation of the *Kara Deniz*. It has been heard on two occasions. On the first, the learned judge found that the formalities of the transfer to the claimant appeared to be complete; but he had doubts, which the circumstances certainly seem to have warranted, whether the transaction might not have been a collusive one entered into for the purpose of assisting the Turkish Government, then an enemy of His Majesty, and accordingly the case was adjourned to give the claimant the opportunity of calling further evidence upon that point. Subsequently the case came on again, and a decree of condemnation was pronounced upon the ground that the claimant had, at the time of the capture and continuously thereafter, a commercial domicile in Constantinople, and that he had never formed any intention, nor taken any steps, which had the effect of divesting him of that commercial domicile and adopting some other. If the decision that he had not done so, and had therefore retained his Turkish commercial domicile, was correct, it is not contended before their Lordships that the condemnation was not properly pronounced.

The question is one of fact, and depended in the first instance upon the evidence given as to the acts and intentions of the claimant. He was by race a Greek. He was a member of the orthodox Greek Church, but was born in Constantinople a Turkish subject. About three years before the war he had been naturalised as a Persian subject, but he continued to carry on his business in Constantinople as before. In partnership with a Turkish subject, he traded as a manager of shipping; and in co-ownership, sometimes with Turks and sometimes with Germans, and in one or two cases without any co-owners, he was owner of a number of vessels trading principally in the Black Sea, where they carried the Russian mails, and through the Suez Canal and down the Red Sea, where they engaged in the pilgrim traffic to Mecca. This business he carried on up to the very eve of the outbreak of the war between Turkey and Great Britain. He happened then to be in the Piræus in consequence of some trouble into which one of his vessels, the *Teheran*, had got. The imminence of war must have been obvious to him, as it was to everybody else, because his vessels had been employed in transporting troops for the Turkish Government, a service which they had rendered in time of peace for some years, but now were called on to render upon an exceptionally large scale.

In the autumn of 1914 mines had been laid in the Dardanelles, the traffic through the Straits was no longer conducted in the ordinary mode of times of peace, and it could hardly have been a surprise to him when, at the Piræus, he learned that war had formally begun. He took an early opportunity of removing from the immediate area of war his wife and children, and brought them to the Piræus. His Turkish partners he left in Constantinople. His material interests were there, because his ships, except the *Teheran* and the *Kara Deniz*, were in the hands of the Turkish Government; and his undertakings therefore continued as before in Constantinople, although they were seriously hampered, and perhaps brought to a standstill by the war. He next devoted himself to the fortunes of the *Kara Deniz*, which he had bought in the previous August. It may be assumed for present purposes that everything connected with the purchase was done in good faith; but she was a vessel at that time on passage eastwards, and reached Bombay before the claimant had been able to communicate with the captain for the purpose of taking the formal steps necessary to change her flag and to establish her as a Persian vessel. She reached Bombay flying the Turkish flag, under the command of a Turkish captain, with a Turkish crew; she had no register on board, but in other respects she was documented as a Turkish vessel. The claimant accordingly went to Bombay himself for the purpose of trying to terminate her stay at Bombay, for the authorities insisted that, before the change of ownership could be recognised, the register must be produced and put into regular order. His intention was to

forward the vessel to a destination, which he says had been prearranged—Busra.

Under these circumstances the burden of proof was upon him to satisfy the learned judge that the commercial Turkish domicile, which he had certainly retained up to the time when war broke out, had been altered. He might have stated that it was his intention definitely to give it up, and not to resume business in Constantinople at all. As to that, he made statements in evidence before the learned judge which negatived any such intention, because he said in cross-examination: "I shall go back as soon as the Dardanelles are open. It is immaterial to me whether war is going on or not. I want to go to look after my business. I was afraid of the safety of my wife and family, as they were Greeks." It is true that in re-examination he said: "I do not want to trade there while war continues. If I got to Constantinople I would try and get my ships to Piræus"; and it is suggested that what he really meant was that he expected that very shortly, not only would Constantinople be in the hands of the British forces, but apparently would have been annexed to the British Empire, and have become a British possession. No grounds are shown for so far-reaching an anticipation as that; but, at any rate, he gave this evidence before the learned judge, who formed his own opinion as to it. Cogent grounds would be needed to alter the conclusion drawn by him from the oral evidence which the appellant gave, in spite of the fact that he spoke Greek, and that it seems doubtful whether the interpreter thoroughly understood Greek, while the court did not, at any rate, profess to understand that language. Every act of Mr. Atychides at the time was consistent with the intention to retain his commercial domicile at Constantinople, and is inconsistent with any intention to divest himself of it. He did his best to continue the voyage of the *Kara Deniz* to a Turkish port, although he was not able to show that there was any particularly pressing commercial object in sending her to Busra, where no cargo was engaged, where no agent had been appointed, and where, so far as appears, there was no trade to be expected. He continued to act exactly as before, so far as their Lordships know. It may be said that there was very little that he could do with his business in Constantinople, he being in the Piræus and his ships being in the hands of the Turkish Government; but still the matter rested with him, and on appeal their Lordships think it impossible to dissent from the conclusion at which the learned judge arrived in that state of the evidence, namely, that the claimant had not discharged the burden of proof which lay upon him of showing that he was no longer commercially domiciled in Turkey, as he had been before. That being so, it has not been argued before their Lordships that the condemnation should not stand.

There were other claims raised at the first trial, the nature of which appears to have been that it was contended that the ship had been detained by the Government at Bombay either without legal authority or in the unreasonable exercise of a legal authority, and under such circumstances as to warrant the claimant in the prize proceedings making a claim for damages for detention of the vessel. It may be that, if the ship had been released in the prize proceedings, he might have a claim for something of the kind; but what claim in prize he could have as an alternative to a claim for the release of the vessel, and consistently with her condemnation, does not appear.

On the first occasion, either by arrangement or in the discretion of the learned judge, those questions do not seem to have been tried; on the second occasion it was unnecessary to try them because the vessel was condemned, and there it was conceived that the matter ended. It has been contended before their Lordships by counsel for the appellant, first of all, that there is such a grievance; and, secondly, that it is one upon which their Lordships ought to pass an opinion in the appellant's favour. It is quite clear that, sitting in appeal, their Lordships could not investigate this matter for the purpose of giving a decision themselves if it was never passed upon at Bombay before a court there, and after proper examination of the facts in court; and their Lordships are clearly of opinion that no ground whatever has been made out for giving the appellant any relief in that connection. If he has any such rights, he should prosecute them in Bombay. Their Lordships are very far from encouraging any supposition that he has such rights. Counsel frankly admitted that the case must be, not that there was illegal behaviour on the part of the port officials, but that they acted unreasonably in exercising legal rights for a long time, instead of accepting the representation diplomatically made on behalf of the claimant; and it was contended that the object was the indirect one of getting an opportunity of condemning a Persian vessel as Turkish, if war should break out between Great Britain and Turkey. A charge of bad faith like that, which has never been investigated, still less supported, is one as to which it is unnecessary to say anything further.

Their Lordships therefore think that there is no ground whatever for interfering with the condemnation pronounced by the Chief Justice of Bombay, and they will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant, *P. J. Canning.*

Solicitor for the respondent, *Treasury Solicitor.*

Nov. 17, 20, 21, 1922, *and Jan.* 23, 1923.

(Before Lords HALDANE, SHAW, PARMOOR, WRENBURY, and CARSON.)

CORPORATION OF THE ROYAL EXCHANGE ASSURANCE (OF LONDON) AND ANOTHER *v.* KINGSLEY NAVIGATION COMPANY LIMITED. (*a*)

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

Canada (British Columbia)—Ship—Loss by fire —Destruction of cargo—Bill of lading— Exemptions—Unseaworthiness—Onus of proof —Water Carriage of Goods Act 1919 (9 *&* 10 *Edw.* 7, *c.* 61), *ss.* 4 *and* 7.

The Canada Water Carriage of Goods Act 1919, *by sect.* 4 *renders any clause, covenant, or agreement illegal, null, and of no effect, which purports to relieve the owner, charterer, or agent of any ship, from obligations to exercise due diligence to make and keep the ship seaworthy.*

Sect. 6 *protects the owners of a ship who exercises due diligence to make the ship in all respects seaworthy, against responsibility for loss or damage resulting from faults or errors in navigation, or in the management of the ship, or from latent defect.*

By sect. 7, *"The ship, the owner, charterer, agent, or master shall not be held liable for loss arising from fire . . . or for loss arising without their actual fault or privity or without the fault or neglect of their agents, servants, or employees."*

A cargo of lime was shipped on board a barge belonging to the respondents. On the voyage the barge, owing to her unseaworthy condition, began to leak, with the result that the water flowing in caused a combustion of the lime, and the vessel was set on fire and the cargo destroyed. The cargo was shipped under a bill of lading which contained the following term: "Shipment covered by this bill of lading is subject to all the terms and provisions of and to all the exemptions from liability contained in the . . . Water Carriage of Goods Act. This bill of lading and all matters arising thereunder shall be subject to and be interpreted according to the law of England in so far as the same is not repugnant to the provisions of the said Act."

Held, that if a shipowner seeks to escape liability on the ground that the loss arose from fire, the onus of showing that the loss did arise from fire is affirmatively on him. The respondents, in order to escape liability must prove that the loss arose without their actual fault or privity or without the fault or neglect of their agents, servants, or employees. It was impossible to say upon the evidence that this loss arose without the fault or neglect of their general manager, who being cognisant of the unseaworthy condition of the barge sent her to sea with a cargo of lime. The respondents were, therefore, not entitled to the protection of the Act.

Lennard's Carrying Company Limited *v.* Asiatic Petroleum Company Limited (13 *Asp. Mar. Law Cas.* 81; 113 *L. T. Rep.* 195; (1915) *A. C.* 705) *applied.*

Decision of the Court of Appeal of British Columbia reversed.

APPEAL from the judgment of the Court of Appeal of British Columbia.

The respondents were a company incorporated under the Companies Act of British Columbia and they carried on since 1918 the business of carrying lime from Blubber Bay, Texada Island, to various points in British Columbia and in the United States. In Nov. 1920 the appellants, the Pacific Mills Limited, contracted to buy from the Pacific Lime Company Limited 3000 barrels of lime to be consigned, at Blubber Bay on board a barge called the *Queen City* which belonged to the respondents, to the appellants at Ocean Falls. On the voyage, while the barge was in tow of a tug. smoke was observed rising from the after hatch, and the barge and her cargo were completely burnt and destroyed. The cargo was insured with the first named appellants, and on the 22nd Dec. 1920 they paid to the consignee the amount and took from him an assignment of their claim against the respondents. On the 26th May 1921 the consignee and the assurance company joined in an action against the respondents to recover the value of the lime which had been lost. The facts of the case appear fully from the judgment.

Macdonald, J. held that the immunity from liability for loss by fire given by statute was not absolute; that the barge was unseaworthy, and that as the barge was unseaworthy the onus of showing that the fire did not result from the unseaworthiness of the barge was upon the defendants, and they had not discharged that obligation.

The defendants appealed to the Court of Appeal, who unanimously allowed the appeal. Macdonald, C.J. and Galliher, J. agreed with Macdonald, J. on the construction of the statutes that the immunity was not absolute, but disagreed with him that the burden of proof was upon the defendants of showing that the fire did not occur from the unseaworthiness of the barge. McPhillips, J. was of opinion that the statutory exemption from liability for loss by fire was absolute. He also held that the alleged unseaworthiness had no connection with the fire, and that there was an entire absence of evidence that it originated from the fault of the shipowner.

Martin and Eberts, JJ. gave no reasons for allowing the appeal.

The plaintiffs appealed.

E. C. Mayers (of the Canadian Bar) for the appellants.—The judgment of the learned trial judge was right, and should be affirmed. It is submitted that the barge being proved to be unseaworthy there was no exemption from liability upon which the shipowner could rely. In the alternative, the whole burden lay on the shipowner of proving that the loss occurred without his actual fault or privity. And further it is contended that as it was proved that

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

the barge was unseaworthy, the loss of the barge was caused by the unseaworthiness.

Reginald Symes (of the Canadian Bar) for the respondents.—The appellants have no right of action. Sect. 7 of the Water Carriage of Goods Act and sect. 964 of the Canada Shipping Act are a complete bar to the action. The finding of fact by the trial judge affirmed by the Court of Appeal that the appellants had not proved that the fire was caused by any unseaworthiness of the barge was right. The onus was on the appellants to show that the fire was caused by the unseaworthiness, and they failed to discharge that onus.

E. C. Mayers in reply.

The following cases were referred to :

Leyland Shipping Company Limited v. *Norwich Union Fire Insurance Society Limited*, 13 Asp. Mar. Law Cas. 426; 14 Asp. Mar. Law Cas. 4, 258; 118 L. T. Rep. 120; (1918) A. C. 350;

Lennard's Carrying Company Limited v. *Asiatic Petroleum Company Limited*, 12 Asp. Mar. Law Cas. 381; 13 Asp. Mar. Law Cas. 81; 109 L. T. Rep. 433; (1914) 1 K. B. 419; 113 L. T. Rep. 195; (1915) A. C. 705;

Ingram and Royle Limited v. *Services Maritimes du Treport Limited*, 12 Asp. Mar. Law Cas. 295, 387, 493; 109 L. T. Rep. 733; (1914) 1 K. B. 541;

Virginia Carolina Chemical Company v. *Norfolk and North American Steam Shipping Company*, 12 Asp. Mar. Law Cas. 82, 233; 107 L. T. Rep. 320; (1912) 1 K. B. 229;

McFadden Brothers and Co. v. *Blue Star Line Limited*, 10 Asp. Mar. Law Cas. 55; 93 L. T. Rep. 52; (1905) 1 K. B. 697;

The Southwark, 191 U. S. Rep. 1;

The Wildcroft, 201 U. S. Rep. 378;

Rowson v. *Atlantic Transport Company Limited*, 9 Asp. Mar. Law Cas. 347, 458; 87 L. T. Rep. 717; (1903) 1 K. B. 114;

Joseph Travers and Sons Limited v. *Cooper*, 12 Asp. Mar. Law Cas. 444, 561; 111 L. T. Rep. 1088; (1915) 1 K. B. 73.

The considered opinion of their Lordships was delivered by

Lord PARMOOR.—Early in the month of Nov. 1920 the Pacific Mills Limited contracted to buy from the Pacific Lime Company Limited, 3000 barrels of lime, to be consigned to them at Ocean Falls, on board a barge called the *Queen City*. The *Queen City* belonged to the respondents, the Kingsley Navigation Company Limited. The barge left Blubber Bay, a port on Texada Island. on the 10th Nov 1920, loaded with 3000 barrels of lime, and some soda ash, and proceeded in tow of a tug to Beaver Cove, a port on Vancouver Island, reaching Beaver Cove on the 11th Nov. 1920 at six in the morning. On the same morning at seven o'clock, smoke was observed rising from the after hatch. The *Queen City* was towed away into deep water, where she and her cargo were completely burnt and destroyed. The Pacific Mills Limited had insured the cargo with the Corporation of the Royal Exchange Assurance, and that company paid to them the amount of the loss, taking an assignment of their claim against the Kingsley Navigation Company

On the 26th May 1921 the Assurance Company and the Pacific Mills Limited joined in an action against the respondents to recover the value of the lost lime. The judge of first instance in the Supreme Court of British Columbia gave judgment in favour of the appellants, but this judgment was reversed by the judgment of the Court of Appeal of British Columbia of the 6th June 1922. This is an appeal from the judgment of the Court of Appeal, and the judgment of the Supreme Court is sought to be restored.

The appeal raises questions of considerable importance on the construction of the Water Carriage of Goods Act (9 & 10 Edw. 7, c. 61) enacted by the Parliament of Canada on the 4th May 1910.

The barrels of lime were carried under the terms of a bill of lading, which was probably lost when the cargo and barge were burnt. Their Lordships agree in the finding that the lime was intended to be shipped on the terms of a bill of lading in accordance with the usual custom of shipments of this character then prevailing in the coasting trade. The endorsement on such a bill of lading would include the following term :

"Shipment covered by this bill of lading is subject to all the terms and provisions of, and to all the exemptions from liability contained in, the Act of Parliament of Canada known as the Water Carriage of Goods Act. This bill of lading and all matters arising thereunder shall be subject to, and interpreted according to, the law of England in so far as the same is not repugnant to the provisions of the same Act."

This endorsement subjects the shipment of the barrels of lime to all the terms and provisions of the Water Carriage of Goods Act, and the case, as argued before their Lordships, depends upon the construction of that Act.

Apart from any limitation of liability, either by statute, or agreement, a carrier of goods by sea is liable as insurer of the safety of the goods which he undertakes to deliver, and further warrants that the vessel, in which the goods are intended to be carried, is seaworthy at the time when the goods are placed on board; in other words, that the vessel has that degree of fitness, in relation to the character of the goods to be carried, which a prudent owner of the goods would require a vessel to have at the commencement of a voyage, in view of all probable conditions and contingencies. It follows that, apart from the protection of the Water Carriage of Goods Act, the respondents would be liable. The case for the respondents is that they are within the exceptions from liability, created by that Act, in favour of the shipowner.

The first important section is sect. 4. This section (*inter alia*) renders any clause, covenant, or agreement illegal, null, and of no effect which purports to relieve the owner, charterer, or agent of any ship, or the ship itself, from obligations to exercise due diligence to make and keep the ship seaworthy.

There is nothing in this section which prohibits a shipowner from contracting out of his common law liability to warrant the absolute seaworthiness of the ship, but he cannot contract out of the obligation to exercise due diligence to make and keep the ship seaworthy. The relevant facts in the present case are as follows : On the 2nd Nov. 1920, at the request of the Pacific Lime Company, owners and operators of the *Queen City*, Captain Cullington, Surveyor to the Board of Marine Underwriters of San Francisco, California, proceeded on board the *Queen City* to complete an internal survey, supplementing a survey held on the 11th Sept. 1920. Captain Cullington made the following report :—" Found upon examination a part of the ceiling rotted, also the stern-post rotted so badly that it was almost reduced to pulp, and, from conditions as existing in and around the transom, it is my opinion that the horn timber, also the rim of counter, is affected by rot, and in consequence of the conditions, as found, I cannot recommend this vessel as a risk to underwriters." Captain Cullington stated it did not necessarily follow that because a vessel could not be recommended for insurance it was not seaworthy, but he left no doubt upon the mind of the trial judge that, in his opinion, owing to the conditions in which he found the ship on the 2nd Nov. 1920 he did not consider her seaworthy. This opinion was further corroborated by the evidence of John Kenneth McKenzie, Superintendent of the British Marine and Shipbuilding and Repair Company, who stated that he had been asked by Captain Cullington to have a look on the inside of the *Queen City*, and that he would not call her seaworthy if she had rotten wood in her. It is, however, not necessary to pursue this matter further, since both courts concurred in the finding that the ship was not in a seaworthy condition to carry a cargo of lime, on evidence which, in the opinion of their Lordships, is conclusive.

It remains to consider whether the respondents did exercise due diligence to make and keep the *Queen City* seaworthy. Mr. Mather, the first witness called at the trial on behalf of the respondents, was general manager both of the Pacific Lime Company and of the Kingsley Navigation Company, and acted throughout the whole transaction as the representative of these two companies. He was present on the occasion of the inspection of the ship by Captain Cullington, before the issue of the report of the 2nd Nov., and the report must have come to his knowledge before the loading, on the *Queen City*, of the cargo of lime. No doubt there is some difference in the recollection of Captain Cullington and Mr. Mather as to the conversation which took place on the occasion of the inspection of the ship before the November report, but Mr. Mather's own answers, in cross-examination, leave no doubt that he knew the condition of the ship at the time, although he was not prepared to accept the actual language which had been used according to the recollection of Captain Cullington. Mr Mather says that you could pull handfuls of wood out of the top of the sternpost, and that if Captain Cullington had said that the top was reduced to pulp it would have been quite correct, and that, although he did not think the first stage of decay had set in all along the ceiling, it had set in in places. The manager of a company, who had received the report of the survey of Captain Cullington, and then sent the ship to sea with a cargo of lime in the condition to which that report testifies, cannot be said to have exercised due diligence to make and keep the ship seaworthy. In addition, there is ample evidence that the actual conditions of rot which affected the ship, and rendered her unseaworthy, were known to Mr. Mather on his own personal inspection. The respondents are a limited company, as were the defendants in the case of *The Asiatic Petroleum Company Limited* v. *Lennard's Carrying Company Limited* (*sup.*). They could only act through some individual as their *alter ego*, and they did so act through Mr. Mather. The result is that, as the owners of the *Queen City* did not exercise due diligence to make and keep the ship seaworthy, no clause, covenant, or agreement to escape liability, under this head, would have protected them from a claim for the loss of cargo, and any such clause, covenant, or agreement would have been illegal, null and void, and of no effect, unless it had been in accordance with other provisions of the Act. In the present case there is no suggestion that the other provisions of the Act would have operated to render valid such a clause, covenant, or agreement.

Sect. 6 of the Act protects the owner of a ship who exercises due diligence to make the ship in all respects seaworthy against responsibility for loss or damage resulting from faults or errors in navigation, or in the management of the ship, or from latent defect. In the present case the loss of the lime cargo is not attributed to any of these causes, and, in any case, the protection would not operate to release the respondents from liability, since, as above stated, they did not exercise due diligence to make the *Queen City* in all respects seaworthy.

The section on which the respondents in substance rely for exemption from their common law liability is sect. 7. The first question which arises under this section is whether the loss of the cargo, which followed on an outbreak of fire, is a loss " arising from fire." Captain Cullington states that the effect of the rot which he saw would be that the vessel would lose the effect of the strength of the sternpost, and also of the ceiling, and that there would be a tendency to make the planking work open at the seams, causing her to leak and to take in water. If this leakage was of such an extent that the water rose above the level of the bottom of the barrels containing the lime,

there would be a tendency to oxydisation and combustion, and the creation of a heat atmosphere sufficient to ignite the wooden structure of the vessel. It is said, however, on behalf of the respondents, that the *Queen City* had only taken in 12in. of water in twenty-four hours, which would prove that there was no considerable leakage, and that the depth of the water was not sufficient to affect the lime cargo. Evidence was given by Walter Ford, the captain of the *Queen City*, that at six o'clock in the morning he had sounded the depth of water, and found there was not sufficient to affect the lime cargo, but under cross-examination it appeared that he did no more than drop an iron rod, on which there were no marks of inches or feet, down the sounding hole ; in truth, he was not in a position to make more than a conjecture as to the depth of the water. Moreover, the soundings were taken an hour before there was any sign of the outbreak of the fire, leaving time for a marked increase in the depth of the water if the *Queen City* had sprung leaks to any considerable extent. On the hearing of the appeal, the counsel for the respondents placed the main weight of his argument on the evidence of Walter Ford as to the depth of water, but the trial judge does not appear to have given any weight to this evidence. Their Lordships regard it as quite insufficient to establish the proposition, that the outbreak of fire could not be due to the heat generated by the contact of water with a lime cargo. There is a further passage in Ford's evidence which corroborates this conclusion. He states that he knew that the union of lime and water produced heat, and that this was the reason why he did not turn water on the *Queen City* when he ascertained that she was burning. The unseaworthiness of the *Queen City* was, therefore, of such a character as to render probable a considerable leakage, and the influx of sufficient water to come into contact with the lime cargo, and thus to generate heat which would be sufficient to ignite the timbers of a wooden ship constructed on the lines of the *Queen City*.

Mr. Mather, in his cross-examination, was unable to make any alternative suggestion of the origin of the fire, except that of the heat generated by the contact of lime and water. He added, with perfect candour, "Well, frankly, I will tell you that nothing has occurred to me, or anybody that I have spoken to, except the combination of lime and water." Their Lordships cannot doubt that the unseaworthiness of the *Queen City* was the natural and direct cause of leakage, sufficient to bring water into contact with the lime cargo, and that the ignition of the ship was the natural and direct cause of heat generated by such contact, with the result that the loss is a loss naturally and directly attributable to the unseaworthiness of the ship, and is not a loss arising from fire within the protection of sect. 7. The train of causation, from the unseaworthiness of the *Queen City* to the outbreak of the fire, is unbroken, and as pointed out by Lord Shaw in *Leyland Shipping Company Limited* v. *Norwich Union Fire Insurance Society Limited* (*sup.*), the proximate cause of loss is not necessarily the cause nearest in time. The question of onus is not material in these circumstances ; but, if a shipowner seeks to escape liability, on the ground that the loss arose from fire, the onus of showing that the loss did arise from fire is affirmatively upon him.

In order, therefore, to escape liability, the respondents must be able to prove, under the later words of the section, that the loss arose without their actual fault or privity, or without the fault or neglect of their agents, servants, or employees. Under the terms of sect. 502 of the Merchant Shipping Act 1894 the owner is not liable to make good to any extent whatever any loss or damage happening without his actual fault or privity where (*inter alia*) goods on board his ship are lost or damaged by reason of fire on board the ship. It has been held under this section that parties who plead the section must bring themselves within its terms, and that the whole onus lies on the shipowner to prove that the loss has happened without his actual fault or privity : (*Asiatic Petroleum Company Limited* v. *Lennard's Carrying Company Limited* (*sup.*), *Ingram and Royle Limited* v. *Services Maritimes du Tréport Limited* (*sup.*). In this latter case, Kennedy, L.J. says that the party who is relying upon the provisions of sect. 502 of the Merchant Shipping Act 1894, has not merely to show that the goods, for the loss of which he is being sued, were lost by reason of fire, but also to show affirmatively that the loss happened without his actual fault or privity.

Their Lordships are of opinion that the same principle applies in the construction of sect. 7 of the Water Carriage of Goods Act, and that, therefore, the onus was upon the respondents to show that the cause arose without their actual fault or privity, or without the fault or neglect of their agents, servants, or employees. The words "actual fault or privity" include acts of omission, and if an owner has means of knowledge which he ought to have used, and does not avail himself of them, his omission so to do may be a fault, and if so, it is an actual fault, and he cannot claim the protection of the section : (*Asiatic Petroleum Company Limited* v. *Lennard's Carrying Company Limited* (*sup.*) (Buckley, L.J. p. 432.)

It is not necessary to analyse further the words "actual fault or privity," since the loss must also be without the fault or neglect of the agents, servants, or employees of the respondents, and, quite apart from any question of onus, it is impossible to say in the present case that the loss arose without the fault or neglect of Mr. Mather, who, having seen the report of Captain Cullington, and himself being cognisant of the rotten condition of the timbers in the *Queen City*, sent her to sea with a cargo of lime.

A reference was made during the argument to the Act known as the Harter Act, which was passed by the U.S.A. Congress in Feb. 1893, and came into operation on the 1st July 1893. This Act prohibits clauses which relieve shipowners from liability for the consequence of not

exercising due diligence to make a vessel seaworthy and capable of performing her intended voyage, and exempts shipowners from liability resulting from certain losses where they have exercised "due diligence to make a vessel in all respects seaworthy." In the opinion of their Lordships, it is not necessary to express any opinion on the construction of the Harter Act, in construing the provisions of the Water Carriage of Goods Act, but so far as the provisions of the Harter Act have been brought to their notice, there appears no inconsistency between its provisions and the construction which they have placed upon the Canadian Act. The provisions of the Harter Act were considered by Channell, J. in *McFadden Brothers and Co.* v. *Blue Star Line Limited* (*sup.*). That learned judge held that the immunity clause did nothing more than give immunity in respect of fire arising from certain specified causes in the course of the voyage, provided the shipowners had exercised due diligence to make the ship seaworthy.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, and the judgment of Macdonald, J. restored, and that the respondents do pay the costs of the appellants in the Court of Appeal of British Columbia and on this appeal.

Appeal allowed.

Solicitors for the appellants, *White* and *Leonard.*

Solicitors for the respondents, *Bischoff, Coxe, Bischoff*, and *Thompson.*

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, July 12, 1922.

(Before BANKES, SCRUTTON, and ATKIN, L.JJ.)

THE TERVAETE. (a)

APPEAL FROM THE ADMIRALTY DIVISION.

Maritime lien—Ship owned by foreign government—Collision—Lien for damage, whether attaching—Sale to private owners—Lien for damage—Sovereign rights—Jurisdiction.

A merchant vessel belonging to the Belgian Government damaged the plaintiffs' vessel in collision. The Belgian Government subsequently sold their vessel to private Belgian owners, who traded with her to Cardiff. At Cardiff the plaintiffs claimed to arrest her in an action for the damage which their ship had suffered in the collision.

Held, that, as a foreign sovereign cannot be impleaded, directly or indirectly, in the courts of this country, a maritime lien for collision damage cannot attach to a ship owned and used for public purposes by that sovereign. And if such a ship after the collision is sold to a private individual, and comes within the jurisdiction of the Admiralty Court, there is no lien on the ship, and none can be enforced against the ship in an action in rem *in respect of the collision.*

Judgment of Duke, P. (infra) (1922) *P.* 197) *reversed.*

APPEAL by the owners of the *Tervaete* from a judgment of Duke, P.

Summons by the Belgian Vice-Consul at Cardiff on behalf of the owners of the Belgian steamer *Tervaete* asking that their solicitors might be relieved of an undertaking to appear and put in bail in an action by the owners of the steamer *Lynntown* for damage suffered in collision, and that the writ in the action might be set aside.

The *Tervaete* was formerly the German steamer *Adelina Hugo Stinnes III.* She was handed over to the Belgian Government under the reparation terms of the Treaty of Versailles. On the 18th May 1920 the *Tervaete* (then *Adelina Hugo Stinnes III.*) collided with and damaged the steamer *Lynntown* at Bonanza, on the Guadalquivir River. At that time the *Tervaete* was a public vessel of the State of Belgium, and in its possession and held and worked by the State for the public purposes of the State. At some subsequent date she was sold by the Belgian Government to private Belgian owners and re-named *Tervaete.* Payment was made by instalments. At the time of this summons these payments had not yet been completed.

On the 10th Jan. 1922, when the *Tervaete* was at Cardiff, the plaintiffs, the owners of the *Lynntown*, issued a writ claiming for the damage done at Bonanza, and on the 12th Jan., in order to avoid the arrest of the *Tervaete* and to enable her to sail from Cardiff, the defendants' solicitors, acting on the instructions of the Belgian Vice-Consul at Cardiff, accepted service of the writ and gave the usual undertaking to appear and provide bail. On the 23rd Jan. they entered an appearance under protest. On the 9th Feb. the defendants took out the present summons.

Digby for the defendants.—At the time of the collision the *Tervaete* was owned by the Belgian Government. Ownership by a foreign sovereign or state may be proved by the certificate of the Embassy concerned:

The Jassy, 10 Asp. Mar. Law Cas. 278; 95 L. T. Rep. 363; (1906) P. 270.

[The learned President intimated that the certificate must reach the court from the Foreign Office, and ought not to be produced by a Secretary of the Embassy in evidence. By agreement of the plaintiffs' counsel the Secretary was subsequently called and permitted to produce in evidence a certificate from the Belgian Minister showing that the *Tervaete* at the time of the collision was owned and managed by the Belgian Government.] No maritime lien attached to the *Tervaete*. The nature of a maritime lien is correctly stated in Halsbury:

(a) Reported by GEOFFREY HUTCHINSON and W. C. SANDFORD, Esqrs. Barristers-at-Law.

Laws of England, vol. 26, p. 617, as follows: "a maritime lien is a claim or privilege upon a maritime *res* in respect of . . . an injury caused by it. Such lien does not include or require possession of the *res*, for it is a claim or privilege on the *res*, to be carried into effect by legal process. A maritime lien travels with the *res* into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when called into effect by the legal process of a proceeding *in rem* relates then to the period when it first attached." A maritime lien cannot, therefore, attach unless there is an enforceable claim against the ship. It cannot therefore revive when the ownership of the ship changes. There could have been no claim against the owners of the *Tervaete*, but only against the person whose negligence caused the collision:

The Athol, 1842, 1 Wm. Rob. 381, following Lord Stowel's judgment in *The Mentor*.

The principle there applied to the English Crown applies equally to a foreign sovereign:

The Parlement Belge, 4 Asp. Mar. Law Cas. 234; 42 L. T. Rep. 273; 5 Prob. Div. 197;
The Castlegate, 7 Asp. Mar. Law Cas. 284; 68 L. T. Rep. 99; (1893) A.C. 38;
The Utopia, 7 Asp. Mar. Law Cas. 408; 70 L. T. Rep. 47; (1893) A.C. 492;
The Porto Alexandre, 15 Asp. Mar. Law Cas. 1; 122 L. T. Rep. 661; (1920) P. 30.

As to the solicitors' undertaking, the court will not enforce the undertaking if the action does not lie:

The Jassy (*sup.*).

Dunlop, K.C. and *Dumas* for the plaintiffs.—The Belgian Government is not impleaded. Bail was given on behalf of the Armement Belge, a private corporation. The action is therefore against a private corporation. It is a rule of English municipal law that a maritime lien does not attach to ships belonging to the English Crown; the rule does not thus extend to a foreign sovereign. In this case the cause of action arose, but the remedy by which it might be enforced was suspended: see cases where the remedy was suspended cited in the British Year Book of International Law, amongst them:

The Erissos, unreported;
The Annette and Dora, (1919) P. 105.

The maritime lien may be suspended at the time when the cause of action arises. In *The Parlement Belge* (*sup.*) it was not decided that a maritime lien could not attach, but only that it could not be enforced against a foreign sovereign: (see consideration by Brett, L.J. of *The Charkieh* (1 Asp. Mar. Law Cas. 581; 28 L. T. Rep. 513; L. Rep. 4 A. & E. 59). By the law of Belgium the privilege of immunity from process extends only to governmental acts. The *Tervaete* was trading as a merchant ship. A foreign sovereign can be impleaded unless he objects. The solicitors should not be released of their undertaking, because the vice-consul at Cardiff, when he instructed them to give the undertaking, well knew the grounds upon which the present objection is taken.

Digby in reply.—The remarks of Brett, L.J. in *The Parlement Belge* (*sup.*) are not *obiter*, they were adopted in *The Castlegate* (*sup.*). *The Ticonderoga* (Swa. 251) should be distinguished.

Cur. adv. vult.

March 13.—Sir Henry Duke, in a written judgment, said: This is an action *in rem* brought by the plaintiffs, the owners of the steamship *Lynntown*, to recover damages in respect of a collision which is admitted to have taken place between that ship and the defendants' steamship *Tervaete* on the 16th May 1920 in the Port of Bonanza on the Guadalquivir River. The plaintiffs issued, and served, the writ on the 10th Jan. 1922, the *Tervaete* being then in Barry Dock. They refrained from arresting the vessel in consideration of an undertaking by the solicitors for the defendants to enter an appearance and put in bail. Appearance was entered under protest "to stand as unconditional unless the defendants should within twenty-one days obtain an order to set aside the writ and service." Notice was then made by the defendants and brought to hearing within twenty-one days to discharge the undertaking of the solicitors and to set aside the writ. Upon the hearing an important question of principle is raised. I took time to consider my judgment.

The *Tervaete* is one of the vessels which were surrendered by Germany under the Treaty of Versailles to the allied and associated powers, and upon or after such surrender she became vested in the Government of His Majesty the King of the Belgians. At the time of the collision she was being run by the Belgian Government as a cargo boat for their public purposes. What was the exact nature of her employment at the time of the collision does not appear, but she was subject in the port of Bonanza to the local harbour regulations relating to merchant ships. After the collision, at a date which is not material, the vessel was apparently transferred by the Belgian Government to the Armement Maritime Belge, and at the time of action brought, she was, as she now is, the property of the Société Anonyme Belge d'Armement et de Gérance.

The substantial question between the parties is whether the plaintiffs have, or can in law have, a maritime lien on the *Tervaete* for the damage caused to them by her collision with the *Lynntown*, notwithstanding that at the time of the collision the *Tervaete* was a vessel of the Belgian State employed for the public purposes of the State.

Questions which had been raised on the part of the plaintiffs as to whether the vessel was at the date of the writ owned absolutely by private owners were waived at the hearing, and on the plaintiffs' part the motion was treated as a motion to set aside the writ and subsequent proceedings without insistence on

the fact that the solicitors' undertaking for an appearance and bail had been unconditional. No question of Belgian law was raised.

For the defendants it was contended at the hearing that a maritime lien at no time attached to the ship in respect of the damage done by the collision. Damage resulting from negligent navigation of a ship by the servants of a state was said to give no other right to the person suffering damage than that of personal action against the wrong-doer.

For the plaintiffs it was argued that a maritime lien for damage negligently caused by collision comes into being with the damage, and that where a vessel belonging to a sovereign owner is concerned, although that owner cannot be impleaded, directly or indirectly ; nevertheless, if the ship be transferred to an individual owner the lien may, as against him, be enforced by judicial process.

No direct authority upon the main question at issue was cited on either side. Counsel for the defendants, however, relied upon a passage in the judgment of the Court of Appeal delivered by Lord Esher in *The Parlement Belge* (4 Asp. Mar. Law Cas. 334 ; 44 L. T. Rep. 273 ; 5 Prob. Div. 197), with regard to the nature and effect of a maritime lien. Lord Esher said this : " The property cannot be sold as against the new owner if it could not have been sold as against the owner at the time when the alleged lien accrued." Upon a literal construction of the sentence the words would appear to warrant the contention of the defendants. The Court of Appeal, however, was dealing with a case, which did not raise the questions I now have to decide. The judgment in *The Parlement Belge* (*sup.*) related to an action *in rem* brought against a foreign sovereign by arrest of a vessel engaged at the time in his public service—which was, at the time of the action brought, his ship and employed in his service. The main question at issue in the case was whether the principles of international law which exempt the armed ships of a state from the judicial processes of a foreign state extend like exemption to a vessel employed, as *The Parlement Belge* was, in the carriage of mails, passengers and passengers' luggage. The court declared the law generally in these terms : " As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use or over the property of any ambassador, though such sovereign or property or ambassador be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction." The court also examined the contention that in an action *in rem* the owner of the property concerned is not directly or indirectly impleaded, and declared that by an action *in rem* the owner of the property is indirectly impleaded, and that " the case is upon this consideration brought within the general rule that a sovereign authority cannot be personally impleaded in any court." Neither of the conclusions I have cited is decisive of this case. The dictum which is relied upon by the defendants follows a passage in which Lord Esher discussed the case of vessels brought into collision by the negligence of persons who are not servants of the owner, as, for example, negligence of a compulsory pilot. The statement that " the vessel cannot be sold as against the new owner if it could not have been against the owner at the time," means, I think, that if the collision was not due to negligence of the servants of the then owner no lien will attach to the ship so as to make her subject to proceedings in the hands of a subsequent owner.

There are passages in the judgment of Lord Watson in *The Castlegate* (7 Asp. Mar. Law Cas. 284 ; 68 L. T. Rep 99 ; (1893) A. C. 38), and in the judgment delivered at the Privy Council by Lord St. Helier in *The Utopia* (7 Asp. Mar. Law. Cas 408 ; 70 L. T. Rep. 47 ; (1893) A. C. 492) in the same volume, p. 499, which no doubt must also be considered in this case. Lord Watson, in discussing maritime lien said : " The general principle of maritime lien I understand to be that, inasmuch as every proceeding *in rem* is in substance a proceeding against the owner of the ship, a proper maritime lien must have its root in his personal liability." Lord St. Helier said : " It was suggested that as the action is *in rem* the ship may be held liable though there be no liability in the owner. Such contention appears to their lordships to be contrary to principles of maritime law now well recognised. No doubt at the time of the action brought a ship may be made liable in an action *in rem* though its then owners are not because by negligence of the owners or their servants causing a collision a maritime lien on their vessel may have been established and that lien bind the vessel in the hands of subsequent owners. But the foundation of the lien is the negligence of the owners or their servants at the time of the collision, and if that be not proved no lien comes into existence." The concluding words of the passage I have just cited show, I think, the underlying principle of both those statements of the law.

The present case must be decided upon the general principles of maritime law which are exemplified in *The Parlement Belge* (*sup.*), but unfortunately without the guidance of any decision upon the precise questions which are here raised. These seem to me to be in substance three : Could the Belgian State, by its servants employed in the management of a public ship, so act as to create obligations of the State of which a court of law may take account ? Could the *Tervaete*, notwithstanding her public character and employment, be subjected by the Belgian State or its servants to a maritime lien ? Is the immunity from foreign jurisdictions of sovereign states and their agents and their property due to a principle that their acts can involve no

legal consequences and their property is subject to no legal obligation, or is such immunity due only to absence or jurisdiction in the court?

If no acts of the government or its servants could subject property of the State to an obligation cognisable at law, or if a public ship situated as the *Tervaete* was cannot become subject to a maritime lien, the plaintiffs here have no action *in rem.* If the fact is otherwise, and the immunity of foreign governments from legal process is due merely to the limited extent of the jurisdiction of the courts concerned—to the fact, as was said in *The Parlement Belge* (*sup.*), that every state declines to exercise jurisdiction over the person of any sovereign or ambassador of any other state or over the public property of any state which is devoted to its public use"—then the question whether the plaintiffs have an action *in rem* will depend upon the same considerations as would arise in any case of collision between merchant vessels in private ownership.

I am not aware of any authority which decides that the acts of foreign sovereigns and their servants are not capable of having juristic effect. Early in the history of English law, as appears from Lord Coke's well-known statement of *Calvin's* case, a foreign sovereign was a possible defendant in English courts. A foreign state may acquire property, alienate it, or charge it, and vindicate its rights in property before English tribunals. Such a state, if it takes no objection to the jurisdiction, may be the subject of an adverse judgment in respect of rights it has granted or obligations it has incurred. If a foreign sovereign sues in England the party sued may enforce rights against the sovereign plaintiff by a counterclaim, and in the determination of their relative rights the acts and omissions of each will, speaking generally, be adjudicated upon in accordance with one set of legal principles equally applicable to each, though when judgment is given no process of execution can issue against the sovereign litigant or his property.

In the case of *The Newbattle* (5 Asp. Mar. Law Cas. 356; 52 L. T. Rep. 15; 10 Prob. Div. 33), the King of the Belgians was plaintiff in an action for damage by collision. The defendants in the action counterclaimed for their damage by the collision, and by an order of this court, affirmed by the Court of Appeal, the plaintiff was ordered to give security to answer the counterclaim. If, in truth, negligence of the servants of a sovereign state can give no cause of action, security to answer a counterclaim in such a case would have been idle. It is worthy of note, too, that Lord Esher, in the course of his judgment in the Court of Appeal, distinguished between a power of adjudication in the suit when the sovereign concerned had become a party, and the power to issue process of execution against the ship in question in case of an adverse judgment, and treated the sovereignty of the plaintiff rather as a ground of possible exception to the jurisdiction of the court than as a condition which made any claim at law impossible.

Whether or not the acts of public servants may give the right to a judicial remedy against a sovereign employer, it would no doubt be true that, if the public property of states used for their public purposes is free from all operation of municipal law, no acts or omissions of the sovereign owner of a ship, or his servants, could impose upon the ship a maritime lien. Such a principle of exclusion or exemption has been said to exist. A classic instance is found in the argument of the Admiralty Advocate, Dr. Arnold in *The Prins Frederick* (2 Dods. 451) which as to its conclusion was accepted by Lord Esher in *The Parlement Belge* (*sup.*) and cited with approval in *The Broadmayne* (114 L. T. Rep. 891; (1916) P. 64.

The passage which is relevant to this discussion is in the following terms: "We submit that there is a class of things which are not subject to the ordinary rules applying to property, which are not liable to the claims of private persons, which are described by civilians as *extra commercium* and *quorum non est commercium* and in a general enumeration are denominated *sacra, religiosa, publica publicis usibus destinata.* If a more specific enumeration be made, amongst these things will be found the forum, the basilica, the walls and bulwarks of a city. These are things which are allowed to be, and from their nature must be, exempt and free from all private rights and claims of individuals, inasmuch as if these claims were allowed against them the arrest, the judicial possession and judicial sale incident to such proceedings would divert them from these public uses to which they are destined."

Though Dr. Arnold's argument in *The Prins Frederick* (*sup.*) has been cited with approval in our courts, this particular proposition has never, so far as I am aware, been said to be a statement of English law. The conception of a class of things incapable of being subjected to proprietary rights or personal claims was referred to the Roman law, from which the specific illustrations are drawn, and the conclusion which was enforced by the argument was that things dedicated by the state to its public uses are not subject to legal arrest or judicial sale. It is in that sense, I think, that Dr. Arnold's argument was adopted in *The Parlement Belge* (*sup.*).

It is not necessary here to consider what possessions of a state, if any, are in their nature incapable of being alienated or subjected to charge by acts of the sovereign or his officers. I see no ground for presuming that the *Tervaete* was ever found in such a category. She was a merchant vessel, capable, as I suppose, at all material times of being alienated or charged, and she was, in fact, disposed of in due course by the Belgian Government to the now defendants. Public property of foreign states which has been rendered subject to claims of individuals without being wholly alienated by the state concerned has sometimes been dealt with in English courts while the interest of a sovereign owner subsisted. In *Gladstone* v. *Musurus Bey*

(7 L. T. Rep. 477), where money of the Turkish Government had been paid into the Bank of England under the terms of a contract of the government for the grant of a trading concession, upon an allegation of an intention of the government by its representatives to withdraw the fund and apply it to other uses, the court, by injunction, restrained the bank from making payment pending the suit. So in *Larivière* v. *Morgan* (26 L. T. Rep. 859; L. Rep. 7 Ch. App. 550) Lord Hatherley, L.C. laid it down that where a foreign government has made a contract in this country and has lodged money in the hands of agents in this country for payment of the sums to be due under the contract, the court will not refuse relief to the contractor because the contract is with a foreign government, nor because the foreign government does not appear before the court. Lord Hatherley, in the course of his judgment, puts the case of a foreign government having placed in this country a sum of money, and having charged it with trusts to be performed, subject to which the balance is to be paid back to the foreign government, and asks: "Is it possible to say that in such a case the trustee is not liable to perform the trust because the foreign government, one of the *cestui que trust*, cannot be made to appear?

Many new questions will arise when sovereign states frequently employ their ships in undertakings of a commercial nature. Assume a merchant vessel which is already subject to a maritime lien to be acquired by a sovereign state, will the lien be discharged? Or upon a re-sale will it revive? If a state-owned cargo boat is salved, and without compensation to the salvor the vessel is sold within this jurisdiction, will the salvor have no claim against her capable of being enforced here? If the master of such a vessel finds it necessary to give a bottomry bond for repairs obtained in a remote port where no advance can be got upon the credit of the state, and the vessel is afterwards sold by the state, the obligee being unpaid, will he have no enforceable right against the ship? The principles involved in each of these suppositious cases are in question here.

The question of an ambassador is necessarily distinguishable from that of a sovereign state immediately concerned. But the ambassador has the same absolute immunity from the judicial process of foreign states as is enjoyed by the state whose representative he is. I put to the defendants' counsel the case of a collision between yachts, one belonging to an ambassador and one to a private owner, if, after the ambassador's immunity from process had ceased, action *in rem* could be taken against his yacht. I think it is not entirely irrelevant to the first of the two questions with which I am dealing here. On the whole I think that the immunity from legal process of the public ship of a foreign state, while it is in the hands of the state, does not arise from a rule that the vessel is, to use the language of the civil law, *extra commercium*. I think also that this immunity does not involve the conclusion that such a ship is incapable of becoming subject to obligations to which individual owners may subject ships. I cannot suppose that a sovereign state which could convey its ships to private owners could not hypothecate them. Could the state, then, by acts of its agents subject a ship to a maritime lien? Lord Gorell, in defining a maritime lien in the course of his judgment in *The Ripon City* (8 Asp. Mar. Law Cas. 304; 77 L. T. Rep. 98; (1897) P. 226), says this: "It is a right acquired by one over a thing belonging to another—*jus in re aliena*. It is, so to speak, a subtraction from the absolute property of the owner in the thing. This right must, therefore, in some way have been derived from the owner, either directly or through the acts of persons deriving their authority from the owner." Lord Gorell goes on to say: "The person who has acquired the right cannot be deprived of it by alienation of the thing by the owner."

I have assumed that a sovereign state may, by virtue of its proprietary rights over a ship, hypothecate the ship, and that although the state could not be impleaded in a foreign court in respect of the hypothec, the transaction would be valid. Why may not the same state by its agents impose a maritime lien upon a public ship of the state, and, although the state may not be impleaded, why may not the lien be valid for all purposes which do not depend upon the employment of legal process against the state?

I come to the conclusion that the ground on which jurisdiction over the public ships of foreign states is declined in our courts is not that the acts of sovereign powers by their servants are incapable of conferring rights or creating obligations which may be put in suit, nor that the public property of the states used for their public purposes cannot, because of its public character, be subjected to claims by individuals which are capable of judicial cognisance.

In the well-known case of *The Schooner Exchange* v. *McFadden* (7 Cranch, 116, at p. 147) Marshall, C.J. delivered the judgment of the Supreme Court of the United States to the effect that the exemption from process of the public vessels of foreign powers is founded upon "an implied promise of exemption from the jurisdiction of the country." Lord Esher in *The Parlement Belge* (*sup.*) spoke of such public property as being "but for the agreement subject to the jurisdiction."

Holding, as I do, that a foreign state by its authorised agents may impose a charge or lien upon one of its public ships, and that the charge or lien may be enforced, if it can be done without directly or indirectly impleading the foreign state, what remains is a case of alleged maritime lien within the jurisdiction of the court and capable of being carried to a judgment and to execution without any assertion of jurisdiction over any foreign sovereign or any property of a foreign state. The application of the defendants for a stay of proceedings fails.

The owners of the *Tervaete* appealed.

Bateson, K.C. and *E. A Digby* for the appellants.—The *Tervaete* was owned at the time of the collision by a sovereign foreign state, and no maritime lien can attach to her for any act done while she was the property of a foreign sovereign state. The court has no jurisdiction over the property of a foreign sovereign. A foreign sovereign can submit to the jurisdiction of the English courts, but if he does not submit to it, he cannot be impleaded, and an action cannot be brought against either the sovereign or the *res*, his property. No maritime lien can arise on the vessel either when she is the property of the foreign sovereign state or afterwards when she ceases to be the property of the foreign state for an act done whilst so owned. If the foreign state sells the vessel, it sells it free of any maritime lien set up at the instance of the subject of another state. There is no cause of action *in personam* against the present owner of the *Tervaete* and there cannot be any cause of action *in rem* either, which is a remedy merely ancillary to the remedy *in personam*. They referred to :

The Parlement Belge, 4 Asp. Mar. Law Cas. 234 ; 42 L. T. Rep. 273 ; 5 Prob. Div. 197 ;
The Utopia, 7 Asp. Mar. Law Cas. 408 ; 70 L. T. Rep. 47 ; (1893) A. C. 492 ;
The Newbattle, 5 Asp. Mar. Law Cas. 356 ; 52 L. T. Rep. 15 ; 10 Prob. Div. 33 ;
The Dictator, 7 Asp. Mar. Law Cas. 251 ; 67 L. T. Rep. 563 ; (1892) P. 304 ;
The Tasmania, 6 Asp. Mar. Law Cas. 305 ; 59 L. T. Rep. 263 ; 13 Prob. Div. 170.

Dunlop, K.C. and *Dumas* for the respondents.—The immunity enjoyed by a foreign state at the instance of a British plaintiff is distinguishable from that enjoyed by the British state. The King can do no wrong, but that maxim does not apply to a foreign sovereign when a suit is brought against him by a British national. The plaintiff in such a case has a cause of action, but our courts will not allow the foreign sovereign to be impleaded. When, however, a British subject has a cause of action against a ship, the property of a foreign sovereign, and that ship is sold by the foreign sovereign to a private person, the cause of action which has hitherto lain dormant, is capable of being given effect to, and an action against the *res* can be proceeded with. Suppose a ship to which a maritime lien attaches is sold to a foreign sovereign, the court has no jurisdiction to proceed against that sovereign, but if the ship is sold back to its owner, the maritime lien can be given effect to by our courts, and, equally, when a maritime lien attaches to a ship, the property of a foreign state, such lien can be given effect to when sold by the foreign state to a private person. The lien attached at the time of the collision, and when the ship came as the property of a private owner within the jurisdiction of our courts she became liable to arrest. When a foreign sovereign brings an action in the Admiralty Division a cross-action may be brought against him, and if his vessel has not been arrested his action may be stayed until he gives security for the damage caused to the defendants' vessel. They referred to :

The Newbattle, sup. ;
Magdalena Steam Navigation Company v. *Martin*, 1859, 2 E. & E. 94 ;
Mighell v. *Sultan of Johore*, 70 L. T. Rep. 64 ; (1894) 1 Q. B. 149 ;
The Parlement Belge, sup.

Cur. adv. vult.

BANKES, L.J. (after stating the facts) :—The respondents contend that, as a result of the collision, a maritime lien attached to the *Tervaete* which, now that she is a private property and is found within the jurisdiction, they are entitled to enforce by proceedings *in rem* in the Admiralty Court of this country.

The present proceedings were taken by the respondents to test the correctness of that contention. The respondents do not contest the proposition that, as a general principle of maritime law in the case of a claim for damage arising out of collision, a proper maritime lien must have its root in the personal liability of the owner or of the person for this purpose in the position of owner. The subject is very fully discussed by Lord Gorell in *The Ripon City* (8 Asp. Mar. Law Cas., at p. 311 ; 77 L. T. Rep., at p. 104 ; (1897) P., at p. 242). He gives a definition of maritime lien in language which is, I think, of assistance in this case. He says : " Such a lien is a privileged claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another—a *jus in re alienâ*. It is, so to speak, a subtraction from the absolute property of the owner in the thing. This right must, therefore, in some way, have been derived from the owner either directly or through the acts of persons deriving their authority from the owner."

The respondents further do not dispute that, so long as the *Tervaete* remained the property of the Belgian Government, no proceedings could be taken either *in personam* or *in rem* in respect of the damage done to their vessel by the collision. The contention upon which the respondents relied in the court below, and which was accepted by the President, was that the fact that no such proceedings could be taken was not due to an absence of any liability on the part of the Belgian Government for the negligence of their servants which brought about the collision, but to the rule introduced by international comity which prohibited the taking of any proceedings to enforce that liability.

As a further contention, founded upon the one just mentioned, it was said that a maritime lien did attach to the *Tervaete* as a consequence of the collision, and, though it remained, as it were, dormant and unenforceable during the ownership of the vessel by the Belgian Government, it became enforceable when the vessel

passed into private ownership. These contentions raise the question whether a maritime lien ever did attach to the vessel at a time when she was owned by the Belgian Government. This is quite a different case from a case where a maritime lien attached to a vessel at a time when she was privately owned, which vessel afterwards passed into government ownership and then into private ownership again. It may well be that in such a case the maritime lien is dormant during the period of government ownership. The present case is quite distinct from that and involves the question whether a maritime lien ever attached to the *Tervaete* at all.

I think that it may be conceded for the purposes of the argument that the fact that a sovereign or a sovereign power cannot be proceeded against in the courts of a foreign country does not exclude all idea of liability for a breach of contract or for a tort, in the sense that, under no circumstances, can the sovereign or the sovereign state do wrong. The rule that, where a foreign sovereign sues in the courts of this country, proceedings may be taken against him in mitigation of the relief claimed by him, would be of no value, except upon the assumption that claims for breaches of contract or for torts might be established and set off in mitigation. In the case of *Imperial Japanese Government* v. *Peninsular and Oriental Steam Navigation Company* (8 Asp. Mar. Law Cas. 50 ; 72 L. T. Rep. 881 ; (1895) A. C. 644), the whole discussion as to the court in which proceedings might be taken would have been avoided had the law been that the Emperor of Japan could not be liable for damages resulting from the collision of his vessel with that of the defendants. The point was, however, never suggested in that case. In the case of *The Newbattle* (5 Asp. Mar. Law Cas. 356 ; 52 L. T. Rep. 15 ; 10 Prob. Div. 33) it was assumed that the King of the Belgians might be held liable in damages in the cross-cause for the negligence of those in charge of his vessel, the *Louise Marie*.

The fact that the immunity of an ambassador from process in the courts of this country in respect of debts contracted while he was ambassador lasts during the time during which he is accredited to the sovereign and for a reasonable period after he has presented his letters of recall to enable him to wind up his official business and to prepare for his return home, which is the law as laid down in *Musurus Bey* v. *Gadban* (71 L. T. Rep. 51 ; (1894) 2 Q. B. 382), points also, in my opinion, to the same conclusion. In the numerous cases, such as the *South African Republic* case (77 L. T. Rep. 241 ; (1897) 2 Ch. 487), in which the question of enforcing cross-claims in actions by sovereigns or sovereign states arose, it appears to me to be assumed that the cross-claims are in respect of breaches of contract or of tort actually committed for which the sovereign, or the sovereign state, would have been responsible, but for the immunity from process which he or it enjoyed. In spite of the fact that, so far, I have accepted the arguments of the respondents in support of the judgment of the President, I am unable to agree with his final conclusion, and that on a point to which his attention does not appear to have been specially directed. The point is founded partly on the effect on the property of the sovereign state, if a maritime lien attached to the *Tervaete* as alleged, and partly on a consideration of the nature of a maritime lien itself. If the judgment of the President is right and the maritime lien attached to the *Tervaete*, the value of the vessel to the Belgian Government must necessarily have been affected ; how seriously, of course, depends upon the amount of the respondents' claim. A vessel to which a maritime lien extends for any substantial amount must necessarily be worth less in the market than if she was free from any lien.

In *The Bold Buccleugh* (1851, 7 Moore P. C., at p. 284), Sir John Jervis, when dealing with the question of a maritime lien, adopts Lord Tenterden's definition of it as a claim or privilege to be carried into effect by legal process ; and he then goes on to say that a maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment when the lien attaches.

In *Currie* v. *McKnight* (8 Asp. Mar. Law Cas., at p. 195 ; 75 L. T. Rep., at p. 459 ; (1897) A. C., at p. 106), Lord Watson speaks of a maritime lien as a remedy against the *corpus* of the offending ship. Whether a maritime lien is properly to be regarded as a step in the process of enforcing a claim against the owners of a ship or as a remedy or partial remedy in itself, or as a means of securing a priority of claim, it cannot, in my opinion, consistently with the rule of immunity laid down by the law of nations, be attached to a vessel belonging to a sovereign power, and being used for public purposes. To allow such a lien to attach would be, to use Lord Gorell's language in *The Ripon City* (*sup.*), to create a *jus in re alienâ*, a subtraction from the absolute property of the sovereign state.

I may here refer to the case of *Musurus Bey* v. *Gadban* (*sup.*), in which the immunity from process of an ambassador was considered. It was argued in that case that it was permissible to issue a writ against an ambassador in order to prevent the running of the Statute of Limitations, provided that no further step of serving or attempting to serve it was taken. The court, taking the same view as was taken in the *Magdalena* case (2 E. and E. 94), refused to accept the contention.

Davey, L.J., in *Musurus Bey* v. *Gadban* (71 L. T. Rep., at p. 55 ; (1894) 2 Q. B., at p. 352), says this : "With regard to the first, it is, in my opinion, sufficient to refer to the third section of 7 Anne c. 12, which makes all writs and processes, whereby the person of any ambassador or other public minister may be arrested or imprisoned, or his goods and chattels may be distrained, seized or attached, utterly null and void. It has been decided in *Magdalena Steam Navigation Company* v.

Martin (*sup.*) that the section applies not only to writs of execution against the property or person of a privileged person, but also to writs which lead up to and would in ordinary course have the consequence of attaching his goods or person. If so, I am of opinion that a writ of summons in an action is of that character, and that the effect of the statute (which is said to be declaratory only of the common law) is to make such a writ void and of no effect. Mr. Pollard is quite right in saying that the writ had been served in the *Magdalena* case (*sup.*) and that all that it was necessary to decide was that that service was bad. But the grounds upon which the decision was based in Lord Campbell's judgment go beyond that point, and, in my opinion, show a total want of jurisdiction of the court to entertain the action at all. Lord Campbell (2 E. & E., at p. 111) states the principle to be that for all judicial purposes an ambassador is supposed still to be in his own country, and he concluded his judgment in these words: It certainly has not hitherto been expressly decided that a public minister duly accredited to the Queen by a foreign state is privileged from all liability to be sued here in civil actions; but we think that this follows from well-established principles. These passages, in my opinion, correctly state the legal principles on which the exemption is founded, and are in accordance with the course of decisions in our courts; see, for example, the late case of *The Parlement Belge* (4 Asp. Mar. Law Cas. 234; 42 L. T. Rep. 273; 5 Prob. Div. 197), in the Court of Appeal, in which it was said (I am reading from the marginal note, which is fully borne out by the judgment) that, as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each state declines to exercise by means of any of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory. I am unable to think that the issue of a writ in an action, which action the court has no jurisdiction to entertain, and which writ, therefore, the court has no jurisdiction to issue, can prevent the statute running."

It seems to be impossible, consistently with the law as there expressed, to hold that it is permissible to recognise a maritime lien as attaching to the property of a sovereign or a sovereign state. I see no distinction in principle between the act of the individual issuing the writ and the act of the law attaching the lien. Each equally offends the rule affording immunity. If this is the correct view of the law, then the appellants are entitled to succeed, because, unless a maritime lien attached to the *Tervaete* while she was the property of the Belgian Government, it cannot attach at all. In my opinion the appeal must be allowed with costs here and below, and an order made relieving Messrs. Downing and Hancock from their undertaking dated the 12th Jan. 1922 and setting the writ aside and staying all proceedings thereunder.

Scrutton, L.J. (after referring to the facts): —In my view it is now established that procedure *in rem* is not based upon wrongdoing of the ship personified as an offender, but is the means of bringing the owner of the ship to meet his personal liability by seizing his property. The so-called maritime lien has nothing to do with possession, but is a priority in claim over the proceeds of sale of the ship in preference to other claimants. It does not appear *eo nomine* in cases of collision in the reports till the case of *The Bold Buccleugh* (*infrà*) was heard, where it is defined as a claim in privilege upon a thing to be carried into effect by legal process; and it is stated, erroneously, as is now admitted, that whenever an action *in rem* lies, there a maritime lien exists. The report proceeds (7 Moore, P. C., at p. 284): "This claim or privilege travels with the thing into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process by a proceeding *in rem*, relates back to the period when it first attached."

The cases as to the relation of a maritime lien to the personal liability of the owner are exhaustively examined by the late Lord Gorell in *The Ripon City* (8 Asp. Mar. Law Cas. 365; 77 L. T. Rep. 98; (1897) P. 226). He comes to the conclusion that a maritime lien may exist, though the owner is not personally liable, where there is personal liability in those to whom he had voluntarily entrusted the control of the vessel as charterers, though not if his entrusting is compulsory, as in the case of compulsory pilots. But for a lien to arise, in my view, some person having, by permission of the owner, temporary ownership or possession of the vessel must be liable for the collision. If he is so liable, a privilege or lien at once arises in this sense that, if a vessel comes within English territorial waters, it may be arrested, and the claim or privilege on it will date back to the time of the lien. Any purchaser after the collision takes the ship subject to this possibility of claim.

At the time of the collision, if it happened in English waters, would it have been possible to arrest the *Tervaete* and claim a maritime lien? The well-known decision of *The Parlement Belge* (*sup.*) compels the answer in the negative. Neither the Belgian Government could have been sued *in personam*, nor could their ship have been arrested *in rem*. If this is so, I do not understand how there could then be any maritime lien on the ship. To hold that a lien would come into existence if the Government sold the ship to a private purchaser, would be to deprive the Belgian Government of part of their property; for such a lien about to arise must reduce the price paid to the Government

and so affect the property of the Government.

The general language of Lord Watson in *The Castlegate* (7 Asp. Mar. Law Cas., at p. 288; 68 L. T. Rep., at p. 103; (1893) A. C., at p. 52) that "a proper maritime lien must have its root in the personal liability of the owner," approving the language of Lord Esher in *The Parlement Belge* (*sup.*), and the similar language of Sir Francis Jeune in *The Utopia* (7 Asp. Mar. Law Cas., at p. 411; 70 L. T.Rep., at p. 50; (1893) A. C., at p. 499), appear to me entirely to support this view, even if that general language is not applicable, as Lord Gorell, in *The Ripon City* (*sup.*), thought it was not, to the complicated facts in that case. And while I agree with the President that the passage in *The Parlement Belge* (*sup.*) was not strictly necessary to the decision, yet it was so closely related to it that, coming from such a master of maritime law, I have no hesitation in following it, especially as I agree with it in principle. Lord Esher says (4 Asp. Mar. Law Cas. at p. 245; 42 L. T. Rep. at p. 284; 5 P. Div., at p. 218): "The property cannot be sold as against the new owner if it could not have been sold as against the owner at the time when the alleged lien accrued. This doctrine of the Courts of Admiralty goes only to this extent, that the innocent purchaser takes the property subject to the inchoate maritime lien which attached to it as against him who was the owner at the time the lien attached." In the present case no lien attaches against the Belgian Government, nor could their ship have been arrested *in rem.* But if they could only sell the ship subject to the lien, their property would be affected by the lien, in that they would receive less than the value of the ship free from encumbrances or lien. The result would be that our law would assert a right over the property of a foreign sovereign not arising from any voluntary action on his part which adversely affected his property.

I agree that a sovereign may call upon us to enforce legal rights in his favour. The case of *The Newbattle* (7 Asp. Mar. Law Cas. 356; 52 L. T. Rep., 15; 10 Prob. Div. 33) shows that, if he does so, we may refuse to enforce those rights unless he allows the legal rights that we recognise to be effectively enforced against him. I agree that cases like *Gladstone* v. *Masurus Bey* (1863, 7 L. T. Rep., 477; 1 H. and M. 495) and *Larivière* v. *Morgan* (26 L. T. Rep. 859; L. Rep. 7 Ch. 580) show that, where English trusts are concerned, this court will proceed, though foreign rights are concerned. While, on the other hand, *Vavasseur* v. *Krupp* (39 L. T. Rep. 273; 9 Ch. Div. 351) involves the proposition that this country will not enforce English patent rights against property in the jurisdiction which a foreign sovereign claims, I am disposed to agree that the ground of the decisions is that, though there are English rights, we do not enforce them against a foreign sovereign directly or indirectly, because of the comity of nations. But it respectfully appears to me that the error of the President's judgment is that he is enforcing rights against a foreign sovereign indirectly, when he supports the view that over his property there is by English law an inchoate lien which will diminish the value of that property by lowering the price that a private purchaser will give for it.

I appreciate that the matter becomes of international importance if states increase their commercial trading by national fleets. I have already, in *The Porto Alexandre* (15 Asp. Mar. Law Cas. 1; 122 L. T. Rep. 661; (1920) p. 30), expressed my views of the disadvantages of state immunity in such circumstances, but the remedy is, in my opinion, state agreement by diplomatic action, not infringement of legal principles based on the comity of nations.

For these reasons, I think the appeal must be allowed with costs here and below, and the writ against the *Tervaete* set aside.

Atkin, L.J.—This case raises a question of considerable importance. I have found it difficult, and I differ from the reasoning of the learned President with hesitation; but, having formed a judgment which is not in agreement with his conclusion, I must express it. I understand the argument made by the respondents and enforced by the President to be this: Collision damage caused by the negligent manipulation of a ship creates a right in the person injured to recover damages from the owner responsible for the navigation. It also creates a right in the person injured to a maritime lien over the ship so causing damage. That lien is not a possessory lien, but consists of the right, by legal proceedings in an appropriate form, to have the ship seized by the officers of the court and made available by sale, if not released on bail, to pay the collision damage. If the ship is the property of a foreign sovereign, it is admitted that the legal proceedings cannot be commenced against him either personally or *in rem*, that is, for the arrest of the ship, because by the comity of nations no process can be brought in the courts against the person or the property of a foreign sovereign. But this is only a personal privilege of the sovereign not to be impleaded. The right of the injured person to damages and to a lien still exists, and, as the right to a lien is not abrogated when the ship is transferred into the possession of a third person, so, when the ship formerly owned by the foreign sovereign becomes the property of a third person not protected by the personal privilege of the sovereign, the right to a lien becomes effective, and the necessary proceedings *in rem* may be taken against the ship. The right to a maritime lien, it is said, is equivalent to a charge created by voluntary hypothecation of a chattel by the sovereign—a charge which may not be capable of enforcement while the chattel is in the possession or ownership of the sovereign, but can be enforced as it is transferred into the property of a third person.

A part of that reasoning is irresistible. It seems to me correct to say that the acts of a foreign sovereign may constitute breaches of contract or of duty not arising from contract, which create rights in the other party. True,

such rights may be of little value, as they cannot ordinarily be enforced by action. But the inability is a mere personal inability to sue; they can be made effective in defence as, for instance, by set-off, where the rights give rise to a power of set-off: and, as I should suppose, by a plea of contributory negligence; and should the sovereign submit to the jurisdiction in respect of a claim based upon such rights, I apprehend that the court would be bound to give effect to them. But, in my judgment, upon a true analysis of what is meant by a maritime lien, the right to such a lien is not such as can be created at all by the act of a sovereign. It is not a right to take possession or to hold possession of a ship. It is confined to a right to take proceedings in a court of law to have the ship seized, and, if necessary, sold. The action *in rem* is an action in which the owners of the ship are named as parties to the proceedings, and in which, according to our procedure, if they appear, subject to the statutory right to limit liability, they will be made liable personally for the full damage regardless of the value of the *res*.

The owner, therefore, in such an action is directly impleaded. But whether it be directly or indirectly, the owner who is a foreign sovereign cannot be impleaded at all. The result appears to me to be that the maritime lien against the foreign sovereign cannot exist at all. A right which can only be expressed as a right to take proceedings seems to me to be denied, where the right to take proceedings is denied. No independent liability of the sovereign, such as a liability for debt or damages, remains pendent, protected only by an immunity from legal proceedings. The right of maritime lien appears, therefore, to be essentially different from a right of property by hypothec or pledge created by the voluntary act of the sovereign.

If this reasoning be correct, inasmuch as there never was a time during the ownership of the Belgian Government when the respondents could aver that they possessed a maritime lien over the *Tervaete*, there was no obligation which attached to the ship or to the new owners when the ship became their property. On the explanation of the origin of the maritime lien given by Sir Francis Jeune in *The Dictator* (7 Asp. Mar. Law Cas. 251; 67 L. T. Rep. 563; (1892) P. 304), one may perhaps be allowed to wonder how such a right, avowedly dependent upon the personal liability of the owner, could be held to be enforceable against a new owner not in any way personally liable for the collision. It is too late to raise a doubt as to this point after the decision in *The Bold Buccleugh* (7 Moore P. C. 267). But where there was no right against the old owner, the new owner must escape. I myself should in any case feel bound by the dictum of Lord Esher in *The Parlement Belge* (4 Asp. Mar. Law Cas. 234; 42 L. T. Rep. 273; 5 Prob. Div. 197), referred to in the judgment of the President. I have thought it necessary to state my views on this difficult question in my own way, because I am not sure that I feel so much pressed as my brothers with the contention that a dormant maritime lien over a foreign sovereign's ship would affect the value of the ship in his hands, and therefore must be negatived. The supposition that the liability existed as for a personal claim, but was merely unenforceable, does not seem necessarily to be invalidated by the fact that such liability would impose pecuniary disadvantages upon the sovereign. A voluntary pledge or hypothec would be attended with the same results, but would it not be valid? I do not, however, dissent from their view. I concur in the view taken by my brothers of the cases cited by them and of their bearing on this case.

I only desire to add a word or two on the case of *The Newbattle* (5 Asp. Mar. Law Cas. 356; 52 L. T. Rep. 15; 10 Prob. Div. 33), in the Court of Appeal. There the court held that upon the construction of the Admiralty Court Act 1861, where a foreign government had brought an action *in rem* against the owners of the *Newbattle*, an order could be made staying the action until security had been given by the plaintiffs to answer the counterclaim of the defendant in respect of the same collision. The relevance of the case is that, under the section, a condition precedent of such an order is that the plaintiffs' ship cannot be arrested, and the decision of the court proceeds upon the ground that, though the foreign sovereign has invoked the jurisdiction of the court, and though he were under possible liability for damages in an effective cross suit, yet his ship was exempt from arrest. That a maritime lien was not enforceable under such circumstances appears to afford strong support for the view that it did not exist at all.

For these reasons I think the appeal must be allowed and the order made as stated by Bankes, L.J.

Appeal allowed.

Solicitors for the appellants, *Downing, Middleton*, and *Lewis*, for *Downing* and *Handcock*, Cardiff.

Solicitors for the respondents, *Holman, Fenwick*, and *Willan*, for *Lean* and *Lean*. Cardiff.

July 14 and 18, 1922.

(Before Bankes, Warrington, and Atkin L.JJ.)

Adelaide Steamship Company v. The King. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Insurance—Charter-party—Requisitioned ship—War risk or marine risk—" Consequences of hostilities or warlike operations "—Use of ship as ambulance transport — Collision — Negligence.

In 1916 *the steamship* W. *was taken over by the Admiralty for use as a hospital ship upon the terms of charter-party T.* 99, *the Admiralty accepting liability for all war risks, including " all consequences of hostilities or warlike*

(a) Reported by W. C. Sandford, Esq., Barrister-at-Law.

operations," while the owners undertook the marine risks. The W. *was used as an ambulance transport, and was armed with a gun, and had on board a few Royal Naval men to work it. Her master was instructed that if he were attacked by a submarine, and saw an opportunity of ramming it, he should do so. While carrying wounded men with doctors and nurses from Havre to Southampton, and being navigated without lights on a dark and hazy night, and proceeding at full speed, by the orders of the Admiralty, the* W. *collided with another ship and was damaged. The* W. *was found to be alone to blame for the collision, which was due to the negligence of those in charge of her.*

Held (1), *that the* W. *was engaged in a warlike operation at the time of the collision.*

Re P. and O. Branch Service and Commonwealth Shipping Representative (The Geelong) (15 *Asp. Mar. Law Cas.* 522 ; 127 *L. T. Rep.* 133 ; (1922) 1 *K. B.* 706 ; *since affirmed in the House of Lords* (ante, *p.* 522 ; 128 *L. T. Rep.* 546 ; (1923) *A. C.* 191) *followed ;*

(2) *That, in the circumstances, the negligence of those in charge of the* W. *was immaterial, and that the Admiralty were liable.*

Judgment of McCardie, J. reversed.

APPEAL by the suppliants from the judgment of McCardie, J. in the Commercial Court, on a petition of right, reported 15 Asp. Mar. Law Cas. 525 ; 127 L. T. Rep. 63.

The suppliants were an Australian steamship company of Melbourne. In Aug. 1915 the *Warilda*, belonging to the suppliants, was requisitioned by the Australian Government for transport service. In July 1916 she was taken over by the British Admiralty for use as a military hospital ship under the terms of the charter-party T. 99, which provided that the Admiralty should accept liability for war risks while the suppliants continued to take the marine risks. She was described as an " ambulance transport to be treated as a troop transport." She was armed with one twelve-pounder gun, and had instructions to ram any submarine sighted. On the 24th March 1918 the *Warilda* was carrying wounded men from Havre to Southampton when, about 4 a.m., she came into collision with another steamer, the *Petingaudet*, and both vessels suffered considerable damage. The night was dark and hazy, and the sea smooth. By order of the Admiralty the *Warilda* was being navigated at full speed without lights, and the *Petingaudet* was being navigated without masthead lights and with dimmed side lights. The suppliants claimed damages on the ground that the collision was a consequence of warlike operations ; the Crown in their plea asserted that the collision was due to the negligent navigation of the *Warilda*, and was the result of a marine risk.

The owners of the *Petingaudet* had brought an action against the suppliants, and in that action the collision was held to be due to negligence of the *Warilda* ; and the suppliants were made liable for the damage to the *Petingaudet*. The *Warilda* herself was withdrawn for repairs after the collision, so the suppliants had suffered in three ways ; they had had to pay the cost of their own repairs, they had had to pay for the repair of the *Petingaudet*, and they had lost the hire which would have been payable to them during the time while the *Warilda* was undergoing repairs.

The facts are set out at length in the judgment of McCardie, J. (15 Asp. Mar. Law Cas. 525 ; 127 L. T. Rep. 63).

McCardie, J. held that (1) the *Warilda* was not engaged in a warlike operation, and was not a warship, at the time of the collision ; and (2) that if she had been engaged in a warlike operation, the loss was due to the negligence of those in charge of her ; and the question of negligence being, on the authorities, material, the suppliants could not have succeeded, and there must be judgment for the Crown.

The suppliants appealed.

MacKinnon, K.C., *Dunlop*, K.C., and *Dumas*, for the appellants.—The *Warilda* was engaged in a warlike operation at the time of the collision, and the case is covered by the decision of the Court of Appeal in *Re P. and O. Branch Service and Commonwealth Shipping Representative* (*The Geelong* case) (15 Asp. Mar. Law Cas. 522 ; 127 L. T. Rep. 133 ; (1922) 1 K. B. 706). That was a case of moving military stores from one base of operations to another, while this is a case of moving wounded soldiers, but no distinction can be drawn between the two cases. Secondly, if the ship was engaged in a warlike operation, it is immaterial in the circumstances of this case that those in charge of her were negligent. This is not the case of a merchant ship, sailing without lights in the bright moonlight, running negligently into another ship, in which case the negligence might be material. If a warship in the midst of a naval engagement were to run negligently into another warship, the negligence would be immaterial, and it is immaterial that there was negligence in this case. The risk of negligence while carrying on a warlike operation is one of the risks insured against in a war risks policy. They referred to :

Ard Coasters v. *The King*, 15 Asp. Mar. Law Cas. 353 ; 125 L. T. Rep. 548 ; (1921) 2 A. C. 141 ;

British India Steam Navigation Company v. *Green*, 14 Asp. Mar. Law Cas. 513 ; 15 Asp. Mar. Law Cas. 358 ; 121 L. T. Rep. 559 ; (1919) 2 K. B. 670 ;

Charente Steamship Company v. *Director of Transport*, 38 Times L. Rep. 434.

Raeburn, K.C. and *Balloch* (Sir *Ernest Pollock*, A.-G., with them) for the Crown.—The case is distinguishable from *The Geelong* case (*sup.*), as the operation in this case was peaceful and humanitarian, while in *The Geelong* case there was a military operation, namely, the removal of stores. Secondly, the negligence of those on board the *Warilda* is material, and was the direct cause of the collision ; even

assuming there was a warlike operation, there would have been no collision but for the negligence of the *Warilda*. They referred to :

Britain Steamship Company v. *The King*, 15 Asp. Mar. Law Cas. 58; 123 L. T. Rep. 721 ; (1921) 1 A. C. 99 ;
Larchgrove (*Owners*) v. *The King*, 1919, 36 Times L. Rep. 108 ;
The Geelong case, 15 Asp. Mar. Law Cas. 522; 127 L. T. Rep., 133; (1922) 1 K. B. 706 ;
Inui Gomei Kaisha v. *Attolico*, Lloyd's List, Feb. 10, 1919.

MacKinnon, K.C. replied.

BANKES, L.J.—This is an appeal on a petition of right from McCardie, J. It raises an important point, which has been the subject of discussion elsewhere, but comes now for the first time before this court. The facts out of which the petition arises were as follows : On the 24th March 1918 the suppliants' vessel, the *Warilda*, while crossing with wounded soldiers from Havre to Southampton came into collision with another vessel, the *Petingaudet*, with the result that both vessels were injured. An action was brought in the Admiralty Division, and ultimately the House of Lords, affirming this court, held that the *Warilda* was alone to blame, the grounds being that she did not alter her course or speed as soon as she ought after first sighting the other vessel. After that decision the question arose on which this petition of right was based—namely, whether in the circumstances the collision was a consequence of a war risk or of a marine risk. To decide that question it is necessary to go into the facts more fully. The *Warilda* was, in the first instance, requisitioned by the Australian Government. Then she was taken over by our Government, and for the purposes of this case it is agreed that she was taken on the terms of the charter-party T. 99 under which the Government accepted responsibility for the risks included in the following clause : "Warranted free of capture, seizure, and detention and the consequences thereof or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war." Having thus been taken over she was used as a hospital ship, but owing to the action of the Germans in reference to hospital ships she was transferred from that category, and under regulations made for that purpose she was transferred into a class known as ambulance transports. A gun was placed on board of her and her captain was told that he was not bound in all events to refrain from defending the vessel, but that, on the contrary, if attacked by a submarine it might be his duty to ram the submarine if an opportunity occurred.

On these facts two questions have been debated : first, whether at the time of the collision the *Warilda* was engaged in a warlike operation ; and the second, whether, assuming she was so engaged, the collision was a consequence of that operation, or whether it was due to an independent intervening cause—namely, the negligence of those in charge of the *Warilda*. Upon the first point I am unable to distinguish this case from *The Geelong* case (*sup.*), recently decided in this court, where the vessel in question was engaged in carrying war stores and ambulance wagons from one war base to another. In the opinion of Bailhache, J. that fact itself was enough to establish that the vessel was engaged in a warlike operation. In this court the Master of the Rolls was not prepared to go that length ; but it appeared from the evidence that the stores and wagons were being transported in the course of evacuating Gallipoli, and he held that this did constitute a warlike operation. He said (15 Asp. Mar. Law Cas., at p. 524: 127 L. T. Rep., at p. 135 ; (1922) 1 K. B., at p. 714) : "Now if what she was doing was a part of the operation of the evacuation of Gallipoli I think she would be carrying out a warlike operation just as much as she would have been if she had been carrying things for the purpose of landing upon Gallipoli." Scrutton, L.J. was prepared to agree with Bailhache, J. He said (15 Asp. Mar. Law Cas. p. 525 ; 127 L. T. Rep., at p. 136 ; (1922) 1 K. B., at p. 718) : "I am prepared to hold that carrying ambulance wagons and Government stores from one war base to another in time of war was a warlike operation." But I am content to accept the view of the Master of the Rolls. I can draw no distinction between conveying military stores in the course of evacuating Gallipoli and conveying wounded soldiers via Havre to Southampton from the fighting line in France. Even if I differed from that decision I should follow it in this case because, in my judgment, it is undesirable that this court should draw fine distinctions between cases so closely analogous. But in saying this I do not wish to be taken as in the least dissenting from *The Geelong* (*sup.*), which appears to be largely based on *Britain Steamship Company* v. *The King* (15 Asp. Mar. Law Cas. 58 ; 123 L. T. Rep. 721 ; 15 Asp. Mar. Law Cas. 58 ; (1921) 1 A. C. 99).

I pass now to the second point, whether the collision was a consequence of the warlike operation, within the meaning of clause 19 of the charter-party, or was due to an independent intervening cause, the negligence of those in charge of her. This question has at times been referred to in this court, but always with a view to saving it for further consideration. There has been no definite expression of opinion how it should be decided, unless perhaps one case. *Inui Gomei Kaisha* v. *Attolico* (unreported, cited from Lloyd's List the 10th Feb. 1919) may be thought to contain such an expression. I should like in a few words to set that case in its proper place in the discussion which has taken place before us. It was decided in 1918 by Roche, J. and in 1919 by this court. Two merchant vessels both engaged in their ordinary trading operations collided in the Mediterranean.

It is true that owing to war restrictions both were sailing without lights. The case was opened in the court below and treated all through as turning upon the issue of negligence. The particular question which has been argued in the present case never arose. My judgment was upon the case presented to the court and upon the facts proved in the case; it has no direct bearing upon the points to be decided in this case and contains nothing contrary to the view I am about to express.

The particular point has been dealt with in the court below on three occasions, twice by Bailhache, J. and once by Roche, J.; and each of those learned judges has expressed the view that where a collision takes place between a merchant vessel and a warship the status of the vessel injured has a material bearing on the question how far negligence on the part of those in charge of the injured vessel prevents the the injury from being a consequence of warlike operations. If a merchant vessel engaged in a trading operation by her own negligence brings herself into collision with a war vessel, the injuries she receives may be not the consequences of a warlike operation but the consequences of her own negligence. But if a war vessel engaged in a warlike operation by her own negligence brings herself into collision with a merchantman the injury which the war vessel suffers is the consequence of a warlike operation, and it is immaterial to consider whether the collision was brought about by her own negligence, because it is one of the risks incidental to warlike operations that those in charge of a war vessel may by their negligence bring her into collision with another vessel. In the *Ard Coasters* case (15 Asp. Mar. Law Cas. 353; 125 L. T. Rep. 548; (1921) 2 A. C. 141), where the *Ardgantock*, a merchant vessel, collided with the *Tartar*, a warship, Bailhache, J. said that "in his view therefore the collision was not the to any negligence on the part of the *Ardgantock*. As to the *Tartar*, if she was on a warlike operation, it would not matter whether she was negligent or not, but in justice to the officer in charge of her he could not see any negligence on her part." Again in *British India Steam Navigation Company* v. *Green*, Bailhache, J. said (1919) 1 K. B., at p. 637: "I do not think negligence on the part of the King's officer would matter. The operation would still be a warlike operation, although badly performed. As a fact I have no evidence of his negligence." In *Charente Steamship Company* v. *Director of Transports*, Roche, J. said (38 Times L. Rep. 148): "If a merchant ship was solely to blame for a collision, then, speaking broadly, it would seem to follow in most cases that the collision would not be a result of hostilities because it was not the result of a warship's acting in a warlike operation. If the warship was to blame different considerations arose. Probably in most cases, though not perhaps in all, she would be to blame for negligence in carrying out the naval operation in progress and in such cases he agreed with the view of Bailhache, J. that negligence would be immaterial because it would not constitute a new and independent cause." And later he said; "Where, in such a case, an essential and necessary part of the direct and immediate cause of a loss was a warlike operation, whether well or ill conducted, he would hold that the loss was a consequence of hostilities or warlike operations." I agree where a war vessel engaged in a warlike operation is injured by a collision in circumstances like those in the present case. I do not mean to say there may not be cases in which those in charge of a warship engaged in a warlike operation may be guilty of negligence leading as an independent intervening cause to a collision, negligence which would take the injury out of the class of war risks and bring it into the class of marine risks; but that cannot be said of the negligence in this case. Acting upon orders the *Warilda* was proceeding at night at full speed without lights. The warlike operation on which she was engaged under these conditions involved the risk of injury by the negligence of those in charge, negligence closely connected with the operation and not in any sense an independent intervening cause. Being engaged in a warlike operation the vessel may be treated as if she were a battleship. If a battleship proceeding under war conditions on a particular voyage comes into collision with another vessel the collision is a consequence of the warlike operation, even though it be brought about by the negligence, possibly some minor act of negligence, on the part of those in charge of the battleship.

For these reasons I am unable to agree with the decision of McCardie, J. The appeal must be allowed and judgment must be entered for the suppliants in the form to be decided upon after discussion.

Warrington, L.J.—I am of the same opinion. This case raises two points for decision. The first is whether the *Warilda*, one of the two vessels in collision, was at the time engaged in a warlike operation, so that *primâ facie* the loss due to the collision would be a consequence of warlike operations; and the second point is whether that result is displaced by the fact that the *Warilda* has been found to be guilty of negligence in the way in which she was conducting her operations on the night in question.

Upon the first point I agree with Bankes, L.J. that it is impossible to distinguish this case in favour of the Crown from *The Geelong* (15 Asp. Mar. Law Cas. 522; 127 L. T. Rep. 133; (1922) 1 K. B. 706). On the contrary the facts of this case lead more forcibly to the conclusion that the injured vessel was engaged in a warlike operation. The *Warilda* had originally been employed as a hospital ship. She was uo the list of hospital ships exchanged with the German Government, and under the provisions of the several conventions governing the conduct of war she was under an obligation to abstain from all warlike acts, in return for which obligation she was immune from capture and

attack of all kinds by warships or other military forces of the enemy. Owing to the conduct of the Germans in attacking hospital ships, this ship and others were taken off the protected list and were thereby released from their obligations to abstain from warlike acts themselves. They were placed in a class called ambulance transports. This particular ship was used for conveying doctors and nurses and wounded soldiers from Havre to Southampton. The collision happened on the 24th March 1918 at a time when warlike operations of a specially active kind were proceeding in France, and on that night she was on a voyage from Havre to Southampton with 600 wounded men who were being taken or had come back from the battlefield in France to Havre, which was our base on the French coast, and were being transported in this ship to Southampton. It seems to me that that was about as clearly a warlike operation as any operation of that sort could be. In the course of transporting wounded men from the actual battlefield to the home base, assuming this is a warlike operation to begin with, how can any point be fixed at which the transport ceases to be a warlike operation? Mr. Raeburn, for the Crown, admitted that it would be practically impossible to find any such point. In my opinion, therefore, even if we had not been, as I think we are, bound by the decision in *The Geelong*, I should come to the conclusion that the operation on which the *Warilda* was engaged on the night in question was a warlike operation.

That conclusion being reached, the case raises for the first time for actual decision the question which has often been alluded to in previous cases—namely, whether negligence on the part of a ship engaged in warlike operations is material and prevents the loss from being a loss arising as a consequence of the warlike operation. I need not refer in detail to the three cases mentioned by Bankes, L.J. in which Bailhache and Roche, JJ. have both expressed their opinions on this point. But I wish to say a word about *Inui Gomei Kaisha* v. *Attolico* (Lloyd's List, 10th Feb. 1919), to which in common with Bankes, L.J. I was a party. That case when its facts are carefully considered will be seen to fall into a different class from that to which the present case belongs. The only fact which could be relied on as involving the ships in a warlike operation was that they were steaming without lights. They were both merchantmen and both were engaged on a peaceful voyage, but under instructions from the Admiralty they were both steaming without lights. If, as was established, the ships were guilty of negligence (sufficient, as it seems, to have caused the collision in broad daylight) then the collision was independent of the only fact which gave a warlike colour to their operations, namely, the steaming without lights. In the present case both the status of the *Warilda* and the nature of her voyage determine the nature of the operation on which she was engaged. It was a warlike operation.

Then, was the collision the consequence of that warlike operation? In my opinion it was. Such negligence as was established on the part of the *Warilda;* an error in not changing her direction at the moment when it was thought she ought to have done so, and in not slackening speed at the moment when it was thought she ought to have done so, when she was steaming on a dark night under instructions directing her to maintain full speed even in a fog; such negligence as that seems to me to be merely incidental to the warlike operation she was conducting and not to be a new and independent cause intervening and occasioning the loss. I do not wish to do more than decide this case on the facts of this case. There may be negligence of such a kind as to be a new and intervening cause between the loss of a ship and an undoubtedly warlike operation on which she is engaged. That case is not concluded by anything I have said and is to be regarded as open. For the reasons I have given I think the judgment of McCardie, J. was wrong, and ought to be discharged.

ATKIN, L.J.—I agree. The first question is whether this vessel on her voyage from Havre to Southampton was engaged in a warlike operation. Upon that point I think it is only necessary to say that we are bound by *The Geelong* case (15 Asp. Mar. Law Cas. 522; 127 L. T. Rep. 133; (1922) 1 K. B. 706). The *Geelong* was conveying from one war base to another stores and munitions of war in the course of evacuating Gallipoli, a country that had to be occupied for warlike purposes. The *Warilda* was requisitioned by the Admiralty as an ambulance transport, and was conveying wounded combatants from a war area to a home base. I am unable to distinguish the one case from the other. If any distinction is to be drawn it must be by some court and some authority other than this. In a case like this it is important to avoid fine-drawn distinctions which impair the authority of the decisions of the court.

The other question is how is the case affected by the admitted fact that one of the circumstances of the collision was negligent navigation of the *Warilda?* In order to solve this question it is important to bear in mind the terms of the contract between the owners of this ship and the Admiralty. It is common ground that the terms are those contained in that clause of the Charter T.99, which provides that the risks of war taken by the Admiralty are those which would be excluded from an ordinary English policy of marine insurance by the following or a similar but not more extensive clause: "Warranted free of capture seizure and detention and the consequences thereof or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war." In construing that clause we are not dealing with "consequences of warlike operation" as being some other mode of stating the cause of the collision, and for that purpose it is necessary to refer to the judgment of Lord Sumner in *British India Steam Navigation Company* v. *Green, The Matiana* case (15 Asp. Mar. Law

Cas. 58; 123 L. T. Rep., at p. 731; (1921) A. C., at p. 131), where, adopting the words of Willes, J. in *Ionides* v. *Universal Marine Insurance Company* (8 L. T. Rep., at p. 707; 14 C. B. (N. S.) at p. 290), "the words 'all consequences of hostilities' refer to the totality of causes, not to their sequence," he says: "They are used to save a long enumerative description of incidents of capture seizure or detention or of hostilities or warlike operations, as if one had said 'all forms of hostilities or warlike operations of whatever kind' and some form or kind of hostility or warlike operations must have proximately caused the loss." Therefore the question is, whether the loss was proximately caused by a warlike operation. The *Warilda* was engaged in the warlike operation of navigation of an ambulance transport in the Channel at the time of the collision. She must be treated exactly as if she were a battleship. That is the view taken by Lord Atkinson in *Britain Steamship Company* v. *The King, The Petersham* case, (15 Asp. Mar. Law Cas., at p. 62; 123 L. T. Rep., at p. 725; (1921) 1 A. C., at p. 114), where he says: "The transfer of the combative forces of a power from one area of war to another, or from one part of an area of war to another part, for combative purposes, would, I think, be a 'warlike operation' within the meaning of this charter-party, as would also be the patrolling by the ships of war belonging to a nation of the sea coast of that nation, or of an allied nation, for the purpose of preventing invasion." When the navigation of a vessel is a warlike operation the question may arise whether, if the vessel engaged in the warlike operation comes into collision with another, the damage caused is proximately caused by the warlike operation or, if the operation is being conducted unskilfully, whether the want of skill prevents the collision from being proximately caused by a warlike operation. To mind that question is tested by another—namely, Does the warlike operation cease to be a warlike operation because it is being negligently conducted? That question only admits of one answer: It does not. Warlike operations would be few if there were excluded from that class all operations which are not conducted with care and skill; and if a vessel navigated with reasonable skill and care and coming into collision with another can be said to sustain damage proximately caused by the operation, the same may be said of her when she is being navigated without reasonable care and skill. Could it be said, for example, that the *Warilda* if she is steaming at six knots when the collision occurred would be engaged in a warlike operation, but if she was steaming at twelve knots would not be so engaged? This seems to make it clear that the presence or absence of negligence does not decide the question whether a particular loss is the consequence of a warlike operation. To direct a shell against a vessel would occasion a loss by a warlike operation and the loss would be none the less the consequence of a warlike operation because the shell was negligently directed against another vessel or against some object other than a vessel. So a merchantman rammed by a battleship sustains damage in consequence of a warlike operation whether the battleship is navigated with reasonable care and skill or not. The negligent conduct of warlike operations is a risk of war and is one of the risks intended to be covered in this particular case. If the inquiry to the merchant vessel were the matter in question there could be no doubt she could recover on a war risk policy in these terms, and I can draw no distinction between injury to the merchantman and injury to the war vessel herself in the circumstances I have put. Therefore it seems to me that the loss here was proximately caused by the warlike operation.

I wish to reserve the case where the loss is caused by the negligence, not of the war vessel, but of the merchant vessel itself. It might be that then the loss was not caused by the warlike operation, which was the navigation of the warship. That matter may be discussed when it arises. For the reasons I have given there seems to be no authority binding this court to hold that this loss was not a consequence of a warlike operation; on the other hand the discussion in the House of Lords points to the conclusion at which we have arrived. The appeal must, therefore, be allowed. There is some question whether the owners of the *Warilda* can recover not only for the damage done to their vessel, but also the damages and costs they had to pay in the collision action.

Bankes, L.J.—This appeal will be allowed. The judgment will be set aside. There will be a declaration that the suppliants are entitled to recover, and the amount is to be ascertained by a judge of the Commercial Court.

Appeal allowed.

Solicitors for the appellants, *Parker, Garrett, and Co.*

Solicitor for the Crown, *The Treasury Solicitor.*

Nov. 27 *and* 28, 1922.

(Before Lord Sterndale, M.R., Atkin and Younger, L.JJ., and Nautical Assessors.)

The Dimitrios Rallias. (a)

ON APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY).

Bill of lading—Damage to cargo—Sea water entering hold—Defective rivets in the ship's plates—Rusted condition of the plates—Latent defect—General Produce Black Sea Azoff and Don Steamer 1890 *Bill of Lading—Not liable for "latent defect in hull provided such latent defect did not arise from want of due diligence of the owners. . . ."*

The appellants sued for damage to a cargo of cotton seed shipped under a bill of lading by the terms of which the ship owner's warranty of

(a) Reported by Geoffrey Hutchinson, Esq., Barrister-at-Law.

seaworthiness was not to extend to damage caused by "latent defect in hull provided such latent defect did not result from want of due diligence of the owners or by the ship's husband or managers. . . ." The damage was caused by sea water entering the hold through the fracture of certain rivets by which the plates were attached to the ship's frames. Rust had been allowed to accumulate between the plates and the frames, thus subjecting the rivets to undue stress, which ultimately caused them to break. The damage occurred during a voyage in August 1921. *In* 1920 *the vessel had passed Lloyd's special survey, and in July* 1921 *she had been surveyed for fire damage, when the condition of the rivets was satisfactorily reported upon; but certain cleaning and recoating of steel work in the holds which was then recommended had not been carried out at the time when the cargo was damaged. The damage was augmented by the failure of the master, who was a part owner, to have the bilges properly pumped. Hill, J. gave judgment for the respondents on the ground that although a careful examination would have disclosed the existence of the rust which caused the defect, the surveyors' reports indicated no lack of diligence in the owner or his advisors. The damage was therefore caused by a latent defect in respect of which the owner was protected by the bill of lading.*

Held, reversing Hill, J., that the defect was such that it could have been discerned by a reasonably careful and diligent examination, and extraordinary care was not necessary to make it apparent. The learned judge had treated the question whether a defect was or was not latent as being the same as whether the person charged with the care of the vessel was or was not negligent.

By the exercise of ordinary care by a competent person the rust on the plates would have been found, and it was common ground that something should have been done to remedy it; if the ship sailed without anything being done there was a breach of the warranty of seaworthiness.

Per Lord Sterndale, M.R.—If a defect can be discovered by ordinary care it cannot be said to be latent.

APPEAL from a judgment of Hill, J. sitting with Trinity Masters in an action of damage to cargo.

The appellants were the owners of a cargo of 500 tons of black cotton seed shipped on board the Greek steamer *Dimitrios N. Rallias*, at Alexandria, in Aug. 1921. The respondents, of whom the master, being also a part owner, was one, were the owners of the *Dimitrios N. Rallias*. The cargo was discharged in London in Oct. and Sept. 1921, when it was found to be wet and damaged.

The cargo was shipped under the terms of a General Produce Black Sea Azoff and Don Steamer Bill of Lading 1890 by which it was provided, amongst other matters:

The act of God, Perils damages and accidents of the seas and other waters of what nature and kind soever; Fire from any cause on land or water barratry of the master and crew enemies pirates and robbers arrests and restraints of Princes Rulers and Peoples Explosions bursting of boilers Breakage of shafts or any latent defect in hull and (or) machinery strandings collisions and all other accidents of navigation and all losses and damage caused thereby are excepted even when caused by the negligence default or error in judgment of the Pilot Master mariners or other servants of the ship owners, but unless stranded sunk or burnt nothing herein contained shall exempt the shipowners from liability to pay for damage to cargo occasioned by bad stowage by improper or insufficient dunnage or absence of customary ventilation or by improper opening of valves sluices ports or by causes other than those above excepted, and all the above exceptions are conditional on the vessel being seaworthy when she sails on the voyage, but any latent defect in the hull and (or) machinery shall not be considered unseaworthiness provided the same do not result from want of due diligence of the owners or any of them or of the ship's husband or manager.

By their defence the respondents admitted some damage to the cargo by water entering No. 1 hold, but contended that the damage was caused by excepted perils of latent defects in the hull of the steamer and (or) of heavy weather encountered on the voyage from Alexandria.

The appellants by their reply contended that the *Dimitrios N. Rallias* when she sailed from Alexandria was unseaworthy by reason of the fact that the points of two frame rivets on the third frame abaft the collision bulkhead on the port side of No. 1 hold were broken off. The points of the two rivets were broken off in consequence of the metal between the shell plate and the frame becoming oxidised owing to want of care in the upkeep and lack of painting, thereby allowing a heavy rust scale to accumulate between the frame bar and the shell plating forcing off the point of the said rivets. Alternatively they contended that if the damage was caused by latent defects in the hull such defects resulted from want of due diligence in the owners or some of them or of the ship's husband or manager. The respondents were not, therefore, entitled to rely on the exceptions in the bill of lading.

The action was heard on the 31st July.

A. T. Miller, K.C. and *Langton* for the plaintiffs.

Leck, K.C. and *E. Aylmer Digby* for the defendants.

HILL, J.—In this case the plaintiffs sue under a bill of lading, dated the 30th Aug. 1921, of cotton seed in bulk shipped on the *Dimitrios N. Rallias* at Alexandria for London. Sea water had entered by reason that the points of two rivets were broken off. The rivets were rivets of the side plate fourth from the stem in the fifth strake below the main sheer to the third frame from the fore-peak bulkhead. Sea water entered and passed into the cargo and down to the bilges. During the voyage the pumps were never put on the bilges forward of the machinery space; the engineer said it

was reported to him that the bilges were dry. In consequence of this failure to pump, the water accumulated in the bilges and rose above the tank tops and greatly increased the damage, which in consequence extended right across the ship at the bottom. That the rivet joints were broken off solely by reason of heavy weather was not proved. There was no weather to account for their breaking if the rivets had been sound and exposed only to the stress they ought to bear. The rivets were not sound and were exposed to stresses they ought not to bear. Mr. Scott thought they had always had a defect, and that this continued with the gradual accumulation of rust between the plate and the frames which, inducing very severe tension on the rivets, finally led to complete fracture. The plaintiffs' surveyor thought the accumulation of rust was the cause of the mischief. Whichever it was, it was a defect whereby at the beginning of the voyage the ship was unfit to encounter the ordinary perils of the voyage. If the case rested here, the plaintiffs would have established unseaworthiness, and that the damage was caused by unseaworthiness. But by the terms of the bill of lading the warranty of seaworthiness is limited. It does not extend to latent defect in hull provided such latent defect did not result from want of due diligence of the owners or by the ship's husband or manager.

The defendants say that the defect was latent and did not result from want of due diligence. The plaintiffs say that the defect was not latent and did result from want of due diligence. I must consider further the facts. I do not find any original defect in the rivets themselves. The accumulation of rust between the plate and the frame was five-sixteenths of an inch—an excessive degree of rust, and calculated to weaken the rivets and to put an undue strain on the rivets so as to cause the points to break off in the working of the ship. The history of the ship, so far as we know it, was as follows. She was built at West Hartlepool in 1899. In 1920, being owned by the Société Maritime Belge and named the *General Degoutte* she passed Lloyd's special survey second No. 2 at Barry. At that time a number of repairs were done to her. In the survey report of Mr. Harris, who was called, it is stated that " she was placed in dry dock, bottom . . . examined, and recoated. Holds . . . examined . . . repairs due to wear and tear are stated to have included holds . . . scaled and recoated as required. . . . ." There is further this record : " Large number of deck rivets renewed. Holds, &c., rust drawn framing beam knees and bulkheads renewed." Under the heading of " Present condition of rivets " appeared " Good." This survey is recorded as beginning on the 2nd Feb. 1920 and ending on the 1st July 1920. The ship was at some time later arrested by the Marshal and on the 7th July 1921 sold by him. Mr. Nicolas D. Rallias was the purchaser, and is still the owner. Before the arrest the ship had suffered damage at Phillipeville by fire and by flooding of No. 1 hold. The fire seems, by the report which is put in, to have been above deck forward—at any rate the damage in No. 1 hold was not by burning but by smoke and dirt and flooding. On the purchase the ship was inspected by Mr. Richards for Mr. Rallias. Mr. Richards was unwell at the time of hearing and unable to give evidence. The purchase was completed on the 15th July 1921. The ship was placed in Smith's Dry Dock at Middlesbrough for the fire damage repairs to her, and was surveyed for Lloyd's by Mr. Gilmour. His survey began on the 18th July 1921 and ended on the 22nd July 1921. The repairs were temporary repairs in the way of No. 1 hold and temporary repairs to enable permanent repairs being deferred until special survey. Mr. Gilmour recommended as follows : " The buckling of the decks in the way of the No. 1 hatchway does not affect the structural efficiency and the vessel is eligible in my opinion to remain as classed." The owners' letter attached contains an undertaking that should the vessel be sold before the next special survey a full explanation of the temporary repairs in regard to the previous damage shall be given to the intending purchasers. Mr. Gilmour's report contains the following : " Vessel placed in dry dock . . . bottom examined. Bottom cleaned and recoated . . . In present condition column rivets good . . . " and at the end this appears in the report : " The owners representative stated that the cleaning and coating of the steel work in hold and 'tween decks would be attended to as early as possible by the crew, which in my opinion is satisfactory." Mr. Gilmour stated in his evidence that as the result of fire No. 1 hold wanted cleaning and repainting. The ship loaded coal at the Tyne for Port Said; she made no water on that voyage. She then went to Alexandria and loaded the cargo in question. The cleaning and coating of the steel work in the hold had not been done. There was some difference amongst the surveyors who were called as to the amount of the rust clearly apparent on the hull plates. In view of Mr. Gilmour's certificate I cannot think it was considerable in July 1921, and can hardly have been very much more at the beginning of the voyage in question. I am advised that careful examination should have disclosed the rust to the extent of five-sixteenths of an inch. It cannot have been the growth of a year or anything like it. It escaped the attention of both Mr. Harris and Mr. Gilmour. When the ship was surveyed after the damage to the cotton seed, the surveyors saw at once where the water had entered, but were not satisfied as to the cause upon an internal inspection of the rivets, nor until one of them, Mr. Scott, went down outside and found that the rivet points were missing.

In these circumstances, I am of opinion that the defect may be fairly described as a latent defect. Then as to due diligence. That means the due diligence of the owner, and of the persons he employs to discharge the duty of examination, and, if necessary, repair. See

Dobell v. *Steamship Rossmore Company* (8 Asp. Mar. Law Cas. 83 ; 73 L. T. Rep. 74 ; (1895) 2 Q. B. 408). The owner was on the spot, but properly trusted to his surveyor, Mr. Richards and Lloyd's surveyor, Mr. Gilmour. Moreover, he and they had before them the fact that in the previous July the ship had passed her Lloyd's survey. I am unable to find a want of due diligence either in the owner or in Mr. Richards. It was said there was such a want because No. 1 was not immediately scaled and painted. But in face of Mr. Gilmour's report I am unable to say that that work was immediately called for. A particular point was made as to the damage caused by the accumulation of water owing to the failure to pump. There was undoubtedly great negligence on board the ship in that respect, and that negligence was the cause of much of the damage. But the damage was by sea water flowing into the ship and not pumped out because of the negligence of the master or crew. That is within the exception "perils, dangers and accidents of the sea . . . and other accidents of navigation . . . even when occasioned by negligence . . . of the master or mariners:" (see *The Cressington*, 7 Asp. Mar. Law Cas. 27 ; 64 L. T. Rep. 329 ; (1891) P. 152). It makes no difference that the master was also the owner, for if the negligence in this respect was his (and it appears rather to have been of the person whose duty it was to sound the bilges) it was his negligence as master and not his negligence as owner : (see *The Westport Coal Company* v. *McPhail*, 8 Asp. Mar. Law Cas. 378 ; 78 L. T. Rep. 490 ; (1898) 2 Q. B. 130). In my view this claim fails and there will be judgment for the defendant.

Raeburn, K.C., *A. T. Miller*, K.C, and *Langton* for the appellants.—The defective rivets did not constitute a latent defect because if proper diligence had been exercised by the owners their defective character would have been revealed. It is not enough to show that the defect was not apparent ; if the owners neglect to take steps which would make it apparent the defect is not latent. The learned judge has found that the ship was not seaworthy at the commencement of the voyage. The evidence also shows that the damage was accentuated by the negligence of the master in failing to have the holds properly pumped. As he is part-owner as well as master there is also lack of diligence in the owners in that respect. The learned judge was wrong in finding that the master is protected against his own negligence by the exceptions in the bill of lading. The exceptions clearly contemplate negligence on the part of persons who were servants of the owners. The master cannot be the servant of himself. Reference was made to :

> *Cargo ex Laertes*, 6 Asp. Mar. Law Cas. 174 ; 57 L. T. Rep. 502 ; 12 Prob. Div. 187 ;
> *The Cressington*, 7 Asp. Mar. Law Cas. 27 ; 64 L. T. Rep. 392 ; (1891) P. 152 ;
> *Westport Coal Company* v. *McPhail*, 8 Asp. Mar. Law Cas. 378 ; 78 L. T. Rep. 490 ; (1898) 2 Q. B. 130.

Leck, K.C. and *E. Aylmer Digby* for the respondents.—The owners exercised due care. The broken rivets were not apparent to inspection and the ship maintained her class ; therefore they were latent defects in respect of which the defendants were not liable. The learned judge found, and intended to find, that the defects were latent. The learned judge has rightly found that, if the master was negligent, he is protected in respect of his negligence by the terms of the bill of lading. Reference was made to :

> *The Carrib Prince*, 1898, 170 U.S. 655;
> *The Northumbria*, 10 Asp. Mar. Law Cas. 328 ; 95 L. T. Rep. 618 ; (1906) P. 292;
> *The Xantho*, 6 Asp. Mar. Law Cas. 207 ; 55 L. T. Rep. 203 ; 12 App. Cas. 503 ;
> *Blackburn* v. *Liverpool, Brazil, and River Plate Steam Navigation Company*, 9 Asp. Mar. Law Cas. 263 ; 85 L. T. Rep. 783 ; (1902) 1 K. B. 290.

Nov. 28.—Lord STERNDALE, M.R.—This is an appeal from Hill, J., with whose conclusion I regret to say I cannot agree. It arises out of damage to cargo shipped on a vessel called the *Dimitrios N. Rallias*, which was bought in July 1921 by her owner, who was also her master, Dimitrios Rallias, she having been built about 1899 and having passed through various ownerships in that time. She was surveyed in July 1921. She was inspected before Mr. Rallias bought her by Mr. Richards on his behalf. Mr. Richards was unfortunately ill and unable to give evidence at the trial. She was also inspected by Lloyd's surveyor. She had gone over her time for inspection and the consequence was that the ship had lost her class. The result of that was that Lloyd's surveyor made a report which ended by saying : "The owner's representative having stated that the cleaning and coating of the steel work in the hold and 'tween decks would be attended to as early as possible by the crew, which in my opinion was satisfactory."

He did not think that anything should be done for the moment in the hold, but that that should be cleaned and coated as soon as possible, and that was work the crew should do. She was in the Tyne at that time, and she loaded a cargo of coal which she took to Port Said and discharged there without damage to the coal. From Port Said she went to Alexandria and loaded a cargo of cotton seed. She left on the 3rd or 4th Sept. and there was a survey about that time. She arrived in London somewhere about the beginning of October, and a good deal of the cotton seed cargo was found to be damaged. When the cargo was discharged she was surveyed in order to find out what was the cause of the damage, and the cause of the damage was discovered to be that the ends of two rivets in No. 1 hold had dropped off, and the consequence was that water was admitted to the cargo.

No proper soundings had apparently been taken on the voyage, and no proper pumping had been done, with the result that the damage

was a great deal worse than it would have been if proper precautions had been taken on the voyage. Before the voyage started nothing whatever had been done to carry out the undertaking given to Lloyd's surveyor that the holds should be cleaned and coated. The whole history does not impress one with the idea of this vessel having been carefully attended to or very carefully navigated.

The next question is, What caused the rivets to break and the heads to drop off? The judge has found, and I think rightly, on the evidence, that it was caused not by any original defect in the rivets, not by the hole through which the rivets had been knocked being not true, but by the accumulation of rust caused by the oxidisation of the metal causing an accumulation of rust between the frame and the plate and putting a tension on the rivets which was an undue tension causing them to go and the heads to break off during the voyage. Some not absolutely calm weather was encountered on the voyage, weather which would cause the ship to work to a certain extent, although the working would not be very much in this part of the ship, but, according to the judge, not weather which caused the damage at all. Because he found that was not the cause of the rivet heads dropping off.

I was a little puzzled at one time to see how that happened. Nobody seems to have asked the engineer. But we were told by one of the counsel that the reason was that when the process of oxidisation began, it would cause the steel of which the frame and plate were composed to swell and become larger, and put tension on the rivets, and when the process had become complete, and the rust formed, the rust would be left there. There is no doubt that an amount of rust, five-sixteenths of an inch, was eventually found at this place. That being the state of things, and that being the reason for the damage, the question is whether the defendant is protected by the clauses of the bill of lading. The clause which is important for this purpose is this: "All the above exceptions (one being perils of the sea) are conditional on the vessel being seaworthy when she sails on the voyage."

The judge has found, and I think rightly, that this accumulation of five-sixteenths of an inch of rust could not have been caused in any very short time, and must have been in evidence substantially to that extent when the ship sailed. He has also held, and I think rightly, that if the ship sailed with such an accumulation of rust that it caused danger to the rivets, put such a tension upon them that they might go without any exceptional weather, the ship was unseaworthy.

The last part of the clause in the bill of lading has to be considered. The clause goes on: "But any latent defects in the hull and (or) machinery shall not be considered unseaworthiness provided the same did not result from want of due diligence of the owners or any of them, or of the ship's husband or manager."

We have had some argument as to whether "owner" there means "owner at the time" or "any owner who may have been owner at any time." It is not necessary to consider that, because, in the view I take, the owner is liable even if that refers only to the owner at the particular time.

The first thing is that there must be a latent defect. We have been told there is no definition of a latent defect, and I am afraid that state of things will not be altered by this decision. I do not propose to give a definition of "latent defect." But I think, at any rate, it is safe to say that if a defect such as appeared could be discovered by the exercise of ordinary care, it cannot be said to be latent. I do not mean to say that is a complete test. I think the judge has treated the case rather as if the question of whether a defect was or was not latent is the same thing as whether the person charged with the care of the vessel was or was not negligent in not discovering it. I am by no means convinced it is the same. At any rate, I am not going to define latent defect any more than I have.

What is the position here? This owner had been told that some work had to be done in this hold by the crew. He also knew he was going to carry a perishable cargo. He did absolutely nothing. If anything had been done could this accumulation of five-sixteenths of an inch of rust have been discovered? The judge seems to have been advised that it could by a careful examination, and the rest of his judgment does not seem to me to be consistent with that finding. But it has been argued that "careful" means some amount of care you could not expect anybody to exercise. I thought it well to ask our assessors whether this rust could have been discovered by the exercise of ordinary care, so as to avoid any question of whether "careful" in the judge's judgment had the meaning of extraordinary care.

We are advised that by a competent person it could have been discovered by the exercise of ordinary care, and if discovered it should have been recognised as dangerous and remedied. The evidence agrees entirely with that advice. The two cargo surveyors say they did observe this rust when they made the survey of the inside of the hold at the end of the voyage. I do not think the gentlemen who surveyed on behalf of the defendants go so far as to say it could not be seen, but they say it was not seen, and great reliance was placed on that. Still greater reliance was placed on the fact that Mr. Richards, according to his report, and Mr. Gilmour, Lloyd's surveyor, who surveyed before the ship went on her fresh voyage in this ownership, did not see it or at any rate did not say anything about it.

When Mr. Gilmour was asked about this he would not say he did not see it and would not say he did. He did not recollect, and as some work was going to be done in that hold he may not have thought it necessary to examine it quite so minutely as he otherwise would have done. On that evidence it is very difficult to

found the argument that this examination was and must have been so careful at that time that it shows that something very extraordinary was necessary to find out the existence of this rust.

Taking the whole of the evidence together I think it supports the advice given to us, that by the exercise of ordinary care by a competent person, the existence of the rust would have been found, and if it had been found everybody agrees that something should have been done. In face of these facts can this be said to be a latent defect? It seems to me it cannot. If it was not this ship was unseaworthy and the owner cannot be excused on the ground that it was a latent defect not resulting from want of due diligence.

I find it very difficult to reconcile some parts of the judge's judgment with other parts—his finding that the cause of the trouble was the accumulation of rust, which put an undue strain on the rivets, and the necessary implication from that that there must have been at the beginning of the voyage substantially this amount of accumulation; his statement that he is advised that careful examination should have disclosed rust to the extent of five-sixteenths of an inch, and that it must have been the growth of a year or more—it seems almost impossible to reconcile these findings with the finding that this was a latent defect. Because if a thing can be found by careful examination it is not latent. I think he has a little mixed up the question of whether there there was negligence on the part of certain surveyors and whether this defect was latent. Even assuming they were not negligent, if this could have been discovered by ordinary care then the defendant does not come within the protection of the bill of lading at all.

I do not say anything about the other matters discussed before us, particularly whether the case of the *West Port Coal Company* v. *McPhail* (*sup.*) applies where the master is not only part owner but sole owner of the vessel. I do not think it is necessary to discuss that in the view I take; nor the question of whether the owner as owner would be liable for his default as master if there were default in not properly sounding and pumping during the voyage. These questions do not arise, and therefore I think it better to say nothing about them.

Atkin, L.J.—I agree; and it is only because we are differing from the learned judge that I add a few words. It appears to me unnecessary to quarrel with any findings of fact of the judge in this case. He found that there was a layer of rust amounting to from five-sixteenths to six-sixteenths of an inch between the flange of one of the frames of No. 1 hold and the plating; and he found that it had existed for a considerable time, and that that, in fact, caused the points of the rivets to fall off by causing an extra tension on the rivets. All the surveyors who were called were of the opinion that that state of things, if it existed, was sufficient to cause the points of the rivets to fall off. Therefore I do not pause to criticise that statement. My own scientific knowledge would not enable me to do it. All the surveyors do not agree that in this particular case that defect did cause the particular destruction of the rivets, because defendant's surveyor suggested that there was an initial defect in the rivets. But that was negatived by the judge. The judge also found that a careful examination by a competent person would have revealed the existence of this state of rust. That view of his has been confirmed by the assessors who help us here.

Under these circumstances it appears to me perfectly impossible to say that the defect was a latent defect. The judge has so found; and it is necessary to inquire shortly what is the meaning of a latent defect. I suppose normally speaking it means some defect that lies hid as opposed to a defect that lies open. But it is suggested that it is not every defect that cannot be perceived by touch or sight or hearing exercised with the most minute examination or observation that is latent; and I can believe that when the word is used with reference to defects in a ship's hull and machinery it may not be capable of the very extreme meaning that they cannot be perceived by the most accurate and refined perception. It was suggested to us that the definition contained in a work of authority, Carver, gathered from American decisions, is a better statement of what is meant by latent defect. That definition is: "A defect which could not be discovered by a person of competent skill and using ordinary care."

In this case I do not think it necessary to say whether that is the true and precise definition of latent defect which would meet every case. But I am prepared to say this: that a defect which does not comply at any rate with these words could not be a latent defect; and I think it is important, bearing in mind the effect of these words, to remember that the phrase is, "which could not be discovered," not which would not be discovered or which might not be discovered. If these words were used it would appear that there would be no difference between the test of what was a latent defect and the test of whether the persons responsible had been negligent or not; and I am quite clear that negligence is not a test of latency.

In this case it is impossible to say this defect could not have been discovered by persons of ordinary skill. One has only to visualise what is meant by a degree of rust of five-sixteenths of an inch existing by the side of the opening between the flange of the frame and the side plate, an interstice into which a man could place his finger, to make it impossible to suggest that this defect was a latent defect. It seems to me to have been a patent defect to anyone looking out for rust.

For these reasons, I think the judge, although correct in all his findings of fact, was wrong in the conclusion he drew from them, and that this was not a latent defect. If that is so, it becomes unnecessary to consider the other interesting questions raised before us.

I agree that there should be a decree for the plaintiffs condemning the defendant and his bail in damages with a reference to the registrar to fix the amount.

Younger, L.J.—I am entirely of the same opinion.

Solicitors for the appellants, *Thomas Cooper and Co.*

Solicitors for the respondents, *Downing, Middleton,* and *Lewis.*

Nov. 20, 22, 23, *and Dec.* 15, 1922.

(Before Bankes and Scrutton, L.JJ. and Eve. J.).

Paterson Zochonis and Co. Limited *v.* Elder Dempster and Co. Limited and others. (*a*)

appeal from the king's bench division.

Damage to cargo—Unseaworthiness—Bad stowage — Unsuitability of ship for particular cargo—Exemptions in bill of lading—Liability of shipowner.

A steamer had been chartered for the purpose of carrying palm oil and other produce from West Africa to the United Kingdom. She had no 'tween decks or any appliances for laying a temporary 'tween deck. Her hold was 24ft. deep. The butts and casks containing the palm oil were stowed at the bottom of the hold and the space above them was filled with bags of kernels which were laid without any effective protection upon the butts or casks with the result that many of the butts or casks were crushed and much of the oil was lost. In an action by the owners of the goods against the charterers and owners of the ship,

Held (Scrutton, L.J. dissenting), that the damage to the cargo did not arise from bad stowage, but that the ship was unseaworthy inasmuch as she was wanting in the necessary equipment to carry the plaintiffs' oil.

The bills of lading exempted the charterers, inter alia, *from liability for loss, injury, or damage arising from a leakage or breakage, or for damage arising from other goods by stowage or for loss or damage arising from collision, straining, or any other peril of the sea, " whether any perils, causes or things in this clause mentioned are due to . . . the wrongful act, omission or error in judgment or negligence of the company's pilot, master, officer . . . crew, stevedore or any person whomsoever in all the service of the company, or not . . . and whether due to or arising directly or indirectly from unseaworthiness of the ship . . . provided in case of any loss, injury or damage arising from or due to unseaworthiness of the ship at the beginning of the voyage all reasonable means shall have been taken to provide against such unseaworthiness. The company may entrust to experienced or qualified officers . . . the duty of providing against unseaworthiness and shall then be deemed to have fulfilled its obligation hereunder. This clause shall be construed as in addition to and not in derogation of or in substitution for any statutory exemption or provision in favour of the company."*

Held, by Bankes, L.J. and Eve, J. that this clause did not touch the plaintiffs' complaint of the breach of the implied warranty that the vessel was seaworthy when she started.

Bank of Australasia *v.* Clan Line Steamers Limited (13 *Asp. Mar. Law Cas.* 99 ; 113 *L. T. Rep.* 261 ; (1916) 1 *K. B.* 39) *followed.*

Decision of Rowlatt, J. affirmed.

Appeal from a decision of Rowlatt, J. in an action tried by him without a jury.

The plaintiffs' claim was for damages to a quantity of palm oil in casks and butts while being conveyed on the steamship *Grelwen* from ports on the West Coast of Africa to Hull.

The total number of casks and butts shipped was 437 of which 299 casks were shipped at Sherbro in West Africa and 138 butts at Conakry in French Guinea. On arrival at Hull it was found that in many instances the casks had been crushed or flattened by the weight which had been placed upon them and a large quantity of oil had escaped into the holds and bilges of the vessel. The goods were carried under bills of lading issued by Elder Dempster and Co. Limited, the African Steamship Company, and the British and African Steam Navigation Company Limited, all of Liverpool, of whom Elder Dempster and Co. Limited were the time charterers of the vessel.

The bills of lading contained the following clauses :—

The shipowners hereinafter called the company . . .

2. . . . shall not be liable for any loss, injury or damage arising from : the act of God, the King's enemies . . . leakage, breakage, chafing . . . insufficiency of wrappers and packages ; or for any damage arising from other goods by stowage or contact with the goods shipped hereunder ; or for any loss, injury or damage arising from sweating, leakage, smell or evaporation from such goods or any other goods. The company shall not be liable for risk of lighterage, craft, hulk, storage or transhipment, or for loss, injury or damage arising from or due to explosion, heat, fire at any time or place whatever, boilers, steam engines, or machinery, or from any damage to or defect in hull, tackle, boilers, steam engines or other engines, oi, or other fuel, or machinery, sheds, warehouses, carts or other vehicles, or their appurtenances. The company shall not be liable for or for any loss or damage arising from or due to collision, stranding, straining, jettison or any other peril of the seal rivers, navigation, or land transit, of whatsoever nature or kind ; whether any perils, causes or things, in this clause mentioned, are due to, or arise directly or indirectly from the wrongful act, omission or error in judgment or negligence of the company's pilot, master, officer, engineer, crew, stevedore, or any person whomsoever in the service of the company, or any person or persons or company for whose acts the company would otherwise be liable, or not, and whether on the ship carrying these goods or not ; and whether due to or arising

(*a*) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

directly or indirectly from unseaworthiness of the ship, vessel, craft or lighter at the commencement of the carriage or during the carriage or any part thereof; provided in case of any loss, injury or damage arising from or due to unseaworthiness of the ship at the beginning of the voyage all reasonable means shall have been taken to provide against such unseaworthiness. The company may entrust to experienced or qualified officers, servants or agents the duty of providing against unseaworthiness, and shall then be deemed to have fulfilled its obligation hereunder. This clause shall be construed as in addition to and not in derogation of or in substitution for any statutory exemption or provision in favour of the company.

4. The company shall not be liable in any event for loss of, or damage to, meat, butter, fruit and (or) other perishable goods, placed or carried in cool or refrigerated chambers in what manner soever such loss or damage may be caused. All such goods are carried on the express condition that the shipper and consignee waive any and every warranty of seaworthiness or fitness implied or otherwise . . . the company undertaking only the appointment of experienced officers and engineers, the shippers being at liberty to inspect the refrigeration chambers before shipment of their goods. . . . All the exceptions contained in clause 2 hereof when consistent with the terms of this clause shall apply to the shipment, carriage and delivery of the above mentioned and other perishable goods, but nothing contained in clause 2 hereof shall be deemed in any wise to lessen the force of any stipulation contained in this clause, and in particular the exception of unseaworthiness or unfitness under this clause shall be absolute and shall not be subject to the proviso contained in clause 2 hereof with reference to unseaworthiness or unfitness.

10. No claim whatever for loss or damage to goods will be admitted unless it be made in writing with full particulars to the company or its agent within two days after the delivery of, or failure to deliver the goods. Any claim shall, if required by the company, be presented in Liverpool. . . .

11. The company has the right to carry the goods below deck and (or) on deck in branch steamers and (or) lighters, river steamers, launches, boats or canoes, and to land and store goods for the purpose of transhipment, reshipment or further carriage, and shall have the right to sub-contract in respect of the carriage or any part thereof, and shall not be liable for any loss, damage or injury within the exceptions in this bill of lading mentioned, whether due to the negligence of its servants or not, but such exceptions shall apply to carriage by such sub-contractors as if such sub-contractors were specifically mentioned in the said exceptions. . . .

In witness whereof the agent of the company hath signed . . . bills of lading of this tenour and date. . . .

The plaintiffs, who were the shippers and owners of the goods, claimed damages from the Griffith Lewis Steam Navigation Company as owners of the vessel and from the other defendants as the persons liable upon the bills of lading.

At the trial in the court below the main question, so far as the evidence was concerned, was whether the responsibility for the damage rested upon the plaintiffs on the ground that the butts and casks were not reasonably fit for the purpose for which they were used or whether it rested upon the defendants upon the ground that the vessel was unseaworthy in the sense that she was not properly or sufficiently equipped to carry this particular cargo. On the question of the condition of the casks Rowlatt, J. found in the plaintiffs' favour. As regards the state or condition of the vessel he found that she was unseaworthy. Judgment was accordingly entered for the plaintiffs. The defendants appealed.

Stuart Bevan, K.C. and *Pritt* for the appellants other than the Griffith Lewis Steam Navigation Company.

Neilson, K.C. and *Clement Davies* for the Griffith Lewis Steam Navigation Company.

Jowitt, K.C. and *C. T. Le Quesne* for the respondents.

The following cases were referred to.

The Thorsa, 13 Asp. Mar. Law Cas. 592; 116 L. T. Rep. 300; (1916) P. 257;

Kopitoff v. *Wilson*, 3 Asp. Mar. Law Cas. 163; 34 L. T. Rep. 677; 1 Q. B. Div. 377;

Ingram and Royle Limited v. *Services Maritimes du Treport Limited*, 12 Asp. Mar. Law Cas. 295; 108 L. T. Rep. 304; (1913) 1 K. B. 538;

Bond, Connolly, and Co. and Woodall and Co. v. *Federal Steam Navigation Company*, 21 Times L. Rep. 438; 22 Times L. Rep. 685;

Calcutta Steamship Company Limited v. *Andrew Weir and Co.*, 11 Asp. Mar. Law Cas. 395; 102 L. T. Rep. 428;

Wiener and Co. v. *Wilsons and Furness-Leyland Line Limited*, 11 Asp. Mar. Law Cas 413; 103 L. T. Rep. 168;

Wade v. *Cockerline*, 10 Com. Cas. 47, 115;

Hayn, Roman, and Co. v. *Culliford and Clark*, 40 L. T. Rep. 536; L. Rep. 4 C. P. Div. 182;

Foulkes v. *The Metropolitan District Railway Company*, 42 L. T. Rep. 345; L. Rep. 5 C. P. Div. 157;

Omoa and Cleland Coal and Iron Company v. Huntley, 37 L. T. Rep. 184; L. Rep. 2 C. P. Div. 464;

Bank of Australasia v. *Clan Line Steamers Limited*, 13 Asp. Mar. Law Cas. 99; 113 L. T. Rep. 261; (1916) 1 K. B. 39;

Tattersall v. *National Steamship Company Limited*, 5 Asp. Mar. Law Cas. 206; 50 L. T. Rep. 299; 12 Q. B. Div. 297;

Morris v. *Oceanic Steam Navigation Company*, 16 Times L. Rep. 533;

Hogarth and Co. v. *Walker*, 9 Asp. Mar. Law Cas. 84; 82 L. T. Rep. 744; (1900) 2 Q. B. 283;

Stanton v. *Richardson*, 1 Asp. Mar. Law Cas. 441; 2 Asp. Mar. Law Cas. 288; 3 Asp. Mar. Law Cas. 361; 33 L. T. Rep. 193; L. Rep. 9 C. P. 390;

Upperton and Wife v. *Union Castle Mail Steamship Company Limited*, 9 Asp. Mar. Law Cas. 475; 89 L. T. Rep. 289;

Queensland National Bank Limited v. *The Peninsular and Oriental Steam*

Navigation Company, 8 Asp. Mar. Law Cas. 338; 9 Asp. Mar. Law Cas. 275; 78 L. Rep. 67; (1898) 1 Q. B. 567;
The Termagant (*Cargo Owners*) v. *Page, Son, and East* (*Limited*), 19 Com. Cas. 239;
Ciampa v. *British India Steam Navigation Company Limited*, (1915) 2 K. B. 774;
The owners of cargo on board the steamship Maori King v. *Hughes and another*, 8 Asp. Mar. Law Cas. 65; 73 L. T. Rep. 141; (1895) 2 Q. B. 550.

Cur. adv. vult.

Bankes, L.J.—The plaintiffs' claim in this action is for damage to a quantity of palm oil in casks and butts while being conveyed in the steamer *Grelwen* from ports in West Africa to Hull. The total number of casks and butts shipped was 437, of which 299 casks were shipped at Sherbro under a bill of lading dated the 22nd Nov. 1919, and 138 butts at Conakry under a bill of lading dated the 3rd Dec. 1919. Both butts and casks were the kind of cargo which must necessarily be stowed at the bottom of a hold. The stowage plan of the vessel was put in evidence at the trial, from which it appeared that the *Grelwen* on this voyage carried butts and casks of palm oil in holds 2, 3, and 4, namely: Hold 2, 523 butts and 57 casks; hold No. 3, 316 butts and 13 casks; hold 4, 232 butts and 82 casks, all shipped at Sherbro, and 147 butts in No. 3 hold, shipped at Conakry. There must be some confusion in the figures on the stowage plan between butts and casks, as according to the plan only 149 casks in all were stowed. It is not possible, therefore, to trace the plaintiffs' oil as shipped at Sherbro into any particular hold. The butts shipped at Conakry were stowed in No. 3 hold. On arrival at Hull the butts and casks and their contents were found to be in what some of the witnesses described as a shocking condition. The butts and casks had in many instances been crushed or flattened by the weight which had been placed upon them, and a large quantity of oil had escaped into the holds and bilges of the vessel. The plaintiffs claimed damages from the Griffith Lewis Steam Navigation Company, as owners of the vessel, and from the other defendants as the persons liable upon the bills of lading.

There can be no doubt as to what caused the damage complained of. It was undoubtedly the great weight of the cargo which was stowed directly upon the butts and casks. In each case this cargo consisted of bags of kernels of a total weight in No. 2 hold of 781 tons, in No. 3 of 660 tons, and in No. 4 of 709 tons. At the trial in the court below the main question, so far as the evidence was concerned, was whether the responsibility for the damage rested upon the plaintiffs, on the ground that the butts and casks were not reasonably fit for the purpose for which they were used, or whether it rested upon the defendants, upon the ground that the vessel was unseaworthy in the sense that she was not properly or sufficiently equipped to carry this particular cargo. On the question of the condition of the casks, the learned judge found in the plaintiffs' favour, and no question arises on that point now. The argument in this court on this part of the case has been confined to the question of whether, upon the plaintiffs' evidence, the judge's finding that the vessel was unseaworthy was justified. Before dealing with the evidence it is necessary to define precisely what the obligation upon the defendants is, and to consider some of the authorities to which attention has been called. I select a passage from Lord Blackburn's speech in *Steel and another* v. *The State Line Steamship Company* (3 Asp. Mar. Law Cas. 516; 37 L. T. Rep. 333; 3 App. Cas. 72, at p. 86), as exactly expressing what the extent of the obligation is: "I take it, my Lords, to be quite clear, both in England and in Scotland, that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a 'warranty,' not merely that they should do their best to make the ship fit, but that the ship should really be fit."

The question in every case must be whether the vessel is or is not fit for the purpose of carrying the particular cargo in respect of which the complaint of unseaworthiness is made. It is not necessary that the complaint should have reference to the whole of the vessel. It is quite sufficient if it is established as to a particular part of the vessel in which the cargo about which the complaint is made is carried. The complaint must have reference to the state or condition of the vessel, and very often it has reference to the want of some necessary equipment. I propose to refer to a few only of the authorities in support of these propositions. In *Tattersall* v. *National Steamship Company Limited* (*sup.*) the complaint was infection of the vessel by foot and mouth disease rendering her unfit to carry cattle. In *Stanton* v. *Richardson* (*sup.*) the complaint was that the vessel's pumps were unfit to enable her to carry a cargo of wet sugar. In *Ciampa* v. *British India Steam Navigation Company Limited* (*sup.*) the complaint was of the after effects of the fumigation of a vessel upon a parcel of lemons. In *Queensland National Bank Limited* v. *The Peninsular and Oriental Steam Navigation Company* (*sup.*) the complaint was of the construction of the bullion room. In *Upperton and Wife* v. *Union Castle Mail Steamship Company Limited* (*sup.*) the complaint was as to the construction of a lavatory which was used as a luggage room. In all the above cases the complaint was held upon the evidence to be justified, and the finding was that the ship was unseaworthy. In *The owners of cargo on board the steamship Maori King* v. *Hughes and another* (*sup.*) where the question

turned upon a breakdown of refrigerating machinery during the voyage, A. L. Smith, L.J. formulated the point for decision in these words : " Whether the plaintiffs are right in saying that there is an implied warranty that that part of the ship in which the meat is taken shall be seaworthy when the voyage begins."

The question for decision in the present case depends upon what is the true inference to be drawn from the facts. Before dealing with the evidence, I must call attention to the course the action took in the court below. The plaintiffs' case was that the vessel was unseaworthy for one or both of two reasons : (1) that the proper steps had not been taken to equip the vessel so as to enable a temporary deck or platform to be laid to keep any excessive weight off the tiers of casks, (2) that the escaped oil had clogged the pipes leading to the pumps. The learned judge decided against the plaintiffs' second contention, and I did not understand that any objection to this finding was pressed in this court.

The defendants' case, on the other hand, so far as the evidence was concerned, was confined to an attempt to prove that the fault lay entirely with the condition of the butts and casks, and that no complaint could be made of the stowage. Having failed in this contention, the appellants are driven to contend as their only point in this court that the damage was caused by bad stowage and that the vessel was not unseaworthy. The question for decision, consequently, is whether the facts as proved constitute a case of damage, as the result of bad stowage, or damage as a result of unseaworthiness, in the sense in which that word is used in this connection. I here wish to point out that mere proof of the fact that the loss complained of may have resulted from bad stowage does not exclude all possibility of establishing a case of unseaworthiness. Scrutton, J. calls attention to this point in *Ingram and Royle Limited* v. *Services Maritimes du Treport Limited* (*sup.*) and cites authority in support of the proposition.

I pass now to consider the material facts, upon which there is little, if any, dispute. Palm oil in butts or casks is what Mr. Minto, the marine superintendent of Messrs. Elder Dempster, describes as a prominent feature of West African cargoes. Messrs. Elder Dempster employ a number of vessels in the West African trade. All the vessels regularly engaged in the trade have 'tween decks. Palm oil in casks or butts is always loaded at the bottom of a hold, and the butts or casks are piled on each other in tiers. There is a difference of opinion as to whether the butts or casks will bear the weight of more than three tiers. Some witnesses speak to four. No one suggests more than four. In 'tween deck ships four tiers or three tiers with a small quantity of kernels in bags will fill the hold, and, consequently, in 'tween deck ships there is no possibility of subjecting the butts or casks to the pressure to which they were subjected in the present case.

The *Grelwen* is not regularly engaged in this trade. She was chartered in May 1919 on a time charter for twelve months. Her captain had never before this voyage had any experience of palm oil cargo. The vessel has no 'tween decks. She is what is known as a single deck ship and her holds are some 24ft. deep from the main deck to the tank top. The whole, or practically the whole, of these spaces above the three or four tiers of butts and casks were, on the voyage in question, filled with bags of kernels which were laid without any effective protection upon the butts or casks. There was no satisfactory evidence of palm oil in casks ever having been safely carried in a single-deck ship before. One witness spoke to two occasions, but he could give no names, and no investigation was made into the question of how the cargo was stowed or protected, but in one of the two instances it was proved that the casks were badly damaged. The complaint of the plaintiffs is that the vessel was not properly equipped in that there was no proper receptacle (to use the language of Collins, M.R. in *Upperton and Wife* v. *Union Castle Mail Steamship Company Limited* (*sup.*) in which the palm oil could be carried. They contend that the erection of a platform or temporary deck on which the weight of the bags of kernels could be carried was essential in order to render the vessel seaworthy to carry their particular cargo.

Temporary 'tween deck platforms are, according to the plaintiffs' evidence, quite well-recognised forms of a vessel's equipment in cases where the nature of the cargo requires them. One witness speaks of their use in connection with the carriage of onions, and another in connection with the carriage of candied peel. The *Grelwen* was so constructed that she would have required some special fittings to carry the beams on which the platform would be laid ; and it might, and probably would, have been necessary for her to take the beams out with her to the West African coast. On this point the evidence of Captain Coysh, a marine surveyor called for the defendants, is important. In answer to Mr. Jowitt he said that it would have been quite possible to rig up a temporary deck, and that it is simple enough to carry out the necessary beams for a platform if it is known that the ship is going to carry oil in casks.

As to the necessity and reasonableness of this particular form of equipment, and as to its absence constituting unseaworthiness, the evidence is all one way. The nature of the damage sufficiently indicates the necessity. The witnesses who were called for the plaintiffs depose to the other points, and no one was called to contradict them. The answer attempted is that the casks, if proper casks, would have carried the weight placed upon them. The judge has negatived this contention, and no one is now questioning that part of his decision. He has accepted the evidence of the plaintiffs' witnesses. Is there any authority which indicates that he was not entitled to accept it ? I think not. On the contrary, I think that the language used in some of the cases tends in favour of the view taken by the learned judge. I will deal with some of these cases before dealing with those in

which the decision has been in favour of bad stowage as against unseaworthiness. *Hogarth and Co.* v. *Walker*, 9 Asp. Mar. Law Cas. 84; (1899) 2 Q. B. 401; 82 L. T. Rep. 745; (1900) 2 Q. B. 283) was a case tried before Bigham, J., in which the question was whether under a policy of insurance covering ship's "furniture" dunnage mats and separation cloths were included in that expression. The learned judge treats both as necessary for the carriage of the cargo, and says that if the ship went to sea without them she would be unseaworthy. He says that he sees no distinction between them and moveable bulkheads. In the Court of Appeal A. L. Smith, L.J. says with regard to the dunnage mats, at p. 285: "If they are, as was stated, laid on the floor of the ship to prevent the grain from being damaged by wet from the floor, I should think that the vessel would not be seaworthy for the carriage of grain in bulk unless she had such mats." There does not appear to me to be any difference in principle between the temporary platform contended for in the present case and Bigham, J.'s temporary bulkhead or A. L. Smith, L.J.'s equipment for protection of the cargo from damage from below. I refer also to the judgment of Collins, M.R. in *Upperton and Wife* v. *Union Castle Mail Steamship Company Limited* (9 Asp. Mar. Law Cas. 475; 89 L. T. Rep. 289; 9 Com. Cas., at p. 52): "Now the ship in order to be seaworthy for the business of carrying passengers and luggage must be fitted and equipped with proper receptacles for the luggage. It is admitted that at the time of starting from Las Palmas this lavatory was the only available place for the respondents' luggage; *primâ facie* therefore, the ship was not at that time properly equipped. It was contended, however, that the damage was really due to negligent stowage or to a negligent act on the part of one of the crew. It seems to me that this was a question of fact and that there was plenty of evidence to justify the learned judge in finding that the ship was not seaworthy."

I pass now to consider a few of the cases in which the decision has been against unseaworthiness, and in favour of bad stowage. *The Thorsa* (13 Asp. Mar. Law Cas. 592; 116 L. T. Rep. 300; (1916) P., p. 257) is one of the more recent. In that case the trial judge held upon the evidence that the damage was due to bad stowage, and that the ship was not unseaworthy. On appeal the decision was affirmed. Swinfen Eady, L.J., in his judgment at the bottom of p. 261, expressly points out that in that case it had not been contended that the ship was in any way defective in design or structure or in condition or equipment at the time she sailed. The *Calcutta Steamship Company Limited* v. *Andrew Weir and Co.* (11 Asp. Mar. Law Cas. 395; 102 L. T. Rep. 428; (1910) 1 K. B. 759) was a case in which a number of points were raised, and among them the question of unseaworthiness of the vessel by reason of some dates, which were damaged, being placed in a particular position in one part of a hold. A passage in the judgment of Hamilton, J., as he then was, at 15 Com. Cas., p. 191 is, I think, instructive, as he makes it clear that he comes to this decision upon the evidence laid before him. *Bond, Connolly, and Co., and Woodall and Co.* v. *Federal Steam Navigation Company Limited* (21 Times L. Rep. 438, and 22 Times L. Rep. 685) is another case to which reference may be made. In that case Channell, J. held, upon the evidence, that the equipment of the ship, so far as the refrigerating machinery was concerned, was ample, but that it had been rendered insufficient by reason of bad stowing. He refused to find that the ship was unseaworthy. I have referred to these authorities as samples only of their class. They do, I think, sufficiently indicate the lines upon which the decisions have proceeded when dealing with questions of unseaworthiness and of bad stowage as opposed to unseaworthiness.

In my opinion, Rowlatt, J. was justified, upon the evidence before him, in arriving at the conclusion at which he did arrive on this part of the case. I agree with him in thinking that the vessel was wanting in the necessary equipment to render her seaworthy to carry the plaintiffs' oil.

Every case must depend upon its own particular circumstances. The present case seems to me a very special one in which the evidence takes it altogether out of the region of bad stowage and into the region of unfitness of the vessel to carry the particular cargo. Captain Minto, the appellant's principal witness, seems to share this view, as on page 19 of the Note of his evidence he treats the piling of oil casks eight tiers high as not being a question of stowage at all. In dealing with this case I do not think that the court is at liberty to take the stowage plan and endeavour to restow the cargo so that damage could have been avoided. No one has suggested that it would have been possible, and the court has no evidence on which to act. I also think that it is no answer to the complaint that the holds of this vessel were unfit to carry palm oil, and in that sense unseaworthy, to say that if no other cargo but the palm oil had been placed in them no damage would have been done, and that the case is therefore one of bad stowage.

Having arrived at the conclusion that the vessel was unseaworthy, it is necessary to deal with the contention that the appellants are protected by the conditions in the bills of lading. The bills of lading do not contain any express warranty of seaworthiness. Under these circumstances it is, I think, established that, though exceptions may be introduced in a bill of lading to an express warranty of seaworthiness, where there is no express warranty exceptions will be read as not applicable to the implied warranty. I endeavoured to give an explanation of this rule in *Bank of Australasia* v. *Clan Line Steamers Limited* (13 Asp. Mar. Law Cas. 99; 113 L. T. Rep. 261; (1916) 1 K. B. 39, at p. 55), but I am not sure that it is not wiser to accept the fact than to attempt to give an explanation of it. Be that

as it may, if the rule is applied in this case the result is that none of the exceptions touch the plaintiffs' complaint of the breach of the implied warranty that the vessel was seaworthy when she started on her voyage. Apart from this consideration I think that the appellants must fail upon this part of the case upon one or both of two grounds: (*a*) that the language of the exception clause No. 2 is so ambiguous that it affords no protection, *Nelson Line Limited* v. *James Nelson and Sons Limited* (10 Asp. Mar. Law Cas. 581; 97 L. T. Rep. 812; (1908) A. C. 16); (*b*) that no case with regard to the officers' being experienced or qualified was made in the court below, and that even if it had been made there was no evidence that all reasonable means had been taken by the employment of officers, servants, agents, or otherwise to provide against unseaworthiness.

For these reasons I consider that the appeal by the defendants other than the owners fails. With regard to the owners, I cannot see how they can be in a better position than the charterers and grantors of the bills of lading. Under these circumstances the appeal of both sets of appellants fails and must be dismissed with costs.

SCRUTTON, L.J.—This is an appeal from a judgment of Rowlatt, J. finding the owners and charterers of a steamer called the *Grelwen* liable for damage to a shipment of palm oil in casks. The damage complained of is that the casks were crushed by excessive weight loaded above them without sufficient means being provided to keep the weight off the casks. The judge has found that the ship was unseaworthy, in the sense of being unfit for the carriage of this cargo, and I gather that the exact unseaworthiness he finds is that the ship had not on board iron or wooden beams 50ft. long to go athwart the holds and support a platform which would keep the superior weight off the casks below.

The *Grelwen* is classed 100 A1 at Lloyd's and is a ship of what is known as the Isherwood construction, a type analogous to a standard ship, having, amongst others, this feature, that in the hold under the main deck she has not, as many ships have, either a permanently laid 'tween deck, or permanent 'thwartship beams on which a temporary 'tween deck could be laid. She has a single hold some 24ft. deep. It would be absurd to suggest that merely on that account she is unseaworthy. Lloyd's class her with that feature of construction, which has many advantages for stowage.

Most of the ships running in the Elder Dempster Line from and to West Africa have a laid 'tween deck under the main deck. Between the 'tween deck and the floor of the hold there is room for four tiers of palm oil casks, or three tiers and some bags. This is normal stowage and the weight is not enough to damage the bottom tier. But in a deep hold like the *Grelwen's* when three tiers of palm-oil casks have been stowed there are still some 15ft. of space which if filled with bags of palm kernels would have four times as much weight as a fourth tier of casks. There was on the ship some light cargo, 201 bales of wool, and 11,500 bundles of piassava, described in the evidence as light straw-like fibre. Instead of utilising this light cargo in holds 2, 3 and 4, or leaving, as a ship often has to do, an empty space at the top of the hold, a platform was laid of shifting boards on the top of the casks and on this the hold was filled with bags of palm-nut kernels. An attempt was made to prove that the casks were defective. The learned judge negatived this, and I see no reason to interfere with his finding. I treat the case on the assumption that excessive weight stowed above the casks damaged them, and that this was bad stowage. Was it within the authorities unseaworthiness?

It has been established by authorities binding on this court that the fact that a ship, seaworthy in other respects, sails on her voyage with a hold so stowed that one parcel of cargo must damage another is not unseaworthiness of the ship, but bad stowage by the ship's servants. Swinfen Eady, L.J. expresses this in *The Thorsa* by saying: "The contention put forward really amounts to this: that if two parcels of cargo are so stowed that one can injure the other during the course of the voyage, the ship is unseaworthy. I am not prepared to accept that. It would be an extension of the meaning of 'unseaworthiness' going far beyond any reported case." Similar passages are to be found in the judgments of *Bond, Conolly, and Co. and Woodall and Co.* v. *Federal Steam Navigation Company* (*sup.*); *Calcutta Steamship Company Limited* v. *Andrew Weir and Co.* (*sup.*); *Wade* v. *Cockerline*; and *Ingram and Royle Limited* v. *Services Maritimes Du Tréport Limited* (*sup.*). These cases, and particularly the decision of this court in *The Thorsa* (*sup.*), in my opinion, prevent us from saying that a ship which starts with her cargo so stowed that damage must ensue on the voyage is therefore unseaworthy. The ship must be fit at loading to carry the cargo the subject of the particular contract. If she is so fit, and the cargo when loaded does not make her unseaworthy, as in the case of the iron plates which might go through the ship's side, the fact that other cargo is so stowed as to endanger the contract cargo is bad stowage on a seaworthy ship, not stowage of the contract cargo on an unseaworthy ship. The *Thorsa*, when loaded, was so stowed that the cheese would damage the chocolate, but this court did not hold her unfit to carry the chocolate. She could have carried it safely if properly stowed. Where weighty cargo is stowed on the top of perishable cargo, the ship, if stable, is not unseaworthy, but is badly stowed. The nautical witnesses who said this ship was unseaworthy would also have said the *Thorsa* was unseaworthy, for they did not know the law. I myself am not aware of any case, and counsel could not refer us to any case, where a ship has been held unseaworthy from the fact that the stowage of one parcel of cargo necessarily damaged another, except in cases where the bad stowage endangered the safety of the ship and so caused the damage, as in *Kopitoff* v. *Wilson* (*sup.*), where the bad stowage

of armour plates allowed them to make holes in the ship's side; or where the temporary condition of the ship made her unfit to carry the cargo safely, as in *Tattersall* v. *National Steamship Company Limited* (*sup.*) where the hold for cattle was infected with bacilli of foot and mouth disease; or the condition of the permanent equipment made her so unfit, as in *Stanton* v. *Richardson* (*sup.*) where the pumps were not fit to drain a wet sugar cargo contracted to be carried, or in *Ciampa* v. *British India Steam Navigation Company Limited* (*sup.*) where the absence of a bill of health caused cargo to be fumigated and damaged. But where the ship herself is fit for the cargo contracted to be carried, if carefully stowed, but sails in an unfit condition as a cargo carrying and loaded vessel because other cargo is improperly stowed so as to damage the contract cargo, in my opinion that condition is bad stowage, and is not a breach of an obligation to provide a seaworthy ship. I think, indeed, the cargo owner's counsel admitted this view of the law, but argued that here there was defective equipment of the ship, or stowage which affected the safety of the ship.

The contention as to defective equipment was, I think, based on the assumption that a ship with a deep hold should carry with her beams wooden or iron fifty feet long to go athwart the hold, if it was desired to stow heavy cargo on the top of cargo which would be damaged by weight. For the fore and aft boards of any platform there was an ample supply of shifting boards. There was no evidence that ships of this class ever carried such lengthy beams as part of their equipment, and it cannot be said that ships of this class, duly classed at Lloyd's, are unseaworthy. The cargo on this bill of lading could have been safely carried in this ship. The reason why it was damaged was the way in which other cargo was stowed so as to damage it. Ships carrying weight cargoes constantly sail with holds not filled, because it would not be safe for them to fill their holds. Either lighter cargo, which was available, or less bags of kernels should have been stowed on the top of the casks. Rowlatt, J. has apparently found that the ship was not seaworthy when she started, because the hold was not prepared in a particular way so as to separate one part of the cargo from the other and prevent damage. This finding might have been made in *The Thorsa* (*sup.*), but it was held in that case that this fact was not enough to make the ship unseaworthy. I am of opinion that the evidence here does not prove any defect in equipment usually and reasonably carried by such a ship.

It was further argued that the ship as stowed was dangerous to herself, because the casks might leak and block the pumps and so cause a dangerous list. This, I think, is far too remote. The casks did leak. The leakage was not at once pumped overboard, because the master did not think it right or necessary to pump overboard freight-paying cargo. In colder water some of the oil congealed and could not be pumped, and it occasioned a slight list. But the list was never dangerous; it could have been corrected by the use of the filling tank, but it was never necessary to use it. Both grounds therefore on which it was suggested that the ship was unseaworthy fail.

If the ship was not unseaworthy, it is not disputed that the exceptions protect the shipowner. This renders it unnecessary to consider what would have been the effect of a finding of unseaworthiness, in view of the express exception on that point. But I cannot accept the view of Rowlatt, J. that the exception of unseaworthiness was limited to matters mentioned in the set of exceptions beginning "collision," which he bases on a limited construction of the word "clause" in that exception. In my view the use of the word "clause" in clause 1 (1), the last sentence in clause 2, clause 4, and the wording of clause 11, show that the word "clause" in the place in question is intended to apply to the whole of clause 2.

Like many other judges, I desire to protest against the extremely illegible condition of this bill of lading. Shipowners have had a good deal of warning from the courts, and some day they will find themselves deprived of the protection of their exceptions on the ground that they have not given reasonable notice of them as terms of the contract.

The above considerations lead to the conclusion that the charterers, with whom, in my opinion, the bill of lading contract was made, and who include the first three defendants, were protected by the exceptions in their bill of lading. But it was argued that the fourth defendant, the owner, was liable in tort because he was not a party to the bill of lading and therefore could not claim the benefit of the exceptions contained in it, but was a bailee liable for negligence—*i.e.*, bad stowage. To this counsel for the owner made reply that the owner in the case of a time charter like the present one was not in possession of the goods. This, in my opinion, is contrary to all authorities, of which *The Omoa and Cleland Coal and Iron Company* v. *Huntley* (*sup.*) is a type. The real answer to the claim is, in my view, that the shipowner is not in possession as a bailee, but as the agent of a person, the charterer, with whom the owner of the goods has made a contract defining his liability, and that the owner as servant or agent of the charterer can claim the same protection as the charterer. Were it otherwise there would be an easy way round the bill of lading in the case of every chartered ship; the owner of the goods would simply sue the owner of the ship and ignore the bill of lading exceptions, though he had contracted with the charterer for carriage on those terms and the owner had only received the goods as agent for the charterer. In *Hayn, Roman, and Co.* v. *Culliford and Clark* (*sup.*), referred to by the court, the charterer was not protected by his bill of lading, and it was useless for the owner to claim the benefit of the bill of lading, or say he held under these terms. If he had held on the terms of the bill of lading its terms did not protect him.

For these reasons, in my view, the appeal should be allowed and judgment entered for the defendants with costs here and below. Of course, the real question is: Which set of underwriters should bear the loss ?

Eve, J.—In Nov. and Dec. 1919 the plaintiffs shipped at Sherbro on the West Coast of Africa and Conakry in French Guinea 299 casks and 138 butts of palm oil for carriage on the steamship *Grelwen* to a United Kingdom port.

On arrival at Hull in Jan. 1920 many of the casks and butts had been so crushed and broken that their contents had leaked out, and in this action a claim is made to recover a sum of 6900*l.* odd by way of damages from the first three defendants as charterers and from the fourth defendants as owners of the ship. The claim is based on the allegations (1) that the vessel was unseaworthy in that she was structurally unfit and (or) not properly equipped for the carriage of the goods, and (2) that the defendants were negligent in and about the stowage, custody, and care thereof. The negligence asserted on the hearing of these appeals was the imposition on the top of the tiers of casks and butts of an excessive weight of palm kernels in bags without erecting in the holds any platform or temporary deck to protect the casks and butts from the excessive weight. The absence of a temporary platform or deck constitutes the structural unfitness relied upon as proving that the vessel was unseaworthy.

The defendants deny the unseaworthiness and, not admitting any negligence in stowage, custody, or care of the goods, rely upon certain exceptions in the bills of lading as protecting them even if negligence be found.

It was sought at the trial to make out a case that the collapse of the butts and casks and the consequential loss or destruction of their contents were due to their inherent weakness attributable to age and exposure, and the greater part of the time occupied in the hearing was directed to evidence upon this issue, but the learned judge has found, and, in my opinion, no other finding was possible upon the evidence, that they succumbed to the excessive weight imposed upon them. Against this finding no argument has been advanced on the appeal, and we have to decide between the parties on the footing that an unreasonable and excessive weight was, in fact, imposed on the butts and casks and that the destruction and damage which resulted was the direct consequence of that imposition.

In these circumstances three questions arise for consideration : the first, Was the ship unseaworthy, that is, unfit to carry these butts and casks, or was the imposition of this excessive weight bad stowage ? The second, What is the true construction of the exceptions relied upon by the defendants ? And the third, What protection, if any, is afforded thereby to the defendants ?

The following appear to me to be the relevant facts about which there is no dispute. The *Grelwen* is a well-known type, a single-deck ship with a shelter deck and with holds some 25ft. in depth ; she is without stringers and is not fitted with scantling fastened to the frames or any other device for rigging up a temporary 'tween deck in the holds. Palm oil is a prominent feature in West African cargoes and the ships that normally bring it are 'tween deck vessels. Palm kernels in bags are constantly shipped with palm oil. All the Elder Dempster ships employed in the West African trade have 'tween decks, but during the War two ships that had no 'tween decks carried palm oil in casks to Hull ; one of them was the *Athelstan* and the other may have been the Belgian boat spoken of by Captain Coysh. There is no satisfactory evidence as to how the casks were stowed in the *Athelstan*, but it is proved that the cargo in the Belgian boat arrived in very much the same condition as the one with which we are now dealing. The oil is brought in casks and the proper place to stow them is at the bottom of the hold ; they ought not to be stowed in more than three tiers, and in that case the space between the top tier and the 'tween deck may be packed with two layers of palm kernel bags ; if four tiers of casks are stowed the risk of collapse is increased, but there is no space for any kernel bags on the top of the fourth tier.

These facts were supplemented by the evidence of Captain Cockrill who, when asked in chief, " Would you say, speaking from your experience, that the vessel was a seaworthy vessel ? " answered " No—she was unseaworthy " ; of Mr. Peel, who was asked, " Do you consider that this was a suitable vessel for the carriage of the palm oil ? " and answered " In the lower holds certainly not " ; and of Mr. Heaton who, when invited to express his view about the erection of a temporary 'tween deck replied : " If it was determined to put oil down below in a hold to the height of three casks and stow palm kernels on top, some erection should have been made to keep the weight off the casks. It is perfectly sure there would be trouble, for some of the casks would collapse. I have never seen an erection made in the West African trade, but I have never been in a ship that had a 26ft. hold to stow oil in." I cannot find that any of these answers were challenged in cross-examination.

On these materials the learned judge came to the conclusion that the ship was unseaworthy. He sums it up by pointing out that there remained above the highest tier of casks a space for cargo some 12ft. to 15ft. in depth, and that unless a feather-weight cargo was stowed in that space the hold was not of a character in which the casks and butts could have been stowed. " Therefore," he concludes, " it is a hold in which you cannot put these casks at the bottom which is the place to put them." Then he adds : " It could have been made proper for the stowage of such a cargo by the erection of what has been called a temporary 'tween deck or a platform, which would tend to keep the weight of the superincumbent cargo off the barrels. That could have been done and then the hold would have been fit to receive this cargo."

The question is: Ought we to dissent from that conclusion? In the first place there was evidence to justify it, and although it may be said that the conclusion is perhaps more in the nature of an inference from facts than a finding of fact itself, the Court of Appeal in *Upperton and Wife* v. *Union Castle Mail Steamship Company Limited* (*sup.*) treated the question whether the damage to the passenger's baggage was due to unseaworthiness or to negligent stowage or a negligent act on the part of one of the crew as a question of fact, and it appears to me we ought not to disregard the evidence to which I have already referred. It certainly goes some way to establish the proposition that in order to be seaworthy for the purpose of carrying palm oil in casks the ship must be fitted with a permanent or temporary 'tween deck and that the deep hold of a single-deck ship is not a fit receptacle for such a cargo unless equipped with the means for keeping any superimposed cargo from resting on the tiers of casks.

It cannot be denied that the distinction between unseaworthiness and bad stowage is in some cases a very fine one, but there is a distinction, and I think it is well illustrated by a comparison of this case with a case like *The Thorsa* (*sup.*) where a hold already half packed with chocolate was filled up with a cargo of gorgonzola cheeses and the damage to the chocolate, resulting from the packing of these two commodities in one hold, was held to be due to improper stowage and not to unseaworthiness. It could not be said there that the hold was not as fit a receptacle for carrying chocolate as it was for carrying the cheeses. It was a fit receptacle for either, but not for both together. But putting them both together did not render it in any way a less fit receptacle for either. The damage therefore did not arise from any defect in the ship's equipment, but solely from the improper placing of the two cargoes in the same hold. Here it is different. The bottom of the hold is the only proper place to stow the casks; the hold is not fit for casks because, assuming they are stowed, as they should be, in three tiers only, no greater weight can safely be imposed on them than would be represented by the weight of a fourth tier, and if they be stowed in four tiers nothing can safely be placed upon them. But it is idle to suppose that the charterers will be sending the ship to sea with only three tiers of casks plus the equivalent in weight of a fourth tier in the hold, and therefore it is that the hold becomes unseaworthy unless it be so equipped as to allow the space above the casks to be utilised without injury to the casks.

On the whole I have come to the conclusion that the learned judge's finding on the issue of unseaworthiness was right, and that the first question I have propounded ought to be answered by saying that the damage complained of was occasioned by unseaworthiness.

On the second question, which relates to the construction of clause 2 of the bill of lading, I am constrained to differ from the learned judge. The construction he has adopted involves the imposition in the last sentence of clause 2 on the word "clause" of a meaning different from that admittedly attaching to it in every other place—and there are several—where it is used in the document. Such a departure from well-recognised canons of construction could only be warranted by a context clearly compelling one in that direction. No such context can be indicated here, and, in my opinion, the expression "this clause" means the whole of clause 2 and nothing less.

There remains the question whether the exceptions afford any protection to the defendants. I do not think they do. I agree that there is no express warranty of seaworthiness in the bill of lading and that the warranty which thereupon arises by implication is not controlled by the exceptions. I also agree that there is no evidence that all such reasonable means to provide against unseaworthiness as are contemplated by clause 2 were, in fact, taken.

It follows that, in my opinion, both these appeals fail and ought to be dismissed.

Appeals dismissed.

Solicitors for the appellants, *Lawrence Jones and Co.*

Solicitors for the respondents, *Rawle, Johnstone, and Co.*, agents for *Hill, Dickinson, and Co.*, Liverpool.

Nov. 23, 24, 27, *and Dec.* 15, 1922.

(Before Bankes and Scrutton, L.JJ. and Eve, J.)

Graham Joint Stock Shipping Company Limited *v.* Merchants' Marine Insurance Company Limited. (*a*).

APPEAL FROM THE KING'S BENCH DIVISION.

Insurance (Marine)—Scuttling of ship—Policy taken out by owner of ship—Money lent on agreement for mortgage—Claim by lenders against underwriters.

The plaintiffs advanced a sum of money to a shipowner on the security of a first mortgage on the whole of the ship. A policy was then taken out by certain brokers in their own names and (or) as agents upon the hull and machinery of the ship against, inter alia, *perils of the seas and barratry of master and mariners. While the policy was still in force the vessel was scuttled by the master and crew with the connivance of the shipowner. In an action brought on the policy against the underwriters by the plaintiffs as mortgagees, Greer, J. held that the plaintiffs were entitled to recover to the extent of their mortgage, since they were parties concerned whom the mortgage was intended to benefit.*

Held, reversing Greer, J., that there being no evidence in support of the plaintiffs' case that

(*a*) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

they were parties to the contract of insurance, they had failed to make a foundation for their claim and could not recover on the policy.

Appeal from a decision of Greer, J.

In 1919 Elie Angelis, a Greek shipowner, contracted with a firm of shipbuilders in Sunderland that they should build for him a steamer, the *Ioanna*, for 330,000*l.* Angelis then arranged with the plaintiffs, who were a firm carrying on business in Glasgow, that in consideration of a mortgage of the steamer to be granted to them when she was completed, they would provide moneys payable from time to time to the shipbuilders as construction proceeded. The plaintiffs provided the necessary funds and the steamer was completed in May 1920. On the 28th July 1920 an agreement for a mortgage, embodying the terms previously agreed, was executed giving the plaintiffs a mortgage on the steamer for 145,000*l.* By a policy of marine insurance, dated the 15th June 1920, the defendants had insured the steamer for twelve months from the 29th May 1920 in the sum of 15,000*l.*, against, *inter alia*, perils of the sea, and the vessel proceeded on a voyage to the United States. On the 31st Jan. 1921 she left an American port with a cargo of coal for the Mediterranean. She called at Gibraltar for orders and was there directed to discharge at Naples. While steaming eastward along the Spanish coast she was sunk owing, it was alleged, to her having come in contact with a mine on the 19th Feb. 1921. Greer, J. held that she was sunk with the connivance and by the orders of the owner. In an action brought on the policy by the plaintiffs against the marine risk underwriters, he held that the plaintiffs had an insurable interest, as they were parties whom it might concern and whom it was intended to benefit when the policy was taken out, and further, that the claim of the innocent mortgagees was not barred by the fraud of the owner. The plaintiffs were therefore entitled to succeed against the marine risk underwriters.

The marine risk underwriters appealed.

R. A. Wright, K.C. and *Claughton Scott* for the appellants.

Jowitt, K.C. and *J. Dickinson* for the respondents.

The following authorities were referred to:

Heyman v. *Parish*, 2 Camp. 149;
Hobbs v. *Hannam*, 3 Camp. 93;
Magnus v. *Buttemer*, 11 C. B. 876;
Soares v. *Thornton*, 7 Taunt. 627;
Nutt v. *Bourdieu*, 1 T. R. 323;
Blyth v. *Shepherd*, 9 M. & W. 763;
Thompson v. *Hopper*, 6 E. & B. 172;
Board of Management of Trim Joint District School v. *Kelly*, 111 L. T. Rep. 305; (1914) A. C. 667;
Reid v. *British and Irish Steam Packet Company Limited*, 125 L. T. Rep. 67; (1921) 2 K. B. 319;
Mountain v. *Whittle*, 15 Asp. Mar. Law Cas. 255; 125 L. T. Rep. 193; (1921) 1 A. C. 615;
Sassoon and Co. v. *Western Assurance Company*, 12 Asp. Mar. Law Cas. 206; 106 L. T. Rep. 929; (1912) A. C. 561;
Leyland Shipping Company Limited v. *Norwich Union Fire Insurance Society Limited*, 14 Asp. Mar. Law Cas. 258; 118 L. T. Rep. 120; (1918) A. C. 350;
Hamilton v. *Pandorf*, 6 Asp. Mar. Law Cas. 212; 57 L. T. Rep. 726; 12 App. Cas. 518;
Dudgeon v. *Pembroke*, 3 Asp. Mar. Law Cas. 393; 36 L. T. Rep. 382; 2 App. Cas. 284;
Trinder Anderson and Co. v. *Thames and Mersey Marine Insurance Company*, 8 Asp. Mar. Law Cas. 373; 78 L. T. Rep. 485; (1898) 2 Q. B. 114;
Small and others v. *United Kingdom Marine Mutual Insurance Association*, 8 Asp. Mar. Law Cas. 255, 293; 76 L. T. Rep. 326, 828; (1897) 2 Q. B. 42, 311;
Lewen v. *Swasso*, Postlethwaite's Dict. Art. Assur. 147;
Wilson and Co. v. *Owners of the cargo of the Xantho*, 6 Asp. Mar. Law Cas. 8, 207; 57 L. T. Rep. 701; 12 App. Cas. 503;
Boston Fruit Company v. *British and Foreign Marine Insurance Company*, 10 Asp. Mar. Law Cas. 37, 206; 94 L. T. Rep. 806; (1906) A. C. 336;
Bunyon on Fire Insurance, 6th edit., p. 376;
Nichols and Co. v. *Scottish Union and National Insurance Company*, 2 Times L. Rep. 190;
Macgillivray on Insurance Law, p. 713.

Cur. adv. vult.

Bankes, L.J.—By a policy of marine insurance, dated the 15th June 1920, the appellants insured the steamer *Ioanna* for twelve months from 29th May 1920 in the sum of 15,000*l.* against, *inter alia*, perils of the sea. The *Ioanna* was totally lost on the 19th Feb. 1921. The present action was brought by the respondents claiming to be fully interested in the said policy as mortgagees. The learned judge who tried the action found that the *Ioanna* had been scuttled with the connivance of her owner. As a result of this finding a number of important and interesting questions were raised and discussed both in the court below and in this court. There is one question, however, which goes to the root of the respondents' claim, and that is the question whether the respondents were parties to the contract of insurance. The learned judge held that they were. If his decision on this point cannot be supported the claim must fail, and it becomes unnecessary to consider any of the other points which were raised.

The facts material to this issue need careful consideration. They appear to be as follows:—The *Ioanna* was one of a number of vessels which were built by Messrs. Doxford, of Sunderland, for a Greek owner of the name of Angelis. While building, the vessel was known as No. 540. The respondents had financed the building of

these vessels, and the course of business between them and the owner was that as advances were made during building, charges were given, and eventually a mortgage agreement was entered into under which the owner undertook to execute a first mortgage of the vessel registered under the Greek law, it being intended that the vessel should be registered under the Greek flag. The mortgage agreements appear to have all been in the same, or substantially the same, form, and the only material provision which, for present purposes, need be referred to is that the mortgagor was under an obligation to insure, and provisions were inserted securing, that the mortgagee should derive a derivative title to the policies from the mortgagor. One passage from clause 8 of the agreement needs to be quoted. It is in these terms:—"All policies of insurance on which the premiums have been fully paid over the hull, machinery, and appurtenances of the said steamship shall be suitably endorsed in favour of the mortgagees, and shall be lodged either with them along with the mortgage, or with Messrs. Joseph W. Hobbs and Co. on their behalf, in which event the said Messrs. Hobbs shall address to the mortgagees a letter stating the details of the policies, and acknowledging that they are held to the order and on behalf of the mortgagees."

The Messrs. Hobbs and Co. referred to in this clause are insurance brokers, who effected the insurance in question upon the instructions of a Mr. Mango. This gentleman held a power of attorney from the Greek owner, and acted for him in all the business connected with the building and insurance of these vessels. It appears that while building and while on her trial trip, the *Ioanna* was covered by the builders' policy, and that the charges which had been given covering advances from the respondents for her building had been silent on the question of insurance. In May 1920 Mr. Mango got into communication with Messrs. Hobbs in reference to the insurance of the vessel, the proposal being to take out a twelve-months policy against marine risks and a six-months policy against war risks. On the 12th May Mango wrote to Hobbs telling them that the twelve-months insurance was to commence as from the arrival of the vessel in Smiths' Dock, unless advised to the contrary. On the same day Mr. Psimenos wrote to the respondents telling them that he was preparing the necessary documents for the mortgage of the *Ioanna*, and that they would be in the same form as those in the case of the *Theone*. On the 18th May 1920 Messrs. Hobbs wrote a letter to the respondents' representatives in London in the following terms: "Messrs. Graham and Co., 5, Bishopsgate-street.—Dear Sirs,—Steamship *Ioanna*.—We beg to advise you that we have effected the insurance on the above vessel for twelve months from date to be advised, on hull and machinery valued 275,000*l*. as follows." They then state how it is divided and then they go on, "At the request of our client, Mr. J. A. Mango, we agree that we are holding the policies to your order to the extent of your interest in the vessel, subject to our lien for unpaid premiums and to having the right to cancel the policies should the premiums not be paid, it, of course, being understood that we should not so act without first advising you."

In this letter Messrs. Hobbs speak of Mr. Mango as their client, and it is only reasonable to suppose that the letter took the form it did because Mr. Mango treated the transaction as one which, following the usual course of business, would be covered by the mortgage agreement, and by clause 8 of that agreement. This letter appears to have been the only communication on the subject of the insurance of the vessel passing between Messrs. Hobbs and the respondents or their representatives. On the 19th May Messrs. Hobbs wrote to Mr. Mango informing him that on his instructions they had arranged with underwriters that the twelve-months insurance should commence as from the sailing from the Tyne, date to be declared. On the 31st May Mr. Mango wrote to Messrs. Hobbs telling them that the *Ioanna* sailed at 2.40 on the 29th.

Messrs. Hobbs accordingly had the policy prepared. It is dated the 15th June 1920; it is made out in the somewhat unusual form: "Whereas J. W. Hobbs and Co., and (or) as agents, have represented that they are interested in, or duly authorised, as owner or agent, to make the insurance hereinafter mentioned," which was for a period of twelve months from noon on the 29th May 1920. The mortgage agreement was executed on the 28th July 1920. On the documents as they stand there does not appear to me to be any trace of any intention on anyone's part to take out the policy to cover the separate interest of the mortgagees.

The clear intention as expressed in the mortgage agreement, was that the interest of mortgagees should be a derivative interest and not an independent separate interest. It is true that the policy appears never to have been endorsed, but this I look upon as an oversight. The terms of the letter of the 18th May of Messrs. Hobbs to Messrs. Graham appear to me decisive as to what Mr. Mango's view at that time was. Had the matter rested there I should have been prepared to hold that the respondents had failed to prove that they were parties to the contract of insurance. What occurred at the trial confirms this view. Witnesses were called from the respondents and from Messrs. Graham's employment; they are silent on any question of instructions either to Mr. Mango or to Messrs. Hobbs to insure the separate interest of the mortgagees. Both Mr. Wright and Mr. Raeburn during the trial called pointed attention to the necessity of calling evidence to prove the respondents' case on this point. Finally, Mr. Hobbs was called as a witness, as a result of an objection that the letters passing between his firm and Mr. Mango and his firm and Messrs. Graham had not been proved. In examination-in-chief he said nothing really material to the point. In cross-examination by

Mr. Claughton Scott as to the war risk insurance he was unable to say that he had received any instructions to insure for anyone except for Mr. Mango. His re-examination was confined to the following questions and answers: "Q.—You have told us that when Mr. Mango instructed you you knew that Mr. Angelis was the owner, and you knew that there were mortgagees? A.—That is so. Q.—When you insured, whom did you intend to cover? A.—Whomsoever might be concerned. (Mr. Douglas Hogg).—Thank you, Mr. Hobbs; that is all I want to ask you." This evidence, given after warning, is to my mind extremely significant. The intention of this witness is, according to all the authorities, quite irrelevant: (see *Boston Fruit Company* v. *British and Foreign Marine Insurance Company*, 10 Asp. Mar. Law Cas. 37, 206; 94 L. T. Rep. 806; (1906) A. C. 336, 339; *Small and others* v. *United Kingdom Mutual Insurance Company*, 8 Asp. Mar. Law Cas. 255; 76 L. T. Rep. 326; (1897) 2 Q. B. 42, per Mathew, J. at p. 256 (Asp.); affirmed in Court of Appeal: 8 Asp. Mar. Law Cas. 293; 76 L. T. Rep. 828; (1897) 2 Q. B. 311). It is the authority of this witness which is all-important. He could have spoken of this had he received instructions from Mr. Mango. Mr. Mango might have been called. Some one from the respondent company, or from Messrs. Graham's might have been called. The absence of any evidence on the point is very significant.

It would appear from the judge's note that Mr. Mango was in court and acted as interpreter, but I am not sure as to this, and attach no importance to it.

In these circumstances I find what appears to me to be not only an entire absence of affirmative evidence in support of the respondents' case, that they were parties to the contract of insurance, but evidence which points strongly to the opposite conclusion. For these reasons I am unable to agree with the view taken by the learned judge. I think that the respondents failed in making a foundation for their claim, and in these circumstances the appeal must be allowed, and the judgment must be set aside and entered for the appellants, with costs here and below.

Scrutton, L.J.—In this case the owner has been found to have been privy to the scuttling of the ship, and has not appealed. The question is whether the innocent mortgagee can recover on the policy. If the owner had sued, he would have been prevented from recovering, if by no other reason, by the provisions of sect. 55 (2) (*a*) of the Marine Insurance Act 1906.

As to the mortgagee, two questions arise: (1) Does he prove a loss either by perils of the sea, barratry, or the general words, or are we bound by the decision of this court in *Small's* case (*sup.*) to hold that he does prove such a loss? On this general question I have expressed my view in *Samuel and Co. Limited* v. *Dumas*, 154 L. T. Jour. 467), and I adhere to that view. The mortgagee fails on that ground. (2) The further question is this. If the mortgagee's title is a derivative one from the mortgagor, he is liable to any defences available against the mortgagor, and therefore fails in this action, in which the mortgagor is prevented by his misconduct from recovering. But if the policy was taken out so as to give the mortgagee a direct contract, independent of the mortgagor, he is not affected by a defence open against the mortgagor, but can succeed if he proved a loss by perils insured against. As stated above, I think he does not, but I proceed to consider this case on the assumption that my view is erroneous, and that scuttling by the owner was, against a stranger with an insurable interest who could sue on the policy, a loss by perils of the sea. The test whether a person with an insurable interest at the time of the loss can sue on the policy is correctly stated in Arnould, 9th edit., s. 173, p. 235), in these words: "The true rule, then, would appear to be that any party to whom an interest in the property insured, 'doth, may, or shall appertain,' at any time during the pendency of the risk, may, under the general words, by subsequent adoption, take advantage of the policy to protect such interest, if it appears from extrinsic evidence that the person directing the policy to be effected intended at the time to protect this particular interest, or at any rate to protect the interests generally of the parties who should ultimately appear to be concerned. The onus of proving that the plaintiff's interest was intended to be insured under these general words is on him." This is the result of the decision of the House of Lords in the *Boston Fruit* case (*sup.*), and of the Privy Council in *Yangtsze Insurance Association Limited* v. *Lukmanjee* (14 Asp. Mar. Law Cas. 296; 118 L. T. Rep. 736; (1918) A. C. 585). The material evidence is as to the intention of the broker giving the instructions to effect the insurance, not of the broker who carries out the instructions. (See per Mathew, J. in *Small's* case (*sup.*) p. 45, and per Vaughan Williams, L.J. in the *Boston Fruit* case (*sup.*).

In the present case the person who gave instructions to effect the insurance was one Mango, acting under a power of attorney from the owner, who gave instructions to brokers, Messrs. Hobbs and Co. The original slip was initialled at the end of Nov. and beginning of Dec. 1919. It was for a twelve-months policy, but the date of the commencement of the risk was not filled in. It ran "*Ioanna*" (an illegible hieroglyphic), "new steamer, Angelis." At that time, as appears from the charge of the 1st Dec. 1919, there was an Ioanna Steamship Company, owning the *Ioanna*, and there was a second steamer building in Doxford's yard called No. 540. The first *Ioanna* was under mortgage to the plaintiffs. It appears from the correspondence that before the 20th March 1920 the first *Ioanna* was sold and released from the mortgage, the steamer *Theone* being substituted as security. At some time not proved the name Ioanna was given to steamer No. 540, the first *Ioanna* having presumably changed her name on sale. In May 1920 the

slip that had been initialled in Nov. 1919, was completed by the insertion of a date of commencement of risk, which was initialled by a number of underwriters, and I assume that whatever the insurance was at first, it was in May on the second *Ioanna*.

In May the plaintiffs had two charges on No. 540, dated respectively the 1st Dec. 1919 and the 10th March 1920. These charges on the ship did not expressly mention insurance, but included an agreement to execute a mortgage in a form and with covenants dictated by the mortgagees. No such mortgage was executed till the 28th July 1920, but the form was one which was being used all through 1920 by the owner and mortgagees in the case of other ships. Clause 8 of the form provided that the steamer should be insured and kept insured at the expense of the owners; that all policies of insurance should be suitably endorsed in favour of the mortgagees, and that the policies should be lodged with the mortgagees, or with Messrs. Hobbs, the brokers on their behalf, in which latter case the brokers should write a letter acknowledging that the policies were held to the order and on behalf of the mortgagees. By the last clause of the form the owner appointed the mortgagees to be his irrevocable attorneys " to sue on the policy in his name." It is true that this agreement was not executed till July 1920, but when the policy sued on was handed to Messrs. Hobbs in May they wrote a letter to the mortgagees in the exact words of the eighth clause, and all parties obviously took it as the form of the mortgage agreed to be executed. We have no correspondence produced or evidence as to the slip in Nov. 1919, nor is the cover note produced.

The instructions in May 1920 came to Hobbs from Mango, and are in writing. The policy itself is not in the very usual form " Hobbs and Co. as well in their own names as for and in the name of every person or person to whom the same doth may or shall appertain," but is in the merchant marine form " Hobbs and Co., and (or) as agents." For some reason, which I do not understand, the mortgagees' counsel either did not appreciate the necessity of proving or did not wish to prove whom Mango intended to insure; they did not call anyone to prove who was the principal till after all the evidence and speeches were closed, and then they only called the broker, whose intention was immaterial on the authorities. He said he intended to cover whomsoever might be concerned. Mango, whose intention was material, was not called. An application was made to us to allow him to be called. We did not accede to the request, and personally I should think his evidence of concealed intention, given at a time when from full argument it was quite clear what intention was necessary for success, quite unreliable unless corroborated by contemporary documents, none of which have been produced.

I have come to the conclusion that the intention of the mortgagees' attorney giving the instructions was to insure on behalf of the mortgagor, the mortgagees' interest being protected by an assignment of or a charge on the policy, and an irrevocable power of attorney to sue on it in the name of the mortgagor. I think that there were not two separate insurances, one by the mortgagor, who could, it was agreed, sue on it for the whole amount, and one by the mortgagees to the amount of their mortgage debt, but one insurance by the mortgagor intended to cover the interest of the mortgagees by assignment, and an irrevocable power of attorney to sue in the mortgagor's name. If this is the true finding, the mortgagees' title is that of the mortgagor, and their claim is defeated by the mortgagor's misconduct.

I should, had it been necessary, have decided this point in *Samuel and Co. Limited* v. *Dumas* (154 L. T. Jour. 467) the other way, for there the insurance was effected by the mortgagees' broker on the joint instructions of mortgagor and mortgagees, the policy being retained by the mortgagees' broker.

I think, though it is not necessary to decide the point, that I should hold that the mortgagees had an insurable interest, having a right to have a valid Greek mortgage on the ship, if she had survived, and probably having rights over her by English law.

It is unnecessary to deal with the complicated questions which have been argued on consolidation and the amount to be recovered which will be available elsewhere should the grounds on which this judgment is based be held to be mistaken.

The appeal should be allowed and judgment entered for the respondents with costs here and below.

Eve, J.—On the 19th Feb. 1921, according to that part of the judgment in this action against which no appeal had been lodged, the steamship *Ioanna* was wilfully thrown away by some of her crew with the assent and on the authority of her owner. At the date aforesaid the ship was insured against the ordinary marine risks for a sum of 275,000*l*., and the defendants appeal against so much of the judgment as adjudged the plaintiffs entitled to recover against them the sum of 15,000*l*., their subscription to the policy by which such insurance was effected. The judgment, as far as it is under appeal, is based, first, upon the finding that the plaintiffs were parties to the contract of insurance, and, secondly, upon the learned judge's conclusion that as mortgagees—innocent of any participation in the throwing away of the ship—they are entitled, by virtue of the decision of this court in *Small's* case (*sup.*), to recover for a peril insured against, notwithstanding that the incursion of sea water by which the ship was sunk was due to the felonious act of the owner.

As already indicated in my judgment in the case of *Samuel and Co. Limited* v. *Dumas* (*sup.*), I take the same view of the effect of the decision in *Small's* case (*sup.*) as the learned judge below did, and were that the only ground of appeal I should hold that this appeal failed.

But there is also the contention that not only was no evidence produced at the trial to prove

that the plaintiffs were parties to the contract of insurance, but that, on the contrary, there were materials before the court which are more consistent with their title being that of assignees than of parties to the contract.

It is not necessary for me to recapitulate the facts. Although, as will have been gathered from what has already been said, the earlier history of the plaintiffs' connection with this particular ship was not made very clear, this much may be taken to have been established: that in May 1920 they had an insurable interest under an equitable charge, and that by the terms of such charge the ship was to be insured by and at the expense of the owner against all risks to the extent of the outstanding loan, and that the policies were to be endorsed in favour of the mortgagees and lodged either with them or with Messrs. J. W. Hobbs and Co. on their behalf—in which latter event Hobbs and Co. were to address to the mortgagees a letter stating details of the policies and acknowledging that they were held to the order and on behalf of the mortgagees. The mortgagees were also thereby appointed the true, lawful, and irrevocable attorneys of the owner for him, and in his name to ask, demand, sue for, and recover all insurance moneys under any policy and to give proper receipts and discharges for the same.

In this condition of things the contract of insurance was concluded by Hobbs and Co., as brokers on the instructions of the owner's attorney, Mr. Mango. It was a twelve-months policy, the risk under which was ultimately fixed to commence at noon on the 29th May. Before that date Hobbs and Co. addressed to the plaintiffs' agents, Messrs. Graham and Co., the letter of the 18th May which has already been read by my Lord.

It is impossible to dissociate that letter from the provisions of the equitable charge already referred to, and the two documents read together are wholly consistent with an insurance by the owner and an assignment of the benefit of that insurance to the mortgagees. The policy dated the 15th June throws no further light on the matter, but the subsequent document bearing date the 28th July, which substitutes the security upon which the plaintiffs' rights as mortgagees are sought to be enforced reproduces in substance the provisions relating to the insurances contained in the equitable charge which it superseded.

On the documents there is nothing to show that any of the parties ever contemplated the insurance of the interest of the mortgagees as distinct or apart from that of the owner; on the contrary, the intention to be gathered from the documents is an intention that the owner will insure and assign the benefit of the insurance to the mortgagees.

Was this apparent intention negatived by any evidence produced at the trial? I do not think it was. No evidence was produced as to the intention of the owner or his attorney, Mango, or as to any instructions from the latter to Hobbs and Co., at variance with the conclusion to which an examination of the documents compels. I cannot attribute the absence of this evidence to any oversight on the part of the plaintiffs' advisers in the face of the repeated expressions of intention on the part of counsel arguing on behalf of both defendants to rely upon the defence that the mortgagees stood in no better position than the owner. I think its absence can only be accounted for by the fact that it was not obtainable.

In these circumstances I think the plaintiffs altogether failed to prove that they were parties to the contract of insurance, and that their action to recover on the policy could not succeed for want of such proof. As this conclusion must result in the reversal of the judgment below, it becomes unnecessary to determine how far the plaintiffs, if entitled to judgment, could have recovered on the footing of their being entitled to consolidate their advances on the *Ioanna* with a debt due to them on the security of another ship belonging to the same owner, and which, in fact, had ceased to be a security available for the plaintiffs or capable of being redeemed when the *Ioanna* was cast away.

I agree that the appeal must be allowed and the action be dismissed with costs here and below.

Appeal allowed.

Solicitors for the appellants, *Pritchard and Sons.*

Solicitors for the respondents, *Thomas Cooper and Co.*

Monday, Jan. 22, 1923.

(Before Lord STERNDALE, M.R., WARRINGTON and YOUNGER, L.JJ.)

THE KASHMIR. (*a*)

Collision—Loss of life—Claim against shipowner — Expiration of period for making claims—Leave to make claim—Discretion—Maritime Conventions Act 1911 (1 *&* 2 *Geo.* 5, *c.* 31), *s.* 8.

Sect. 8 *of the Maritime Conventions Act* 1911 (2 *&* 3 *Geo.* 5, *c.* 31) *provides that* "*No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel . . . or damages for loss of life . . . suffered by any person on board her by the fault of the former vessel . . . unless proceedings therein are commenced within two years from the date when the . . . loss . . . was caused. Provided that any court having jurisdiction to deal with an action to which this section relates may in accordance with the rules of court extend any such period to such extent and on such conditions as it thinks fit. . . .*"

The appellant's son, an American soldier, lost his life in a collision which took place in the Atlantic on the 6th Oct. 1918, *for which the respondents' vessel was found to blame. Both vessels were under requisition engaged in*

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

carrying American troops to this country. At the time of the collision the vessel in which the plaintiff's son was being conveyed, had on board certain French seamen, members of the crew of a French vessel who had been picked up after a previous collision. Some of these seamen lost their lives in the collision with the defendants' vessel, and it was agreed that the rights of their relatives under Lord Campbell's Act should be preserved notwithstanding that the limitation period under the Maritime Conventions Act had expired.

In April 1921 *the defendants obtained a decree of limitation of liability, and it was ordered that claims against the limitation fund should be brought in within a period of three months. It was also ordered that an advertisement should be inserted in, amongst other newspapers, the* New York Times, *calling attention to the decree and the period for bringing in claims. The plaintiff, who resided in Illinois, did not know of the proceedings against the defendants and was not aware of her rights against them until* 1922. *In April* 1922, *at the instigation of the American Government, the plaintiff began these proceedings, and an application was made to Hill, J. to extend the time for bringing in claims under the above section, so as to allow the plaintiff to make a claim. Hill, J. refused to extend the time on the ground that ignorance of her legal rights, having regard to the fact that she knew that her son had lost his life in the collision, was not a sufficient ground for extending the time to the prejudice of the relatives of the French seamen whose claims had been put forward in proper form.*

Held, that Hill, J. had rightly exercised his discretion in refusing to allow an extension of time.

Appeal from a decision of Hill, J. in chambers, refusing to exercise the discretion allowed him by sect. 8 of the Maritime Conventions Act 1911, so as to allow the appellant, Mrs. Trimpe, an American subject, resident at Illinois in the United States, to make a claim against the respondents, the owners of the steamship *Kashmir*, in respect of the death of her son, an American soldier, in a collision at sea between the steamship *Otranto*, in which he was being conveyed to Europe on war service, for which the respondents had been held liable.

The Maritime Conventions Act 1911 (1 & 2 Geo. 5, c. 57) provides :

Sect. 5 : Any enactment which confers on any court of Admiralty jurisdiction in respect of damage shall have effect as though references to such damage included references to damages for loss of life or personal injury, and accordingly proceedings in respect of such damages may be brought *in rem* or *in personam*.

Sect. 8 : No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel . . . or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel whether such vessel be wholly or partly in fault . . . unless proceedings therein are commenced within two years from the date when the loss or injury was caused. . . . Provided that any court having jurisdiction to deal with an action to which this section relates, may in accordance with the rules of court, extend any such period, to such extent and on such conditions as it thinks fit, and shall if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court . . . extend any such period to an extent sufficient to give such reasonable opportunity.

The appellant, Mary Trimpe, applied to Hill, J. in chambers under sect. 8 for leave to maintain an action notwithstanding that the time for bringing it had expired.

The following statement of facts is taken from the judgment of Hill, J. :

" The writ was issued on the 5th of Dec. 1922. Appearance was entered by the defendants, the Peninsular and Oriental Steamship Company, under protest. The collision happened on the 6th of Oct. 1918, between the *Kashmir* and the *Otranto*. Julius Trimpe was an American soldier on board the *Otranto*, and he, in company with many others, lost his life as the result of the collision. The action between the owners of the *Otranto* and the defendants was begun, and on the 21st of May 1920 there was a decree in this court of both to blame. There was an appeal, and on the 7th Dec. 1920 the Court of Appeal affirmed the decision of this court and dismissed the appeal. Following upon that a limitation decree was pronounced on the 11th April 1921. A bail bond or an undertaking to put in bail was given, and a reference was heard in respect of the damage claimed, but no life claims were brought in. The decree directed advertisements in three papers, of which one was in the *New York Times*. The 11th July was the date for bringing in the claim, and the decree gave liberty to apply for an extension of time for entering claims. No life claim was brought in. No extension of time was applied for in the limitation proceedings and no writ was issued in any life claim until the 5th Dec. 1922."

G. P. Langton for the plaintiff.

Dumas for the defendants.

Dec. 18—Hill, J. stated the facts and continued : " . . . The explanation (of why the appellant's claim was not filed before the 5th Dec. 1922) is, as appears from the affidavit filed in support of the application, that Mrs. Trimpe, the plaintiff was not aware until last summer that she had any cause of action, and it is said that in that respect she was only typical of all the proposed claimants who were said to number some 400. Of course, she must have been aware long before that of the death of her son, but yet although she knew of the death of her son, yet she was not aware that that fact gave her any legal right against the present defendants. Mr. Langton applies under sect. 8, and says that the court in its discretion ought to extend the time so as to enable a writ to be brought—as at the 5th Dec. 1922—in

respect of a cause of action which arose on the 6th Oct. 1918. It is only under the discretionary power of the proviso to sect. 8 that he can apply. The obligatory part has no application, because there always was—apart from the *Kashmir* being within the jurisdiction and capable of being arrested—from the 11th April 1921 a fund in court. Therefore, I have got to consider whether this is a case in which the court ought to exercise its jurisdiction of so extending the time. It may be said that no injury will be done to anybody else—that no competitors to the fund will be prejudiced, and there have been no laches on the part of the plaintiff or of the tentative plaintiffs. Mr. Dumas says there is no sufficient reason for extending the time because the plaintiff did not know that she had a right of suit. But he points out also that although in a sense the defendants would not be prejudiced because they have given security for the fund—in the sense that they would not be worse off than they would have been if the action had been brought at any time—of course they have the right to say that the action against them is barred. Over and above that he says that there are certain people who will be prejudiced. It is agreed that on board the *Otranto* were the crew of a French ship which had previously been run down by the *Otranto*, and on behalf of these men, in plenty of time—within the prescribed limit of time—it was intimated that claims would be preferred against the *Kashmir*, and it was arranged that instead of issuing a writ the matter should stand over and they should be treated as though it had been issued. Says Mr. Dumas: 'If some 400 representatives of American soldiers are to be let in in competition against the fund, then the claims of these Frenchmen will be prejudiced because there will not be nearly enough in the fund to pay everybody'—that everybody would only get some percentage of their actual damage. Mr. Langton points out, in answer to that, that if that is so as a fact it can be dealt with, because under sect. 8 a discretion may be exercised on such conditions as the court thinks fit, and that the court would and ought properly to say that the claims of these Frenchmen are not to be prejudiced and that they are to have a claim upon the fund and that persons let in at this late date should only rank as claimants to the balance. No doubt if I made an order at all I should make it upon those terms. But the question is whether I ought to make an order at all apart from the Maritime Conventions Act. The claim of this plaintiff and of the other plaintiffs would be absolutely barred at the end of twelve months, and a claim could only be brought under Lord Campbell's Act. The Maritime Conventions Act, by sect. 8, has extended the time from twelve months to two years: (*The Caliph*, 107 L. T. Rep. 274; (1912) P. 213. 12 Asp. Mar. Law Cas. 244). That extended time is not any rigid time but is qualified by the proviso in relation to the discretion which is given to the court. But *primâ facie* it is a limit to which the defendants are entitled to have the benefit. It is a statutory limitation which is given to them that they are not to be sued in respect of these life claims after a period of two years. You, therefore, start with that, and it seems to me that it is upon the plaintiff who comes to have the time extended to show that there are substantial reasons why the defendants should be deprived of the right to limitation which the law gives them. That, to my mind, was quite clearly indicated in a case (which I regret was not before me in the Law Reports) to which I have referred in other judgments on this matter; the case of *Hind Rolphe and Co.* v. *Owners of the Steamship James Westoll*. I think it is reported in the *Shipping Gazette*—I am not quite sure of the date of the issue of the newspaper, but it was heard on the 21st Oct. 1913. The court there refused to interfere with the discretion of the judge refusing an extension of time, and in that particular case there were pointed out two considerations which influenced the court. Lord Parker, in the course of his judgment, said: 'It appears to me that what the court has to do is to consider the special circumstances of the case and see whether there is any real reason why the statutory limitation should not take effect. I have carefully read the affidavit which has been filed and really it only amounts to this, that it was not until a comparatively recent date, namely, April 1913, that the amount of the claim could be ascertained. I think that is not a sufficient reason. I think long before two years had elapsed the proposed plaintiff must have known he was in a position to make some claim and that there was plenty of time during which the claim ought to have been made. Therefore, it appears to me, he has suffered no injustice by reason of the section. On the other hand, it is quite possible that if we were to allow the action, which is statute barred, to proceed, the defendants might suffer serious inconvenience and injustice. Therefore, it appears to me, that no case has been made out for the exercise of this discretionary power.' The facts are not identical, but it is quite clear, in accordance with the opinion of the Court of Appeal, that you start with this, that the defendant has got his limitation, and you must not interfere with that unless you have got good reasons for interfering. The only reason here for interfering is this, that the plaintiff, though she knew of the loss of her son, did not know that the loss of her son gave her any cause of action. Now it seems to me that that is a wholly insufficient ground for depriving the defendants of a right which they had otherwise acquired, especially after so long an interval. The fact of the limitation decree does not make it any better for the plaintiff—it makes it rather worse—because the limitation decree by fixing a period and giving liberty to apply for an extension increases the plaintiff's opportunity to bring in a claim and apply for an extension of time for so doing. Therefore, in my view, there is no ground shown why the court should exercise its discretion in favour

of the plaintiff. Therefore, I must dismiss the summons with costs and give leave to appeal."

The plaintiff appealed.

G. P. Langton for the appellant.—This case is different from the ordinary case in which the parties are business people, because this collision took place in war time and the facts were not only not published, but concealed for that reason. Hill, J. did not exercise his discretion properly, but allowed himself to be unduly influenced by the remarks of Parker, L.J., in *Hind Rolphe and Co.* v. *Owners of the James Westoll* (unreported : See *Shipping Gazette*, Nov. 6, 1913). Hill, J. has not found that the appellant was guilty of laches or negligence in putting forward her claim. It is true that, apart from the Maritime Conventions Act, this claim would be statute barred under Lord Campbell's Act, which allows one year only ; but sect. 5 of the Maritime Conventions Act requires that claims for loss of life should be treated on the same footing as claims for damage, and this claim should therefore be considered without reference to the state of the law before the Act was passed. The defendants cannot be prejudiced by the result of this application, since their liability is limited. The fund, calculated at 8*l*. per ton, has already been distributed ; security has been given for the fund calculated at 7*l*. per ton. There were 400 persons in the position of the appellant, and not one of them saw the advertisement which was ordered to be inserted in the *New York Times*. It is only through the action of the United States Government that the appellant now knows that she had a claim against the defendants. The inference put by Hill, J. on the remarks of Parker, L.J. in *Hind Rolphe* v. *Owners of the James Westoll* is quite right, but the *ratio decidendi* of that case, *i.e.*, that the plaintiff must have known throughout that he had a claim, is not present here. The appellant never knew that she had any claim. What better case could there be for the exercise of discretion than that of a private person resident at the other side of the world, remote from the ordinary channels of information in such matters ? It was not until the proceedings before Hill, J. that the appellant was aware that the learned President had given leave to apply for extension of time in the limitation suit.

Reference was made to :

The Disperser, 15 Asp. Mar. Law Cas. 115 ; 123 L. T. Rep. 683 ; (1920) P. 228 ;
The Zoe, 5 Asp. Mar. Law Cas. 583 ; 54 L. T. Rep. 879 ; 11 Prob. Div. 72.

Bateson, K.C. and *Dumas* for the respondents were not called upon.

Lord Sterndale, M.R.—This is an appeal from a decision of Mr. Justice Hill, who declined to act upon the proviso to sect. 8 of the Maritime Conventions Act to the extent of either extending the time during which an action might be brought by the appellant in this case against the respondents, or, in the alternative, the time within which a claim might be made against a fund which is in court in a limitation suit which had been brought by the defendants on admitting their liability.

The matter arises out of a collision which had taken place in Oct. 1918. This writ was issued on the 5th Dec. 1922. Therefore, it is a long time out of the two years' limitation for bringing such an action which, as the law stands at present, is imposed by sect. 8 of the Maritime Conventions Act 1911. On the 21st May 1920, there was a decree of the Admiralty Court holding both vessels to blame. On the 7th Dec. 1920 that decree was affirmed by this court. A limitation suit was then brought by the Peninsular and Oriental Steam Navigation Company, the respondents here, and on the 11th April 1921 a decree was made in that limitation suit by the learned President, in which he ordered, among other things, that advertisements of the decree should be published at intervals of not less than a week, beginning from that time up to the 4th July 1911, and that claims should be brought in by the 11th July—that is a week after the last advertisement. He then concluded the decree by saying that there was liberty to ask for extension of time. That is the way in which it is expressed in this order. It is said that the learned President really meant to give liberty to ask for extension of time within three months. It would not have been a very valuable liberty if that had been what was given ; but I take it from the decree that there was a liberty to ask for extension of time. I will assume—I am not going to decide because it is not necessary—that the decision of Deane, J., in *The Caliph* (12 Asp. Mar. Law Cas. 244 ; 107 L. T. Rep. 274 ; (1912) P. 213), is right, that the limitation of time for bringing an action under Lord Campbell's Act is, since the passing of the Maritime Conventions Act 1911, two years, and not one year, as it was before. This plaintiff is wishing to assert a right under Lord Campbell's Act. Before the Maritime Conventions Act of 1911 she would not have had a chance, because the action would have been irrevocably barred in twelve months after the loss ; but I shall assume that it is two years now. I say that I do not decide it because I do not wish to throw any difficulty in Mr. Bateson's way if in another place he wishes to question the decision. But assuming that the period of limitation is two years with power in the court to extend it, it is said that it ought to be extended—in fact, almost that it ought to be extended *ex debito justitiæ* so far as I can make out—because this lady, the appellant, was living in one of the middle states of America and did not hear, and could not hear, of what had happened, and that all she knew was that her son, who was an American soldier, had been lost at sea. It was said also—I do not think there is any evidence of it, but perhaps we may take judicial notice of the fact—that in all probability the British authorities concealed the loss of this transport or vessel as much as

they could—I suppose she was a transport, but I do not know that. Mr. Justice Hill has held that that is not sufficient.

This is a matter of discretion, and no doubt we can interfere with the learned judge's discretion if we like, but we ought not to do so except upon a very strong ground. I cannot see that the learned judge has proceeded in any way upon any wrong principle. It is true that he has cited in his judgment a case which proceeds upon entirely different facts, the case of *Hind Rolphe and Co.* v. *The Owners of the James Westoll* (unreported: see Shipping Gazette, Nov. 6, 1913). If he based his decision upon any similarity of the facts of that case and the facts of this case, I think there would be reason for saying that he was allowing himself, possibly, to be led astray. But he does nothing of the kind. He does read a passage from Lord Parker's judgment which shows that the facts were very different, and then he says: "The facts are not identical." It is, perhaps not a very strong way of putting it—they were as different as two sets of facts could be. He goes on: "It is quite clear in accordance with the opinion of the Court of Appeal that you start with this, that when the defendant has got his limitation you must not interfere with that unless you have got good reason for interfering." That is the conclusion he draws from that case, and that is not questioned as being incorrect. But it is said that as the learned judge read a passage in which the different facts were set out, we must conclude that he allowed himself to be misled by the different set of facts in that case, and acted as he ought not to have done in this case. I can see no ground for saying that at all. It seems to me that the learned judge from that case merely drew the conclusion that the principle which he stated was correct; and, in fact, that principle which he stated was correct. Therefore, I think the learned judge has proceeded upon no incorrect principle, and we ought not to interfere with his discretion. In my opinion the appeal should be dismissed with costs.

WARRINGTON, L.J.—I agree; and for the same reasons.

YOUNGER, L.J.—I am of the same opinion.

Solicitors: *Thomas Cooper* and *Co.*; *Freshfields, Leese*, and *Manns*.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Feb. 2 *and* 3, 1922.

(Before McCARDIE, J.)

TRANSOCEANICA SOCIETA ITALIANA DI NAVIGAZIONE *v.* H. S. SHIPTON AND SONS. (*a*)

Charter-party—Cargo—Inferior quality—Delay in discharge caused by condition of cargo —No implied warranty of quality—Extra charges in discharging cargo owing to its inferior quality—Payment by shipowners without the assent of cargo owners—Shipowners' right to recover from cargo owners.

The plaintiffs, an Italian company, who were the owners of the steamship P., entered into a charter-party with a firm at Alexandria as berth charterers to convey a cargo on their steamship from Alexandria to London or Hull as ordered on signed bills of lading. The charter-party provided that "a full and complete cargo of cotton seed and (or) other lawful merchandise at the option of the berth charterers" should be loaded on the ship, and "steamer to be discharged as fast as she can deliver in accordance with the custom of the port." The demurrage rate for every running day over and above the lay days allowed was fixed at 250l. About 500 tons of barley were loaded on the steamship under the charter-party as part of the general cargo, one bill of lading being signed in respect of 300 tons and another bill of lading in respect of the balance of 200 tons. The defendants were the indorsees of the bill of lading for the 300 tons of barley. This bill of lading stated that the barley was "shipped in good order and condition," and was "to be delivered in like good order and condition at the Port of London" to the order of the shippers. The bill of lading also provided that: "Cargo to be received by consignees as fast as steamer can deliver in accordance with the custom of the port." The learned judge found that the barley which was loaded was of inferior quality, as it contained a quantity of sand and dust and a number of stones and other rubbish. On arrival of the steamship in London, discharging by the ordinary means employed at the Port of London, namely, by pneumatic suction, began, but owing to the stones and rubbish in the barley the valves of the suction pump became choked and delay was caused owing to the defective condition of the barley.

Held, (*applying* Acatos v. Burns, 3 *Ex. Div.* 232), *that there was no implied warranty by the cargo owners with respect to the barley, that it should be capable of being handled and unloaded expeditiously and effectively by the machinery and appliances in ordinary use at the port of discharge, and the plaintiffs were, therefore, not entitled to recover from the defendants any demurrage in respect of the additional time taken in discharging the ship owing to the defective condition of the cargo.*

(*a*) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

All unloading at the Port of London was done under statutory authority. The Port of London Authority provided machinery and employed all the men. The work done by the men in the hold of the ship was done on behalf of the ship but the work done after the grain had been elevated from the hold until it reached the warehouse was performed on behalf of the consignees of the cargo. Additional charges were made by the Port Authority in respect of cargoes which, by reason of their condition, were exceptional. Owing to the defective condition of the cargo of barley, and the consequent delay in discharging it, the men employed in discharging the cargo demanded a higher rate of remuneration. The Port of London Authority demanded from the plaintiffs payment for the extra expenses incurred in the discharge of the steamship in respect of men and machinery. The plaintiffs, without obtaining the assent of the defendants, paid the extra charges.

Held, that on the facts of this case, there must be deemed to have been an implied request in law by the defendants to the plaintiffs to assent to the increased charges for and on behalf of the defendants. The plaintiffs were, therefore, entitled to recover from the defendants a proportion of the extra charges incurred.

ACTION in the commercial list tried by McCardie, J.

The plaintiffs, in this action, claimed to recover from the defendants, as indorsees of a bill of lading for 300 tons of barley shipped from Alexandria to London, damages in respect of a delay of one and a half days caused to the plaintiff's ship in the discharge of the cargo, at the rate of 250*l.* per day. The plaintiffs also claimed to recover from the defendants a proportion of extra charges incurred in respect of the discharge of the ship which plaintiffs had been obliged to pay the Port of London Authority. They alleged that they had paid this amount as the agents of the defendants and at their request to be implied in the circumstances.

The plaintiffs were an Italian company carrying on business at Naples, and they owned the steamship *Posilipo*. On the 11th March 1921 they entered into a charter-party with a firm in Alexandria as berth charterers to convey a cargo on that steamship from Alexandria to London or Hull as ordered on signed bills of lading. The charter-party provided that " a full and complete cargo of cotton seed and (or) other lawful merchandise, at the option of the berth charterers," should be loaded on the steamship, and " steamer to be discharged as fast as she can deliver in accordance with the custom of the port." Demurrage was fixed at the rate of 250*l.* per running day over and above the lay days allowed. It was also provided that the master of the steamship if desired by the charterers, should sign one general set of bills of lading for the whole cargo at the freight specified therein, and that the berth charterers should be free to sign sub-bills of lading in favour of the various shippers at any rate of freight which should be duly honoured by the master as though they had been signed by him.

The defendants were the indorsees of a bill of lading for 300 tons of barley for full value, being part of about 500 tons of barley loaded on the steamship the *Posilipo* at Alexandria as part of the general cargo. One bill of lading was signed in respect of 300 tons of barley, and another bill of lading was signed in respect of the remaining 200 tons of barley.

The bill of lading in respect of the 300 tons of barley stated that the barley was " shipped in good order and condition . . . on the good steamship *Posilipo* " and was " to be delivered in like good order and condition at the Port of London " to the order of the shippers. " Cargo to be received by consignees as fast as steamer can deliver in accordance with the custom of the port."

All unloading at the Port of London was done by the Port of London Authority under statutory authority. The Port of London Authority provided all the necessary machinery and employed all the men required for the work. The work of unloading, in so far as it was done in the hold of the ship, was done by men called " ship's men," and was done on behalf of the ship. But the work done after the corn was elevated from the hold until it reached the warehouse was done on behalf of the receivers of the cargo. The Port Authority published duly authorised tables of rates and charges with respect to grain and seed and other matters, and these tables provided for an extra charge on cargoes or portions of cargoes exceptional in character arising from the nature, stowage, or condition of the goods. For instance, the following statement is found in the Grain and Seed Book, at p. 10: " An additional charge will be made when extra expense is involved in the working out owing to the condition of the goods or to any other cause." Another statement in another part of the book in question was as follows: " Grain in a damaged or heated condition or involving extra expense from any other cause will be charged at special additional rates."

The barley which was loaded on the steamship *Posilipo* was found by the learned judge, on the facts, to be of inferior quality as it contained a quantity of rubbish, including sand, dust, and stones. When the barley came to be discharged by the ordinary methods, namely, by pneumatic suction, the valves of the suction pump became choked owing to the sand, dust, stones, and other rubbish contained in the barley. Thus, in consequence of the inferior condition of the barley, a delay of one and a half days was caused in unloading. For the same reason extra expense had to be incurred by reason of the men complaining to the Port of London Authority and refusing to work unless they were paid at a higher rate, because they found that the inferior condition of the barley would interfere with their remuneration.

The plaintiffs had assented to an arrangement whereby an extra payment was made to the men, but the defendants were never asked to assent to the extra payments. The Port of London Authority demanded payment from the plaintiffs of the extra charges incurred in connection with the discharge of the steamship, owing to the discharge being delayed by reason of the inferior condition of the barley, and the plaintiffs paid these extra charges and sought to recover from the defendants a proportion of them. They alleged that it was an implied term and condition of the contract under which the barley was shipped that the barley should be capable of being handled and unloaded expeditiously and effectively by the machinery and appliances in ordinary use at the port of discharge, and they further said that the barley was not so capable of being so handled and unloaded owing to presence of sand and stones in it.

C. R. Dunlop, K.C. and *G.W. Ricketts* for the plaintiffs.

Leck, K.C. and *D. H. Leck* for the defendants.

McCardie, J.—In this case there are two distinct claims by the plaintiffs, the owners of a vessel called the *Posilipo*, against the indorsees of a bill of lading who received the goods thereunder. In my opinion the points which arise with regard to the different claims are quite distinct.

The first claim is for damages for detention of the *Posilipo*. The second claim, in substance, is one for moneys paid by the shipowners to the use of the defendants.

I will deal first with the question of the delay of the ship. It is not alleged by the plaintiffs that the cargo was not taken as fast as the ship could actually deliver the cargo. There was no actual default in that respect by the receivers. They were bound to act with reasonable expedition as is shown by the decisions in *Good, Flodman, and Co.* v. *Isaacs* (7 Asp. Mar. Law Cas. 212; 67 L. T. Rep. 450; (1892) 2 Q. B. 555) and *Hick* v. *Rodocanachi* (7 Asp. Mar. Law Cas. 233; 65 L. T. Rep. 300; (1891) 2 Q. B. 626; 68 L. T. Rep. 175; (1893) A. C. 22), and they did so.

The real claim for delay against them is based on the case alleged in par. 6*a* of the statement of claim which raises an important question on the obligation of a shipper of goods. The paragraph in question states: "Alternatively, it was an implied term and condition of the contract under which the barley was shipped and carried as aforesaid to be implied from the nature and express terms thereof"—[that is the bill of lading]—"that the same should be capable of being handled and unloaded expeditiously and effectively by the machinery and appliances in ordinary use at the port of discharge." The statement of claim goes on to allege that the barley was not capable of being so handled and unloaded by reason of the presence of the sand and stones in the barley and in consequence delay to the ship was occasioned. That is the allegation. Is it well founded? If it is, a wide vista of responsibility is opened as against the shippers of goods.

It is difficult to see at what stage the application of the duty alleged would stop, and it is difficult to see how the measure of the liability by the shipper would be fixed. Mr. Dunlop, counsel for the plaintiffs, cited in support of the proposition, the decision of Atkin, J. in *Mitchell Cotts, and Co.* v. *Steel Brothers and Co.* (13 Asp. Mar. Law Cas. 497; 115 L. T. Rep. 606; (1916) 2 K. B. 610). But, in my view, before considering that case, it is desirable to remember the rule which exists with respect to the shipment of dangerous goods. The principle applicable to the matter is lucidly stated in Scrutton on Charter-parties, art. 31, as follows: "By the common law of England the shipper of goods impliedly undertakes to ship no goods of such a dangerous character or so dangerously packed, that the ship-owner or his agent could not, by reasonable knowledge and diligence, be aware of their dangerous character, without notice to the ship-owner or his agent of such dangerous character; and he is therefore liable to any person who is injured by the shipment of such dangerous goods without notice."

The authorities quoted under that article seem clearly to establish the proposition as to the duty of a shipper with respect to dangerous goods. I think it is well to recognise the fact that the decision of Atkin, J., in *Mitchell, Cotts, and Co.* v. *Steel Brothers and Co.* (*sup.*), to which I have just referred, undoubtedly enlarges the duty of a shipper, because in that case the shippers of a cargo of rice, which is not a dangerous cargo in itself, upon a vessel which they had chartered for a voyage to Piræus, knew that the rice could not be discharged there without the permission of the British Government, although they thought that they might obtain permission. They, however, failed to obtain permission to discharge at the Piræus and the ship was delayed. It was found that the shipowner did not know and could not reasonably have known that the permission of the British Government was necessary to enable the ship to discharge her cargo of rice at the Piræus, and it was held that the delay arose from a breach by the charterers of their obligation to the shipowners, and that the shipowners had a cause of action against the charterers. But if the rule as to dangerous goods is extended to matters which do not involve danger, a very wide field is opened for discussion.

In my view, however, there is no warranty that this barley was capable of being handled and unloaded expeditiously and effectively by the machinery and appliances in ordinary use at the port of discharge, and I think that the decision which I am giving is fully supported by the cases which show the duty which does not rest upon the shipper.

The intermediate area may sometimes be a matter of doubt. The case cited by Mr. Leck, counsel for the defendants, of *Acatos* v. *Burns* (1878) 3 Ex. D. 282) is useful. That was a

case of a cargo of maize shipped by the plaintiff and which, owing to the vice of the maize, sprouted, so that further transport was impossible. One of the questions in the action was whether the shipper of maize had warranted that the maize was fit for carriage in the vessel, and it was held by the Court of Appeal that where the owner of the vessel has an opportunity of examining goods shipped on board her, no warranty on the part of the shipper of the goods can be implied that they are fit to be carried on the voyage.

In my view the principle of that case, and not the principle of the cases as to dangerous goods, is applicable to the facts here. If it were otherwise the position would be strange. There may be a variation as to the length of time necessary for the discharge of various qualities of barley, but the shipowner can inquire as to the quality of barley shipped, and he can inspect the barley. All that happened in this case was, that 300 tons of barley were shipped on board. No description was given as to the character or nature of the barley, that is to say, whether good or bad or otherwise. As Mr. Leck, counsel for the defendants has pointed out, under the berth charter the charterers had the power to load a complete cargo of cotton seed and (or) other lawful merchandise at their option. In my view, therefore, there was no warranty with respect to this barley that it should be capable of being handled and unloaded expeditiously and effectively by the machinery and appliances in ordinary use at the port of discharge. I see no reason to doubt that the shipowners did know, and certainly could have known as fully as the shippers, the nature and description of the cargo. There is no suggestion of concealment or secrecy. If there had been something here other than a mere defect of quality I should have reserved my decision, because, in my opinion, the obligations of a shipper with respect to a warranty as to the character of the goods that he ships have not yet been fully and clearly determined. Atkin, J. has gone one step beyond the dangerous goods principle. Whether the law may go further is a matter for consideration, but I only mention, for the purposes of future discussion when the question may again arise, that many authorities which may call for consideration are referred to in the recent book, by Mr. Leslie on the Law of Transport, at pp. 29 *et seq.*

Inasmuch as I find that there was no warranty in the present case, it is unnecessary to consider the points which arise with respect to sect. 1 of the Bills of Lading Act 1855 (18 & 19 Vict. c. 111), as to whether, if there had been a breach of warranty by the berth charterers, or by the original shipper of these goods, sect. 1 of the Act of 1855 would have transmitted the responsibility for that breach to the present holders for the value of the bill. That point I leave without further consideration.

I only desire to add, with regard to the implication of terms in a bill of lading or charter-party, that the facts of this case, which deal only with quality of barley, are, in my opinion, not such as would lead me willingly to an implication of the implied term alleged in the statement of claim. The case of *Hamlyn and Co.* v. *Wood and Co.* (65 L. T. Rep. 286 ; (1891) 2 Q. B. 488), would seem to be unfavourable to that implication. It further follows that I need not consider the question that has been raised as to estoppel.

I come now to the second point, which, in my view, rests on a wholly different basis. All unloading at the Port of London is done by the Port of London Authority under statutory authority. The Port Authority have published duly authorised tables of rates and charges with respect to grain and seed and other matters, and these tables provide for an extra charge on cargoes or portions of cargoes exceptional in character, arising from the nature, stowage, or condition of the goods. For instance, the following statement is made in the Grain and Seed Book, at p. 10 : " An additional charge will be made when extra expense is involved in the working out owing to the condition of the goods or to any other cause."

By virtue of the condition of this barley, extra expense was caused. Extra charges were paid to the corn trimmers, and the condition of the barley caused the suction machinery and attendant workmen to be employed for a longer period than would otherwise be the case. Therefore, the Port of London Authority charged, and in my view, properly charged, substantially more than they would have done if the cargo had been in a normal condition. The shipowners have paid those charges and they seek to recover from the defendants a portion of those extra charges upon the ground that they have paid that portion to the use of the defendants. The defendants were not requested to assent to the extra charges. In my opinion, however, on the facts of the present case, there must be deemed to have been an implied request in law by the defendants to the plaintiffs to assent to the increased charges for and on behalf of the defendants.

Let me make the position quite plain. The operation of unloading is a joint operation. The trimmers are in the hold and they are called ship's men and work on behalf of the ship ; they are, of course, employed by the Port of London Authority. But the operations from the time the grain is elevated from the hold and taken upwards till it gets to the warehouse, where it is put into bags and then into craft, are done on behalf of the receivers. Therefore, although there is one totality of operations, as a matter of fact there is a clear division with respect to the allocation of work.

Of the total extra charge made by the Port of London Authority and paid by the shipowners, about 8*l*. 13*s*. 6*d*., is in respect of extra labour for the receivers' part of the operation, and 50*l*. for the burden upon the machinery with respect to work done for the receivers, making a total of about 58*l*. odd. Mr. Dunlop, for the plaintiff, relies on the point that there was no request by the defendants to do the work

and pay the increased charges. I appreciate that point, but, in my opinion, it is impossible, in view of the cases in which requests have been implied by law, to hold that the defendants are not liable. This question, although perhaps somewhat new as regards shipping, is not at all novel with regard to railways, and I will merely refer to several cases upon the matter as showing the circumstances in which the court will imply a request in spite of a protest or in spite of the fact that the defendant ignores what is proceeding : (see *Great Northern Railway* v. *Swaffield*, 30 L. T. Rep. 562 ; L. Rep. 9 Ex 132 ; *London and North Western Railway* v. *Duerden*, 113 L. T. Rep. 285 ; 114 L. T. Rep. 590 ; *London and North Western Railway* v. *Crooke and Co.*, 20 Times L. Rep. 506 ; and *Midland Railway* v. *Myers, Rose, and Co.*, 99 L. T. Rep. 411 ; (1908) 2 K. B. 356 ; (1909), A. C. 13).

In my opinion those cases show clearly the extent to which the law will go in implying a request in a case where the interests of two persons are concerned, and where it is essential that one should do something in order to carry out the joint interests. Now here there was a joint obligation on the shipowners and the receivers. It was essential that the ship should be discharged as fast as she could be. It was one operation in substance, but two for the purposes of allocation, and there was a payment made by the plaintiffs, which to the extent of the figures that I have stated was, in my opinion, not only in fact, but in law, for the benefit of the defendants. The work they are charged with, was work which was done for them, and the liability of the defendants, in my opinion, is wholly independent of any question of warranty or of any question as to the quality of the cargo. It is a liability which depends upon the fact that it was their cargo which was being discharged from this vessel.

The result is, therefore, that the defendants succeed upon the first point which was raised by their counsel with regard to delay, but that they are liable in regard to the second claim to the extent of three-fifths of 58*l.* as they were receivers of only 300 tons out of the 500—namely, 35*l.* 3*s.* 6*d.* There will be no costs on either side.

Solicitors for the plaintiffs, *Constant* and *Constant*.

Solicitors for the defendants, *Lowless* and *Co.*

May 17, 18, *and* 24, 1922.

(Before MCCARDIE, J.)

JOHN EDWARDS AND CO. *v.* MOTOR UNION INSURANCE COMPANY LIMITED. (*a*)

Insurance (Marine)—P.p.i. clause—Honour policy — Indemnity—Subrogation—Election—Validity of policy—Marine Insurace Act 1906 (6 *Edw.* 7, *c.* 41), *s.* 4, *sub-s.* 2.

By sect. 4, *sub-sect.* 2 *of the Marine Insurance Act* 1906, " *A contract of marine insurance is deemed to be a gaming and wagering contract* " —*and therefore void by sub-sect.* 1 *of the same section*—" . . . (b) *where the policy is made 'interest or no interest,' or 'without further proof of interest than the policy itself,' or 'without benefit of salvage to the insurer,' or subject to any other like term.*"

The defendants subscribed an honour time policy of marine insurance for 5610*l. for twelve months from the* 11*th March* 1920, *on freight and chartered freight on the steamship* White Rose *of which the plaintiffs were the owners. The policy contained the following clauses: Clause* 5*:* " *In the event of the total loss, whether absolute or constructive, of the steamer, the amount underwritten by this policy shall be paid in full, whether the steamer be fully or only partly loaded or in ballast, chartered or unchartered.*" *Clause* 7 *:* " *In calculating the amount due under this policy in respect of any claim except under clauses* 3 *and* 5, *all insurances on freight (including honour policies on freight) shall be taken into consideration and when the total of such insurance exceeds in amount the gross freight actually at risk only a rateable proportion of the gross freight loss shall be recoverable under this policy, notwithstanding any valuation therein.*" *The policy also contained the following conditions in the slip attached to it :* " *Full interest admitted. Production of this policy to be deemed full and sufficient proof of interest.*"

During the currency of the policy, the White Rose *became a total loss, being run into and sunk by the steamship* Fantee, *which vessel, in subsequent proceedings, was found solely to blame for the collision. The owners of the* Fantee *limited their liability by virtue of the Merchant Shipping Acts. The plaintiffs claimed about* 69,000*l. as the value of the vessel and* 2349*l. for loss of hire. This claim for loss of hire was accepted and passed by the registrar of the court. The amount to which the owners of the* Fantee *limited their liability was* 43,000*l., and they paid that sum. The proportion of the* 43,000*l. attributable to the claim of* 2349*l. for loss of hire was* 1416*l.* 12*s.* 3*d. the amount at issue in the action. The defendants contended that they were entitled to that sum of* 1416*l.* 12*s.* 3*d., against the full amount of their honour policy, by virtue of the doctrine of subrogation.*

Held, (1) *that the policy was void by virtue of sect.* 4 *of the Marine Insurance Act* 1906, *and was destitute of all legal effect between*

(*a*) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

the parties; (2) that it was not a contract of indemnity, and therefore there was no scope in it for the doctrine of subrogation; and (3) that the plaintiffs did not by asking for, and receiving payment under the policy, elect to treat it as valid and binding.

Action in the Commercial list tried by McCardie, J.

The plaintiffs claimed from the defendants the sum of 1416*l.* 12*s.* 3*d.*, under a policy of marine insurance. The facts and points of argument are fully stated in the written judgment of McCardie, J.

Leck, K.C. and *Le Quesne* for the plaintiffs.

R. A. Wright, K.C. and *H. Claughton Scott* for the defendants.

Cur. adv. vult.

May 24.—McCardie, J. read the following judgment:—The points of insurance law raised by this action are novel. The plaintiffs (John Edwards and Co.) claim from the defendants the sum of 1416*l.* 12*s.* 3*d.* under circumstances which can be briefly stated. The plaintiffs owned the steamship *White Rose*. In March 1920 the defendants subscribed an honour time policy of marine insurance for 5610*l.* for the space of twelve months from the 11th March 1920, on freight and chartered freight on the said vessel. The policy incorporated certain Institute Time Clauses. Clause 5 was this: "in the event of the total loss, whether absolute or constructive, of the steamer, the amount underwritten by this policy, shall be paid *in full*, whether the steamer be fully or only partly loaded, or in ballast, chartered or unchartered." Clause 7 was this: "In calculating the amount due under this policy in respect of any claims, except under clauses 3 and 5, all insurances on freight (including honour policies on freight), shall be taken into consideration, and when the total of such insurance exceeds the amount of gross freight actually at risk, only a rateable proportion of the gross freight lost shall be recoverable under this policy, notwithstanding any valuation therein."

The policy also contained the following conditions in the slip attached to it: "Full interest admitted." "Production of this policy to be deemed full and sufficient proof of interest." Those are the only provisions of the policy I need mention.

During the policy period the *White Rose* was proceeding from Liverpool to the Bristol Channel in ballast to take up a charter, and whilst on the voyage she was, on the 20th March 1920, run into and sunk by the steamship *Fantee*. In subsequent proceedings the *Fantee* was found solely to blame for the collision; but her owners claimed to limit and did limit their liability by virtue of the Merchant Shipping Acts. The claim of the plaintiffs was for about 69,000*l.* as the value of the vessel, and also for 2349*l.* for loss of hire. This claim of the plaintiffs for loss of hire was accepted and passed by the Registrar of the Court. The amount to which the owners of the *Fantee* limited their liability was 43,000*l.*, and they paid this sum. The proportion of the 43,000*l.* attributable to the said claim of 2349*l.* for loss of hire was 1416*l.* 12*s.* 3*d.* This is the amount at issue in the present action.

After the total loss of the *White Rose*, various sums were paid to the plaintiffs by underwriters of valid policies of marine insurance on the hull of that vessel, and the defendants paid to the plaintiffs the full 5610*l.* under their said honour policy. Various payments by way of adjustment have been made as between the plaintiffs and certain underwriters of the valid policies on hull out of the said sum of 43,000*l.* The only portion of that sum of 43,000*l.* in dispute is the above amount of 1416*l.* 12*s.* 3*d.* The defendants claim that they are entitled to that 1416*l.* 12*s.* 3*d.* by virtue of the doctrine of subrogation. The plaintiffs deny that the doctrine has any application to a mere honour policy. Hence the present action to determine the question. The points at issue have been fully and ably argued by counsel on both sides.

The first matter for decision is whether or not the policy of March 1920 is void under sect. 4 of the Marine Insurance Act 1906 (6 Edw. 7, c. 41). In spite of the ingenious arguments by the defendant's counsel, I can feel no doubt on the point. The words of sect. 4 are clear. They are these—sub-sect. 1: "Every contract of marine insurance by way of gaming or wagering is void." Sub-sect. 2: "A contract of marine insurance is deemed to be a gaming or wagering contract (*a*) where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest, or (*b*) where the policy is made 'interest or no interest,' or 'without further proof of interest than the policy itself,' or 'without benefit of salvage to the insurer,' or subject to any other like term. Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer." I do not pause now to discuss the section inasmuch as I ventured to express my views upon it in *Cheshire and Co.* v. *Vaughan Brothers and Co.* (15 Asp. Mar. Law Cas. 69, at p. 70; 25 Com. Cas. 51). At p. 57 of that report, after reciting the provision that every contract of marine insurance by way of gaming or wagering is void, I said this: "The sub-section constitutes an emphatic condemnation by the Legislature of any gaming contract with respect to marine insurance. It must be remembered that this sub-clause rests upon no mere technicality. It is based upon public policy and it was passed in order to prevent (if possible) what was deemed to be a grave public mischief. So early as 1745 the Legislature had perceived the evils of gaming contracts of this description and had provided a measure of legislation to deal with them."

My decision in that case was affirmed by the Court of Appeal, and Bankes, L.J. incidentally observed (15 Asp. Mar. Law Cas. 69; 123 L. T. Rep. 487; (1920) 3 K. B., at p. 251): "The main evil which it was intended that the earlier Act should deal with, as recited in

the preamble, was as great when the Act of 1906 was passed as it was in 1745."

I think it clear that every policy containing a p.p.i. clause is made void by virtue of sect. 4 (2) (*b*) of the Act of 1906 whether it be a wagering contract in fact or not: (see *Cheshire and Co.* v. *Vaughan Brothers and Co.*) (*sup.*) and per P. O. Lawrence, J., in *Re London County Commercial Reinsurance Office, Limited* (15 Asp. Mar. Law Cas. 553; 127 L. T. Rep. 20; (1922) 2 Ch. 67). If a p.p.i. clause or any like term exist in the policy then it matters not that the assured possesses an insurable interest, nor does it matter that he introduces into the document such a provision as that, for example, appearing in clause 7 of the Institute Time Clauses. In each case the policy is void. I therefore hold that sect. 4 of the Act of 1906 avoids the policy now before me. If this be so there arises for decision the further question, can a right of subrogation spring from a document so declared void by statute?

The doctrine of subrogation must be briefly considered. It was derived by our English courts from the system of Roman law. It varies in some important respects from the doctrine as applied in that system, and indeed, the actual term "subrogation" does not, I think, occur in Roman law in relation to the subjects to which it has been applied by English law (see Dixon on the Law of Subrogation (Philadelphia, 1862), c. i.). The doctrine has been widely applied in our English body of law as, for example, to sureties and to matters of *ultra vires* as well as to insurance. In connection with insurance it was recognised ere the beginning of the eighteenth century.

In *Randal* v. *Cockran*, decided in 1748 (1 Ves. Sen. 98), it was held that the plaintiff insurers, after making satisfaction, stood in the place of the assured as to goods, salvage, and restitution in proportion for what they paid. As the Lord Chancellor (Lord Hardwicke) said: "The plaintiffs had the plainest equity that could be." It is curious to observe how this doctrine of subrogative equity gradually entered into the substance of insurance law, and at length became a recognised part of several branches of the general common Law. In *Mason* v. *Sainsbury* (3 Doug., at p. 64), Lord Mansfield said: "Every day the insurer is put in the place of the insured." Buller, J., in the same case, in approving judgment for the plaintiff insurer, said (3 Doug., at p. 64): "Whether this case be considered on strictly legal principles or upon the more liberal principles of insurance law, the plaintiff is entitled to recover." The more liberal principles were based on equitable considerations; and in the well-known case of *Burnand* v. *Rodocanachi* (4 Asp. Mar. Law Cas. 576; 47 L. T. Rep. 277; 7 App. Cas., at p. 339), Lord Blackburn said in reference to a marine policy: "If the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back." This equity springs, I conceive, solely from the fact that the ordinary and valid contract of marine insurance is a contract of indemnity only. The point was put most clearly by Brett, L.J., in *Castellain* v. *Preston* (49 L. T. Rep. 29; 11 Q. B. Div., at p. 386), when he said: "The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity and indemnity only." That is the principle embodied in sect. 79 of the Marine Insurance Act 1906. If, then, subrogation is based on indemnity, it is well to consider the features flowing from subrogation. This matter is neatly stated in Porter on Insurance 6th edit., p. 236 as follows: "This right rests upon the ground that the insurer's contract is in the nature of a contract of indemnity, and that he is therefore entitled upon paying a sum for which others are primarily liable to the assured, to be proportionally subrogated to the right of action of the assured against them." See, too, Arnould on Marine Insurance, 10th edit., vol. 2, s. 1226, and MacGillivray on Insurance, p. 733.

If once the claim is paid, then, as a matter of equity, the rights to recover against third persons pass from the assured to the insurer, although the legal right to compensation remains in the assured, and although actions at law must be brought in the name of the assured and not of the insurer: (see *London Assurance Company* v. *Sainsbury*, 3 Doug. 245, and *King* v. *Victoria Insurance Company*, 74 L. T. Rep. 206; (1896) A. C. 250).

As pointed out in MacGillivray (p. 740), it follows from this equity that if the assured, upon tender of a proper indemnity as to costs refuses the use of his name, the insurer can, by proceedings in equity, compel him to give the use of his name. This has long been settled law.

I have dwelt on the above points because it is necessary to bear them in mind when testing the questions at issue in the present case. It will be observed that the whole basis of the subrogative doctrine is founded on an actual binding and operative contract of indemnity, and that it is from such a contract only that the equitable results and rights, as indicated above, derive their origin.

At this stage I ought to notice a contention raised by the counsel for the defendants. They submitted that the right of subrogation rested, not on the original contract of insurance, but upon the payment made by the insurer under a contract apparently of that character. They referred to several dicta; I need only mention two. Thus, in *Simpson* v. *Thomson* (3 Asp. Mar. Law Cas. 567; 38 L. T. Rep. 1; 3 App. Cas., at p. 284), Lord Cairns said: "I know of no foundation for the right of underwriters, except the well-known principle

of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss." So, too, in *Castellain* v. *Preston* (49 L. T. Rep. 29; 11 Q. B. Div., at p. 389), Brett, L.J. said: "But he cannot be subrogated into a right of action until he has paid the sum insured and made good the loss." These dicta, however, are capable of just explanation by the theory that the principle of subrogation is ever a latent and inherent ingredient of the contract of indemnity, but that it does not become operative or enforceable until actual payment be made by the insurer. It derives its life from the original contract. It gains its operative force from payment under that contract. Not till payment is made does the equity, hitherto held in suspense, grasp and operate upon the assured's *choses in action*. In my view the essence of the matter is that subrogation springs not from payment only, but from actual payment conjointly with the fact that it is made pursuant to the basic and original contract of indemnity. If then, the right of subrogation rests upon payment under a contract of indemnity, how does the matter stand when the policy of insurance is an honour policy only? In my opinion such a policy is not a contract of indemnity at all. It is the negation of such a contract. I respectfully agree with the statement in Arnould, s. 311, that "a wager (or honour) policy may be defined to be one in which the parties, by express terms, disclaim, on the face of it, the intention of making a contract of indemnity." This statement, I think, puts the point forcibly and well. It matters not in what way the disclaimer be expressed, whether by the words, "Production of this policy to be deemed full and sufficient proof of interest," or by any like phrase. Such a policy was since 1745 (19 Geo. 2, c. 37), and is, in truth and substance, a wager, and is regarded as such by sect. 4 of the Act of 1906. Thus, under the Act of 1745, it was said by Lord Mansfield in *Kulen Kemp* v. *Vigne* (1 Term. Rep., at p. 308): "A necessary consequence of this being a wagering policy is that the insurer cannot abandon." And so, too, in the earlier case of *Dean* v. *Dicker* (2 Str. 1250) it was held that on a policy "interest or no interest," a recapture of the ship after being in an enemy's port would not avail the defendant insurer, inasmuch as the policy was a mere wager upon a total loss in the voyage. I think that Parliament has placed a "p.p.i." policy on much the same footing as a wager on a horse race. In substance it is a mere bet. The insurer agrees to pay on the occurrence of a given event, irrespective of the actual interest or loss of the assured. It is none the less a bet in substance, because the wagering parties may have clothed the wager with certain conditions. Sect. 4 of the Act of 1906 cannot be defeated by a mere device of phrases. If, then, the policy before me is to be deemed a mere wager and not a contract of indemnity, it follows that there is no juristic scope for the operation of the principle of subrogation. The essential basis of subrogation is wholly absent.

There is also the further point, that by sect. 4 of the Act of 1906 the present policy is void. It is destitute of all legal effect between the parties. If so, it cannot operate as if it were a valid bargain carrying with it the legal and equitable results and the body of jural remedies which ordinarily flow from an insurance indemnity contract. Legal proceedings to enforce subrogative rights cannot be based on a document which is stricken with sterility by Act of Parliament. I may cite the words of Scrutton, L.J., in *Cheshire and Co.* v. *Vaughan Brothers and Co.* (15 Asp. Mar. Law Cas., at p. 76; 123 L. T. Rep. 487; (1920) 3 K. B. 240, at p. 255), when he said: "In my view the court must give full effect to the nullity and invalidity which the statute declares, and 'cannot consider as the basis of a legal obligation a set of relations which Parliament has declared to be null and void.'" It therefore follows that, *primâ facie*, the defendants are not entitled to the sum of 1416*l.* 12*s.* 3*d.* in dispute.

Before passing to the final contention of the defendants, I may mention three well-known decisions cited and relied on by the defendants' counsel. First, *King* v. *Victoria Insurance Company* (*sup.*) where the Privy Council held that the insurer, seeking to exert his subrogative remedies, must show that he has paid the assured, but need not show that he was legally bound to pay under the terms of the policy. In that case, however, the policy was valid and hence there was no doubt that the foundations of subrogation existed. If so, it seems just to hold that payments reasonably made under the policy should operate as creating a right to subrogative remedies. Secondly, *Thames and Mersey Marine Insurance Company* v. "*Gunford*" *Ship Company* (12 Asp. Mar. Law Cas. 49; 105 L. T. Rep. 312; (1911) A. C. 529) where the House of Lords held that the omission to disclose the facts relating to the over insurance of the vessel and the existence and amount of honour policies amounted to the non-disclosure of material circumstances dealt with by sect. 18 of the Marine Insurance Act 1906. This decision was remarkable for the powerful and condemnatory views expressed by Lord Shaw on gambling marine policies. The case recognises that honour policies in fact exist. It certainly recognises, I think, nothing more. It emphasises, on the contrary, their invalidity for contractual purposes. It merely decides that an honour policy as a bare fact may be a relevant circumstance for disclosure to an insurer under sect. 18 of the Act of 1906. Thirdly, *Bridger* v. *Savage* (53 L. T. Rep. 129; 15 Q. B. Div. 363), where the Court of Appeal held that an agent who had received winnings on bets on horse races made with third persons must account to his principal for them, although the bets were void under 8 & 9 Vict. c. 109, s. 18. That decision was followed by the Divisional

Court in *De Mattos* v. *Benjamin* (70 L. T. Rep. 560.)

The ratio of *Bridger* v. *Savage* (*sup.*) has ofttimes been discussed, for example, by Scrutton, L.J., in *Cheshire and Co.* v. *Vaughan Brothers and Co.* (*sup.*) Perhaps the best explanation of *Bridger* v. *Savage* (*sup.*) is that given in Arnould, ss. 109, 121, and the notes thereto, namely, that an agent cannot dispute the title of his principal. This is a reasonable explanation, though it may not apply in cases where the transactions giving rise to the receipt by the agent are not merely void, but are prohibited under penalty of imprisonment or fine. However, that may be I cannot see that *Bridger* v. *Savage* (*sup.*) is relevant to the question now before me.

I can now briefly deal with the final contention of the defendants, namely, that the plaintiffs, by asking for and receiving the 5,610*l.* under the honour policy, thereby elected to treat it as valid and binding, and cannot now be heard to allege the contrary so as to avoid accounting for the 1,416*l.* 12*s.* 3*d.* Now the principle of election or approbation, so far as it touches the present case, seems to be just and reasonable. The basic rule was well put by Honyman, J., in *Smith* v. *Baker* (L. R. 8 C. P., 357), when he said: "A man cannot at the same time blow hot and cold. He cannot say at one time that the transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and at another time say that it is void for the purpose of securing some further advantage." The rule so stated has been often applied by the courts, namely, in *Roe* v. *Mutual Loan Fund Association* (where Lopes, L.J., said (19 Q. B. Div., at p. 351): "The whole conduct of the plaintiff shows that he treated the bill of sale as valid in order to obtain an advantage." A like principle was stated by Chitty, J., in *Peru Republic* v. *Peruvian Guano Company* (57 L. T. Rep. 337; 36 Ch. Div. at p. 499), where he said: "A principal must act consistently; he cannot, as was stated by Lord Kenyon—see *Smith* v. *Hodson* (4 Term. Rep. 211, at p. 217)—blow hot and cold, or, to use Lord Cairn's expression (derived from the Scotch phraseology), he cannot approbate and reprobate at the same time, he must adopt entirely or repudiate entirely." These words of Chitty, J., are well illustrated by the notes to *Smith* v. *Hodson* (*sup.*), in Smith's Leading Cases, 12th edit., vol. 2, p. 139, and are confirmed by the observations of Lord Finlay in *Morris* v. *Barron and Co.* (118 L. T. Rep. 34; (1918) A. C. 1.) I am not concerned in this action to examine or analyse the various decisions in which the court have purported to apply the underlying principles of law which are connected with the use of such words as "affirmation," "approbation," "election," or the like. I accept the rule stated by Honyman, J., in *Smith* v. *Baker* (*sup.*).

In my opinion, however, that rule has no application to the present case. The present plaintiffs never did assert the validity of the honour policy issued by the defendants; they knew, and the defendants knew, that it was void under sect. 4 of the Act of 1906, inasmuch as the p.p.i. clause had expressly been made a part of the bargain. It is true that the plaintiffs asked for payment of the sum of 5,610*l.* Their ground of claim, however, was not that the policy was valid, but that the insurers ought to pay under the p.p.i. bargain. Each side was fully aware of the position. The insurers did not inquire as to the actual interest or the actual loss of the assured. They merely paid the amount which they had agreed to pay in the event which happened. The assured made no representation except that they had won (as was the fact) their wager. The policy was presented and paid as an honour policy. The case seems similar to that which arises when a bookmaker presents his weekly account to the customer with whom he has made bets. He asks for payment of the debit balance, but does not represent by his account that the bets set forth are legally valid. Each side knows that they are void. There is no question in such a case of affirmation or election. And so in the case now before me the matter, as I think, is in substance the same. I deem it clear that the insurers paid, not as under a legally enforceable bargain, but as upon an honour policy. Such a policy is void of subrogative quality. The insurance had been made irrespective of indemnity. I therefore hold that the claim of the defendants to subrogation fails, and that the plaintiffs, and not the defendants, are entitled to the sum of 1,416*l.* 12*s.* 3*d.* in question. I give judgment for the plaintiffs with costs.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Botterell* and *Roche*, for *Weightman, Pedder*, and *Co.*, Liverpool.

Solicitors for the defendants, *William A. Crump* and *Son.*

June 22 *and* 23, 1922.

(Before ROWLATT, J.)

WATSON (JOSEPH) AND SON LIMITED *v.* FIREMEN'S FUND INSURANCE COMPANY OF SAN FRANCISCO. (*a*)

Insurance (Marine)—General average—Contribution — Supposed peril — Mistake — Alleged general average act—Loss—Not incurred in relation to avoidance of peril insured against —Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *s.* 66, *sub-s.* 6.

By sub-sect. 6 *of sect.* 66 *of the Marine Insurance Act* 1906 (6 *Edw.* 7, *c.* 41): "*In the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connection with the avoidance of a peril insured against.*" *The defendants, an American company, had issued to the plaintiffs three certificates of insurance against fire in respect of a number of barrels of rosin shipped by the plaintiffs on the steamship* S. F. *on a voyage from New York to Hull. While*

(*a*) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

the steamship in question was at sea, the master noticed what appeared to be steam, or vapour, or smoke issuing out of No. 1 hold, and he thought that the cargo was on fire. Acting on that assumption which turned out to be a mistaken one, he had high-pressure steam turned into the hold to put out the supposed fire. In doing so he damaged the plaintiffs' rosin. The plaintiffs claimed a general average loss under the certificates of insurance. The defendants refused to pay on the ground that what they had insured against was an actual peril and not a supposed peril. It was contended on their behalf that a general average claim could only arise out of something done to avoid an actually existing peril and not merely a supposed peril. The learned judge found on the evidence that there was no fire.

Held, that this was not a general average loss. The insurance was against fire and not against mistakes. Where there was only a mistaken though reasonable belief in the existence of a peril the thing could not be construed as a peril within the meaning of the Marine Insurance Act 1906, *and sub-sect.* 6 *of sect.* 66 *of that Act did not bring in losses incurred owing to a mistaken belief that a peril insured against existed. Therefore the claim failed.*

ACTION in the Commercial List, tried by Rowlatt, J.

The plaintiffs claimed from the defendants the sum of 3706*l.* in respect of a general average loss under three certificates of insurance issued by the defendants. The plaintiffs had shipped a number of barrels of rosin on a steamship on a voyage from New York to Hull, and they had taken out three certificates of insurance with the defendants, an American company. These certificates insured the goods against the ordinary risks including fire and explosion.

During the voyage, the captain, observing something which appeared to be smoke, or steam, or vapour issuing from the hold, thought there was a fire in the hold, and acting upon that assumption, which proved to be a mistaken one, he caused high-pressure steam to be turned into the hold to put out the supposed fire, and, in doing so, damaged the cargo of rosin. As a matter of fact, the captain was mistaken, because there was in fact no fire in the hold.

The plaintiffs, however, brought the action to recover a sum of money in respect of the damage done to the rosin as a general average loss within the meaning of sect. 66 of the Marine Insurance Act 1906 (6 Edw. 7, c. 41). They claimed that the damage done to the rosin in the hold by the injection of steam into the hold was a loss incurred "for the purpose of avoiding, or in connection with the avoidance of," a peril insured against within the meaning of sect. 66 of the Marine Insurance Act 1906.

By the Marine Insurance Act 1906:

Sect. 66 (1). A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice; (2) there is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure. . . . (6) In the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connection with the avoidance of a peril insured against.

Leck, K.C., and *Le Quesne* for the plaintiffs.

MacKinnon, K.C., and *Simey* for the defendants.

ROWLATT, J.—I propose to give judgment on the footing that the question raised is one which must be decided according to English law. I will first deal with the facts. I do not think that the evidence establishes that there was a fire in the hold. I accept the theory that the vapour seen by the captain issuing from the hold, was given off by the rosin which had become heated by steam escaping from a broken pipe. It has been argued that there is a "peril" within the meaning of sect. 66 of the Marine Insurance Act 1906 in every case where the captain believes that a peril exists. I do not think so. Cases were cited which shows that much depends upon the view taken at the time by the captain or person in authority as opposed to that taken by those who, after the event, may have had a better opportunity of forming a correct judgment. But it appears to me that there is an ambiguity in the contention which they were cited to support. It is one thing to say that where a peril in fact existed we must take the view of the captain formed at the time with regard to what would be the outcome of that peril, and we must not say to him, "If you had held on, you would have found that all would have come right," or something of that kind. But it is another thing to say that we must take the captain's view as to whether the state of facts existed which are alleged to have constituted the peril.

In *Corrie* v. *Coulthard* (3 Asp. Mar. Law Cas. 546n) there was a real peril to the ship—namely, that the mainmast, being loose, might work through the bottom of the vessel. If no action had been taken by the captain, what would have been the result? As it turned out, nothing would have happened, and the peril would have had no disastrous consequences. But it was held that a loss incurred in averting that peril was a general average loss. In the American case of *The Wordsworth* (88 Fed. Rep. 313), water was coming in at the forepeak, and the captain put back into port to remedy this. There was peril for water was coming into the ship, though not in the manner supposed by the captain, and nobody knew what would be the result. The words of the Marine Insurance Act 1906 do not justify me in holding that there is a peril whenever it looks as if there was a peril. I do not think, therefore, that this was a general average loss.

But even if it was a general average loss, I do not think that the plaintiffs can recover, because they could only do so under their insurance against peril by fire. The underwriters insured against fire in fact, and if there had been a fire, they would have had to pay. But why should they pay if in fact there was no fire? They did not insure against an error of judgment on the part of the captain in deciding whether there was a peril or not. It has been argued that this was a loss incurred "for the purpose of avoiding, or in connection with the avoidance of, a peril insured against" within the meaning of sect. 66, sub-sect. 6, of the Act, but I do not think this was a loss of that kind. I am of opinion that the effect of that sub-section is to include losses which are collateral to the main process of avoiding a peril insured against, and that it does not affect losses incurred in a mistaken attempt to avoid a peril which is in fact non-existent. There must be judgment for the defendants.

Judgment for the defendants.

Solicitors for the plaintiffs, *Waltons and Co.*

Solicitors for the defendants, *W. A. Crump and Son.*

June 21 and 26, 1922.

(Before McCARDIE, J.)

HOWARD HOULDER AND PARTNERS LIMITED v. MANX ISLES STEAMSHIP COMPANY LIMITED. (a)

Shipbroker — Charter-party — Negotiation — Remuneration — Broker's commission — Option to charterers to purchase ship — Contract to pay commission to broker on stated price — Deal carried through at smaller price — Broker's right to commission — Quantum meruit.

In 1913 *the plaintiffs, who were steamship agents and brokers, effected on behalf of the defendants a charter of their steamship, the M. I., for seven years, expiring about Oct.* 1920, *and for this service the defendants paid them commission. In the autumn of* 1919 *the plaintiffs began negotiations with a limited company, which was associated in business with the then charterers of the vessel for a new charter-party to begin when the former ended. Terms were eventually agreed, and the arrangements were embodied in a charter-party dated the* 23rd *Dec.* 1919 *made between the defendants and the limited company. This charter-party, which was signed about the* 8th *Jan.* 1920, *was for a period of five years from the expiration of the earlier charter-party. It contained a clause giving the charterers the option of purchasing the ship at any time after the signing of the charter-party and the completion of the charter period for* 125,000*l. The defendants, on the date of the signing of the charter-party, signed and gave to the plaintiffs a commission note dated the* 23rd *Dec.* 1919, *the same date as that of the charter-party. By this commission note the defendants agreed to pay the plaintiffs, under the five years' charter completed that day,* 5 *per cent. brokerage on hire as earned and paid. "Should the option of purchase contained in charter be availed of, the brokerage on purchase to be* 3½ *per cent., payable on the final completion of purchase." In July* 1921 *the defendants sold the steamship to the charterers for* 65,000*l. The plaintiffs claimed* 3½ *per cent. of that sum as brokerage, and, in the alternative, a* quantum meruit *for services rendered.*

Held, that, having regard to the settled rule for the construction of commission notes and similar documents which referred to the remuneration of agents, that a plaintiff could not recover unless he showed that the conditions of the written bargain had been fulfilled, the plaintiffs' claim for commission so far as it was based on the terms of the commission note, failed, because the conditions had not been fulfilled, the sale of the steamship for 65,000*l. instead of* 125,000*l. being a wholly new and distinct bargain from that referred to in the commission note.*

Held, further, that the plaintiffs could not claim on a quantum meruit *because the parties had reduced their contract into writing in the commission note. The action therefore failed.*

ACTION tried by McCardie, J.

The plaintiffs who were steamship agents and brokers, sued the defendants, who were shipowners, for brokerage at the rate of 3½ per cent. on the purchase price of the defendants' steamship the *Manx Isles*, which was sold by the defendants to the charterers during the period of a charter-party which had been negotiated by the plaintiffs. The plaintiffs claimed under the terms of a commission note, whereby it was agreed that they were to receive 3½ per cent. brokerage on purchase price "should the option of purchase contained in the charter be availed of." By a clause in the charter-party the charterers had the "option of purchasing steamer at any time between the date of signing charter and the completion of charter period for the sum of 125,000*l.*"

During the currency of the charter-party the defendants sold the steamship to the charterers for 65,000*l.*

The plaintiffs now claimed brokerage, or alternatively, a *quantum meruit* for alleged services rendered. The defendants denied liability.

W. A. Jowitt, K.C. and *H. Claughton Scott* for the plaintiffs.

A. Neilson, K.C. and *P. Vos* for the defendants.

Cur. adv. vult.

June 26, 1922.—McCARDIE, J. said: The plaintiffs are steamship agents and brokers. They seek to recover commission from the defendants, who formerly owned a steamship, the *Manx Isles*. The claim springs from the sale of that ship by the defendants under circumstances which can be stated with brevity.

(a) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

In the year 1913 the plaintiffs effected a seven-years charter of the above vessel. For this service on behalf of the defendants the plaintiffs received commission. The charter period would expire about Oct. 1920.

In the autumn of 1919 the plaintiffs began an active negotiation between the defendants and a limited company which was associated in business with the former charterers for a fresh charter-party to begin when the former ended. The history of the negotiations is shown in the large body of correspondence laid before me. The first proposals related to a suggested purchase of the vessel by the limited company. Much discussion took place with regard to price. Then the question turned to a proposal for a fresh charter-party for a long period. Discussion occurred with regard to the terms.

Finally, correspondence took place with respect to a charter-party for a long period, conjointly with an option by the charterers to purchase. A further body of letters ensued on the actual form of the charter-party and option. At length terms were agreed and the arrangements were embodied in a charter-party between the defendants of the one part and the limited company (the British Molasses Company Limited), of Liverpool, of the other part.

The charter was signed on or about the 8th Jan. 1920. It was dated the 23rd Dec. 1919. It was for five years from the expiration of the 1913 charter. The monthly hire was 4750*l.* The following was the clause as to purchase: " Charterers have option of purchasing steamer at any time between the date of signing charter and the completion of charter period, for the sum of 125,000*l.* without oil burning installation, but if such installation has in the meantime been fitted charterers are to pay cost of fitting same less a reasonable amount for depreciation."

It is clear that the plaintiffs took a very active and effective part in bringing about the above bargain. Before the charter-party was signed, on the 8th Jan. 1920, the plaintiffs and the defendants had discussed the question of the plaintiffs' remuneration. No agreement was then arrived at. On the day, however, when the charter-party was signed, the defendants signed and gave to the plaintiffs a commission note which was made of like date as the charter-party, namely, the 23rd Dec. 1919. It represented the bargain between the plaintiffs and the defendants as to the plaintiffs' reward. It is the document set forth in the statement of claim. It is as follows: " December 23, 1919. Dear Sirs,——S.S. *Manx Isles*. We hereby agree to pay to you under the five-years charter completed to-day per above steamer with the British Molasses Company Limited, Liverpool, 5 per cent. brokerage on hire as earned and paid. Should the option of purchase contained in the charter be availed of the brokerage on purchase to be 3½ per cent., payable on the final completion of purchase.—Yours truly, LOWDEN, CONNELL, and Co." That is the commission note.

The remaining facts are few. For about eight months after it came into operation the charter-party was duly fulfilled. Hire was paid to the defendants, and upon this hire the plaintiffs received their commission as bargained. Then, at the beginning of July 1921, the defendants sold to the charterers the *Manx Isles* for 65,000*l.* Thus the charter-party ceased to exist.

The plaintiffs then made certain claims on the defendants for commission. The defendants' denied liability. In the statement of claim the plaintiffs have set out several distinct heads of demand. First, they claim against the defendants that they deprived them of their future commission by selling the vessel to the charterers. Under this head they ask for 5 per cent. on the total hire which would have been earned. The total is 247,000*l.* Thus they claim 12,350*l.* Secondly, they claim (alternatively) 3½ per cent. (the rate named in the commission note) on 65,000*l.*, the price given by the charterers for the vessel. Thirdly, they claim (alternatively) a reasonable remuneration as on a *quantum meruit* for their services as above indicated, which they assert to have resulted in the sale of the vessel for 65,000*l.*

The first head of claim must, of course, fail. It is met by the decision of the House of Lords in *French* v. *Leeston Shipping Company Limited* (15 Asp. Mar. Law Cas. 544; 127 L. T. Rep. 169; (1922) 1 A. C. 451).

I do not propose to enquire whether that opinion be consonant with various weighty decisions which will be familiar to those who have had to consider this branch of law, but which were not cited to the House of Lords. Nor is it necessary to consider here the limits which legal principle may impose on the operative extent of the conclusion reached by the House of Lords on the particular circumstances of *French's* case (*sup.*). It will suffice to say that the facts of this present litigation are so similar to those in the House of Lords' case as to defeat the first head of the plaintiffs' claim.

The writ in this case was issued before the House of Lords had announced their opinion in *French's* case (*sup.*). It must be taken that there was nothing in law to prevent the defendants from selling the ship, although the result was that the plaintiffs lost any chance of earning further commission under the terms of the commission note.

In view of the dictum of Lord Dunedin in *French and Co.* v. *Leeston Shipping Company* (*sup.*) I may add that there is here no evidence and no suggestion that the defendants sold the vessel to the charterers in order to escape the payment to the plaintiffs in respect of the charter hire. That dictum of Lord Dunedin may call for consideration in some other case. I express no opinion on it.

I must now consider the second and third heads under which the plaintiffs formulate their case. I think that so far as the plaintiffs seek to rely on the commission note they must

fail. The words of the note are: "Should the option of purchase contained in the charter be availed of, the brokerage on purchase to be 3½ per cent., payable on the final completion of purchase." The option of purchase in the charter was an option to purchase pursuant to express terms which fixed the price at 125,000*l.* That option was never exercised. The owners and the charterers made a wholly distinct bargain whereby the charterers bought at 65,000*l.* only. The plaintiffs took no part in negotiating this fresh bargain, which was made when shipping conditions had greatly changed and vessels had heavily fallen in value. It is a settled rule for the construction of commission notes and the like documents which refer to the remuneration of an agent that a plaintiff cannot recover unless he shows that the conditions of the written bargain have been fulfilled. If he proves fulfilment he recovers. If not, he fails. There appears to be no half-way house, and it matters not that the plaintiff proves expenditure of time, money, and skill. This rule is well illustrated by *Alder* v. *Boyle* (1847, 4 C. B. 635), where commission was not payable until an abstract of conveyance was drawn out; *Bull* v. *Price* (1831, 7 Bing. 237), where the commission was only payable on money actually "obtained"; *Battams* v. *Tompkins* (1892, 8 Times L. Rep. 707), commission payable on "completion" of purchase; *Clack* v. *Wood* (47 L. T. Rep. 144; 9 Q. B. Div. 267), commission payable "subject to the title being approved by my solicitor"; and by such illustrative decisions as *Mason* v. *Clifton* (1863, 3 F. & F. 899) (commission to be paid if money is raised on specified terms) and *Martin* v. *Tucker* (1 Times L. Rep. 655) (commission to be paid on "the amount of the capital brought into the business").

It, therefore, seems clear that the plaintiffs cannot recover upon the actual terms of the commission note. I may add that it may well be that an owner would be willing to pay 3½ per cent. if he sold his ship for 125,000*l.*, but exceedingly unwilling to do so if he sold at 65,000*l.* only.

Mr. Jowitt, however, rested his able and ingenious argument for the plaintiffs not so much on the actual terms of the commission note as upon the suggested right of the plaintiffs to recover upon a *quantum meruit* for services performed and resulting (so it is said), either directly or indirectly, in the sale for 65,000*l.* of the vessel. This raises a question of interest and importance to all agents who rely on the payment of commission as their means of income. The commission note before me represented the result of discussion between the plaintiffs and the defendants. It embodied their bargain. They reduced their agreement to writing. There was no collateral arrangement whatever. The rights of the plaintiffs are to be found in the commission note alone, and so the parties intended. If this be so, then it follows, as Mr. Neilson so forcibly indicated for the defendants, that the rule *Expressum facit cessare tacitum* here applies. There is no scope on the present facts for the operation of the *quantum meruit* principle. If I were to rule in the plaintiffs' favour I should ignore the well-established rule and a substantial body of authoritative decision.

In *Mason* v. *Clifton* (3 F. & F. 899) Cockburn, C.J., when summing up to the jury, said, at p. 901: "If . . . B. is employed to procure money upon certain terms, and does not procure it upon those terms, but upon other and different terms, then A. will not be liable to him for commission. Nor can B., in such case, claim to recover a reasonable remuneration for trouble and labour, for he has not done what he was employed to do."

So, too, in *Green* v. *Mules* (30 L. J. C. P. 343), Willes, J., in speaking of the commission agreement there in question, said: "The substance of the matter was, 'If the letter is effectual, I (the defendant) will pay you 100*l.*, though not liable; if it is not effectual, I will pay you nothing.'" These cases well illustrate the *Expressum facit cessare tacitum* rule, though that rule was not especially mentioned in them.

The matter was clearly put in *Martin* v. *Tuckett* (*sup.*) in the judgment of Lord Coleridge, C.J. when he said (1 Times L. Rep., at p. 655) that the plaintiffs "could not claim on a *quantum meruit* because they had chosen to tie themselves down by the express terms of the agreement." Much the same view was expressed by the Court of Appeal in *Barnett* v. *Isaacson* (4 Times L. Rep. 645, at p. 646), where Lord Esher said: "The plaintiff was only to be paid in case of success, no matter what labour and trouble he had devoted to the matter." Finally, I may mention *Lott* v. *Outhwaite* (10 Times L. Rep. 76, 77), where Lindley, L.J. stated: "It was said that there was an implied contract to pay the agent a *quantum meruit* for his services. The answer was that there could be no implied contract when there was an express contract." The authorities cited in Smith's Leading Cases (12th edit., vol. II., p. 24, and following) do not, I think, assist the plaintiffs. The point in favour of the defendants is clearly and correctly set forth in Halsbury's Laws of England, (vol. I., p. 193). For these reasons I must hold that the plaintiffs cannot recover upon a *quantum meruit.*

It, therefore, is not strictly needed that I should inquire whether the plaintiffs were the "efficient cause" of the sale of the vessel for 65,000*l.* As, however, the question was argued before me, I briefly express my opinion Bearing in mind *Toulmin* v. *Miller* (58 L. T. Rep. 96), and applying the tests laid down in *Millar* v. *Radford* (19 Times L. Rep. 575), and in *Nightingale* v. *Parsons* (110 L. T. Rep. 806; (1914) 2 K. B. 621), I should hold that the plaintiffs were not the "efficient cause" in bringing about the sale of the vessel for 65,000*l.* They took no part whatever (as I have said) in the independent negotiation which led to that result, and the sale was made under conditions and in view of circumstances wholly distinct

from those contemplated by the option in the charter of the 23rd Dec. 1919.

I must, therefore, give judgment for the defendants.

Judgment for the defendants.

Solicitors: For the plaintiffs, *W. A. Crump* and *Son*; for the defendants, *Rawle, Johnstone*, and *Co.*, for *Hill, Dickinson*, and *Co.*, Liverpool.

June 22 *and July* 4, 1922.

(Before MCCARDIE, J.)

NORWICH UNION FIRE INSURANCE SOCIETY *v.* COLONIAL MUTUAL FIRE INSURANCE COMPANY. (*a*)

Insurance (Marine)—Reinsurance—Subject to same conditions as the original policy—Variations of original contract of insurance—No notice of variation to reinsurers—Loss under original policy—Claim under original policy — Compromise — Action against reinsurers—Liability.

The plaintiffs issued an insurance policy to the owners of the Victorieux, *dated the* 9*th July* 1920 *in the usual form, for* 15,000*l. for twelve months from the* 14*th July* 1920 *to the* 13*th July* 1921. *The policy contained the following words:* "*Hull and machinery, valued at* 313,050*l., subject to Institute Time Clauses as attached, including the four-fourths running down clause. Subject to Institute Warranties as attached. Cancelling insurance already placed.*" *Clause* 18 *of the Institute Time Clauses was as follows:* "*In ascertaining whether the vessel is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.*" *By a policy of reinsurance dated the* 13*th Aug.* 1920 *for a period of twelve months, the plaintiffs insured part of their risk with the defendants for* 2500*l. for a premium of* 25*s. per cent. The policy contained the following words:* "*The said ship, &c., goods and merchandise, &c., for so much as concerns the insured by agreement between the insured and the said company in this policy, are and shall be valued at* 2500*l. on hull and machinery, &c., valued at* 313,050*l., or valued as original policy or policies, being against the risks of total and (or) constructive and (or) arranged total loss of steamship only. No salvage charges and no sue and labour charges attached thereto. Subject to valuation clause as if in original, subject to original warranties but half additional premiums cancelling returns only; being a reinsurance of Norwich Union Company. Subject to the same clauses and conditions as the original policy.*" *In Feb.* 1921 *negotiations took place between the plaintiffs and the shipowners, and an agreement was arrived at and a slip was initialled by the plaintiffs as follows:* "*Agreed to reduce policies on hull and machinery valued* 313,050*l. To pay only* 225,000*l. in event of total loss and return premium* 10*s. per cent. gross on* 313,050*l. Amounts insured on disbursements and freight not to be prejudiced thereby. Dated the* 8*th Feb.* 1921." *This agreement was endorsed on the plaintiffs' head policy. The defendants never assented to, nor were they aware of, any variation in the head policy. In Feb.* 1921 *the vessel became a total loss, and the plaintiffs, as head insurers, made a payment to the owners of the vessel in respect of the total loss of the vessel and claimed from the defendants an indemnity under the reinsurance policy.*

Held, that as by the agreement embodied in the slip dated the 8*th Feb.* 1921 *endorsed on the plaintiffs' head policy, the terms of the head policy were altered without the knowledge or assent of the defendants, the reinsurers, the latter were relieved from liability to the plaintiffs.*

ACTION tried by McCardie, J. sitting in the Commercial Court without a jury.

The plaintiffs had issued an insurance policy to the owners of the *Victorieux*, and had reinsured part of their risk with the defendants. A loss having occurred under the head policy, the plaintiffs claimed against the defendants under the policy of reinsurance.

The facts and arguments sufficiently appear from the headnote and the judgment of McCardie, J.

C. R. Dunlop, K.C. and *R. I. Simey* for the plaintiffs.

F. D. MacKinnon, K.C. and *S. Lowry Porter* for the defendants.

Cur. adv. vult.

July 4.—MCCARDIE, J. read the following judgment: The points in this case involve the principles of marine and other reinsurance.

The plaintiffs and the defendants are insurance companies. The plaintiffs' claim rests on a policy of reinsurance dated the 13th Aug. 1920, and made with the defendants upon a steamship, the *Victorieux*. The facts of the case are these: The head policy issued by the plaintiffs to the owners of the *Victorieux* was dated the 9th July 1920. It was in the usual form. It was numbered 133,424. The sum insured was 15,000*l.* The premium (at 5 guineas per cent.) was 787*l.* 10*s.* The period was for twelve months from the 14th July 1920 to the 13th July 1921, inclusive. This head policy contained the fololwing words: "Hull and machinery valued at 313,050*l.* Subject to Institute Time Clauses as attached including the four-fourths running down clause. Subject to Institute Warranties as attached. Cancelling insurance already placed." Amongst the Institute Time Clauses was the following clause 18: "In ascertaining whether the vessel is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account." Such was the head policy.

The policy of reinsurance now sued on by the plaintiffs was, as I have said, dated the 13th Aug.

(*a*) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

1920. It was for a period of twelve months from the 3rd July 1920 to the 2nd July 1921, or as original. The amount insured was 2500*l.* The premium was 25*s.* per cent. The following are the material words : " The said ship, &c., goods and merchandise, &c., for so much as concerns the insured by agreement between the insured and the said company in this policy are and shall be valued at 2500*l.* on hull and machinery, &c., valued at 313,050*l.*, or valued as original policy or policies, being against the risks of total and (or) constructive and (or) arranged total loss of steamship only. No salvage charges and no sue and labour charges attach hereto. Subject to valuation clause as and if in original. Subject to original warranties but half additional premiums cancelling returns only ; being a reinsurance of Norwich Union Company. Subject to the same clauses and conditions as the original policy and (or) policies and to pay as may be paid thereon."

Such is the reinsurance policy, which is limited to actual and (or) constructive and (or) arranged total loss of the vessel. Apparently the plaintiffs had reinsured under the above and like policies to the extent of 7500*l.* In Feb. 1921, a transaction took place between the owners of the ship and the plaintiffs whereby the defendants say that they (the reinsurers) were freed from any liability on their reinsurance policy. The owners of the vessel desired a reduction of the premium paid to the plaintiffs and the other underwriters. The underwriters were willing to meet the owners if terms could be arranged. As a result of negotiations an agreement was reached and a slip was initialled by the various underwriters concerned, including the plaintiffs. This was the slip : " Agreed to reduce policies on hull and machinery valued 313,050*l.* To pay only 225,000*l.* in event of total loss ; constructive total loss and return premium 10*s.* per cent. gross on 313,050*l.* Amounts insured on disbursements and freight not to be prejudiced thereby. Dated February 8, 1921." The agreement represented by this slip was, so far as it touched the plaintiffs, duly endorsed on the head policy with such words, *mutatis mutandis*, as were appropriate to express the bargain as between the owners of the ship and the plaintiffs. The alteration was apparently operative as from the 8th Feb. 1921. The defendants submit that the effect of the matters above stated was to destroy *in toto* their liability to the plaintiffs upon the reinsurance policy. The defendants never assented to, nor were they aware of, the variation made by the owners of the ship with the plaintiffs.

I must now state quite briefly a curious set of facts, so that the whole position between the parties may be clear. On the 6th Feb. 1921, the *Victorieux* encountered a cyclone. As a result (so the owners asserted) the vessel became a total loss on that day. The vessel, however, remained afloat. The crew tried to leave her, but heavy seas prevented. On the 10th Feb. 1921, the crew were able to leave the *Victorieux*, and on that day she sank. It is obvious that these facts give rise to argument as to when the vessel became a total loss. Was it on the 6th Feb. 1921, before the slip came into force, or was it on the 10th Feb. 1921, after the slip came into force ? The various underwriters concerned (including the plaintiffs) at first paid on the footing of 225,000*l.*, *i.e.*, on the assumption that the total loss took place after the 8th Feb. 1921 (the date of the slip). But the owners claimed that the total loss occurred on the 6th Feb. 1921, *i.e.*, before the date of the slip, and hence they demanded payment on the footing of 313,050*l.*, *i.e.*, the original valued amount. The difference between the two amounts is about 88,000*l.* Ultimately, the various underwriters concerned compromised this further claim of the owners for the figure of 30,000*l.* Thus the total sum paid by the various underwriters (including the plaintiffs) in respect of the total loss of the vessel was 255,000*l.* Applying these figures to the head policy as between the owners of the vessel and the plaintiffs, the matter works out thus : The effect of the reduction made by the slip and endorsed on the policy was to reduce the plaintiffs' policy with the owners from 15,000*l.* to 10,781*l.* This sum was paid by the plaintiffs to the owners. Then the plaintiffs' share of the compromise figure was about 1430*l.* This sum also the plaintiffs paid to the owners. Thus the plaintiffs have made a payment in all of about 12,200*l.* to the owners of the *Victorieux* in respect of the total loss of that vessel.

Now the defendants, although they dispute any liability at all, have made certain payments to the plaintiffs. They, first of all, paid the plaintiffs the sum of 1796*l.* 16*s.* 9*d.* upon the footing that the value of the vessel lost was to be taken as 225,000*l.* Then, after the abovementioned compromise, the defendants paid to the plaintiffs a further sum of 239*l.* 11*s.* 7*d.* Thus the defendants have paid the plaintiffs a total of 2036*l.* 8*s.* 4*d.*, which, deducted from the amount of 2500*l.* in the reinsurance policy, leaves a balance of 463*l.* 11*s.* 8*d.* It is this balance which the plaintiffs claim in this action. Thus they claim the full amount of the reinsurance policy.

Upon the above facts the defendants submit : (1) That they are not liable to the plaintiffs at all, owing to the alteration of the bargain between the owners of the vessel and the plaintiffs ; and (2) That, if liable at all, they have in any event paid the correct amount due from them to the plaintiffs under the reinsurance policy. It is obvious that these two points are distinct, although the considerations relevant to the one point may bear upon the second point.

The arguments on behalf of the plaintiffs were presented very ably and ingeniously by Mr. Dunlop, I proceed to consider the first question. It is one of serious importance to underwriters. Are the defendants liable at all ? It is curious to observe that in the eighteenth century reinsurance was declared unlawful in England, save where the insurer was insolvent, bankrupt, or dead : (see 19 Geo. 2, c. 37, s. 4, and Arnould on Marine Insurance, 10th edit., vol. 1, p. 442).

In *Mackenzie* v. *Whitworth* (2 Asp. Mar. Law Cas. 490, at p. 495; 32 L. T. Rep. 163, at p. 168; L. Rep. 10 Ex. 142, at p. 149), Pollock, B. remarked: "Reinsurance has been known almost as long as insurance, and (except during a certain period in our own country) it has been practised all over the world."

By the Inland Revenue (Stamp Duties) Act 1864 (27 & 28 Vict., c. 56, s. 1), reinsurance was made lawful. The matter is now dealt with by sect. 9 of the Marine Insurance Act 1906 (6 Edw. 7, c. 41), which provides: "(1) The insurer under a contract of marine insurance has an insurable interest in his risk, and may reinsure in respect of it. (2) Unless the policy otherwise provides, the original assured has no right or interest in respect of such reinsurance." I may say that a policy of reinsurance need not specify that it is a reinsurance (see sect. 26 (2) of the Act of 1906 and *Mackenzie* v. *Whitworth* (3 Asp. Mar. Law Cas. 81; 32 L. T. Rep. 163; L. Rep. 10 Ex. 142; affirmed in C. A. 33 L. T. Rep. 665; 1 Ex. Div. 36), and that where an insurer has reinsured his risk no notice of abandonment need be given by him (see sect. 62 (9). I call attention to the use of the word "risk" in sect. 9 (1) and sect. 62 (9). Now, as Mr. MacKinnon, counsel for the defendants, pointed out in the course of his luminous argument, a policy of insurance and its attendant burdens and right must, subject to any special rules of law, and to any statutory provisions applicable to insurance, be construed upon the normal principles of contract which prevail in the English courts. Insurance, after all, is a mere branch of the general body of contracts. The question of its liability must be tested with that consideration in mind. This being so, it is necessary to turn to the reinsurance policy. It was for 2500*l*. on hull, &c. "valued at 313,050*l*. or valued as original policy or policies." It was "against the risks of total and (or) constructive and (or) arranged total loss of steamer only." It was subject to valuation clause as and if in original. It was expressed to be "a reinsurance of the Norwich Union Company, subject to the same clauses and conditions as the original policy and (or) policies and to pay as may be paid thereon."

There was but one original policy in question—namely, the head policy, dated the 9th July 1920, and numbered 133,424. In my view it was upon that policy, No. 133,424, and that policy only, that the reinsurance policy was based. No other foundation existed. The parties to the reinsurance policy used clear and express words as to the subject-matter of their bargain. It is quite true that in Arnould appears the following passage (10th edit., vol. 1, p. 443): "The thing which the reassured insures is the thing originally insured. In this thing he has an insurable interest to the extent of the liability which he may incur under and by reason of his original contract of insurance." This passage is based on the words of Buckley, L.J., in *British Dominions General Insurance Company Limited* v. *Duder* (13 Asp. Mar. Law Cas. 84; 113 L. T. Rep. 210; (1915) 2 K. B. 394).

But the words which I have cited, and which were much relied upon by Mr. Dunlop, counsel for the plaintiffs, must not be read too narrowly. It is true that the physical subject-matter of the thing reassured is the thing originally insured. But the physical subject-matter of the thing reinsured is one thing and the contractual basis of the reinsurance bargain is another and additional thing. That contractual basis is necessarily described in the reinsurance policy, for otherwise the contractual obligations of the reinsurer could not be defined. In the case now before me I think it is clear that the contractual basis, was the head policy of the 9th July 1920 numbered 133,424. This being so, what was the effect of the bargain made between the owners of the ship and the original underwriters, and which was embodied in the slip of the 8th Feb. 1921, and then endorsed on the head policy?

Mr. Dunlop contended, on behalf of the plaintiffs, that it constituted neither a rescission nor even a variation of the head policy of the 9th July 1920, and that if a variation, it was not of a material character. I agree that there was no rescission. The distinction between rescission and variation is recognised in all the opinions of the House of Lords in *Morris* v. *Baron and Co.*. As Lord Dunedin said (118 L. T. Rep. 34; (1918) A. C. at p. 25): "The difference between variation and rescission is a real one," and the learned Lord indicated several tests. I cannot possibly assent, however, to the suggestion of Mr. Dunlop, counsel for the plaintiffs, that there was no variation. The parties first embodied their new bargain in a slip, and then endorsed the effect of the slip on the reinsurance policy. If this was not a variation, and a variation, moreover, of a material character, I know not what a material variation can be. The original rights and obligations under the head policy were altered in a substantial fashion. Premiums were varied and returned and the amount payable on total loss, constructive total loss, and (or) arranged total loss was deliberately altered to a striking extent—namely, from 313,050*l*. to 225,000*l*. It cannot, I think, possibly be said that the policy as altered was the same as the original policy. The very object of the parties was to effect a serious alteration. It is true that the "thing" (that is, the physical subject-matter of the reinsurance policy) remained the same, but the foundation of the reinsurance policy (to wit, the head policy) was changed in a substantial manner. In other words, the original foundation of the reinsurance policy had, in my view, ceased to exist. The original policy had in substance become a fresh policy with different terms.

The alteration had been effected without the assent or even the knowledge of the defendants. One effect of the alteration will be seen by reference to sect. 81 of the Marine Insurance

Act 1906, which provides: "Where the assured is insured for an amount less than the insurable value, or, in the case of a valued policy for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance." Here an uninsured balance of 88,000*l.* had come into being. In connection with the above point it is also necessary to remember clause 18 of the Institute Time Clauses, already set out. It is unnecessary to work out the various results which would follow from the reduction of the 313,050*l.* to 225,000*l.* It obviously, *inter alia*, brought nearer the probability of a claim for total loss: (see *Marten* v. *Steamship Owners Underwriting Association Limited* (9 Asp. Mar. Law Cas. 339; 87 L. T. Rep. 208).

In my opinion the present case is covered by the ratio of the Court of Appeal per A. L. Smith, Rigby, and Collins, L.JJ. in *Lower Rhine and Wurtemburg Insurance Association* v. *Sedgwick* (8 Asp. Mar. Law Cas. 466; 80 L. T. Rep. 6; (1899) 1 Q. B. 179). There the reinsurance policy was expressed to be subject to the original policy or policies and to pay as might be paid thereon. The reinsured had underwritten two time policies on the ship, and those were in force when the reinsurance was effected. Subsequently, during the currency of the reinsurance policy those two policies came to an end and the reinsured underwrote a fresh time policy of the same subject-matter differing as to the valuation of the ship and in other respects from the two original policies. It was held by the Court of Appeal that the policies referred to in the reinsurance policy were the policies then in existence and that the liability of the reinsurer did not extend to losses which might be incurred by the assured under a policy not containing the same terms, conditions and clauses as the original policies.

A clear light is thrown upon the opinion of the Court of Appeal by the dictum of Rigby, L.J. reported only in 4 Com. Cas., at p. 19, where he said: "It is one thing for the plaintiffs to trust to the policies which the defendants had made and another to trust to those which he might make in the future."

The *Lower Rhine* case (*sup.*) was considered by the Court of Appeal in *Reliance Marine Insurance Company* v. *Duder* (12 Asp. Mar. Law Cas. 95, 223; 106 L. T. Rep. 936; (1913) 1 K. B. 265), but nothing was said to weaken the *Lower Rhine* case (*sup.*). Nor is the effect of the *Lower Rhine* case (*sup.*) modified by the judgment of Bray, J. in *The Scottish National Insurance Company Limited* v. *Poole* (29 Times L. Rep. 16; 18 Com. Cas. 9) or of Bailhache, J. in *Emanuel and Co.* v. *Andrew Weir and Co.* (30 Times L. Rep. 518).

There would seem to be no difference in principle between a cancellation of the original policy followed by a substitution of a fresh policy on different terms and conditions as distinguished from a substantial variation of the original policy by an alteration in its clauses, values, or warranties. It appears to me that there is no halfway house between a right to alter the head policy without consent and an absence of right to do so. Either it can be altered or not. If it can be altered, then what limit is to be placed on the right of alteration? The only sound rule seems to be that the head policy cannot be altered save with the consent of the reinsurer.

It is not without interest to refer to a branch of the law, which, although different in some ways, yet presents many features in common with insurance. I refer to suretyship. It is well settled that if a creditor, without the consent of the surety, varies the terms of his bargain with the debtor the surety is *primâ facie* discharged; (see Leake on Contracts, 6th edit., pp. 599-601). As pointed out by Leake at p. 600: "The Court will not entertain the question of the materiality of the variation in the contract guaranteed, and unless it is self-evident that it is not material or prejudicial to the surety he is left to be the sole judge whether he will consent to remain liable." This passage is amply supported by the well-known judgment of Cotton, L.J. in *Holme* v. *Brunskill* (38 L. T. Rep. 838; 3 Q. B. Div. 495). It seems to me that a rule at least rigorous should apply to matters of insurance. If a head policy could be altered without the consent of the reinsurer the latter would be thrown into a position of danger, difficulty and doubt. The English law has ever been severe towards the unauthorised alteration of a document, and the austerity of its attitude will be apparent on referring to the particular branch of law dealt with in Leake on Contracts, 6th edit., pp 603, *et seq.*, and Arnould, s. 40.

For these reasons I must hold that the defendants were relieved from liability to the plaintiffs. It thus becomes unnecessary to give a developed decision on the further defence, namely, that, whether liable or not, the defendants have already paid all that they could be called upon to pay. Upon this point, Mr. MacKinnon, counsel for the defendants, relied, *inter alia*, on sect. 81 of the Act, and the principle involved in *British Dominions General Insurance Company Limited* v. *Duder* (*sup.*), where the Court of Appeal held that a contract of reinsurance was a contract of indemnity only, and that the defendants, the reinsurers, had refused to agree to the compromise. Mr. Dunlop, counsel for the plaintiffs, on the other hand referred, *inter alia*, to *Re Eddystone Marine Insurance Company* (7 Asp. Mar. Law Cas. 167; 66 L. T. Rep. 70; (1892) 2 Ch. 423); *Marten's* case (*sup.*); *British Union and National Insurance Company Limited* v. *Rawson* (115 L. T. Rep. 331; (1916) 2 Ch. 476); and *Nelson* v. *Empress Assurance Corporation Limited* (10 Asp. Mar. Law Cas. 68; 93 L. T. Rep. 62; (1905) 2 K. B. 281). He also mentioned *Street* v. *Royal Exchange Association* (12 Asp. Mar. Law Cas. 356. 496; 111 L. T. Rep. 235).

I do not, in view of my ruling on the first point, pause to analyse the arguments or the decisions cited. I will merely say that, in my opinion, the defendants are right in their second

contention also. I must therefore give judgment for the defendants.

Judgment for the defendants.

Solicitors for the plaintiffs, *W. A. Crump* and and *Son.*

Solicitors for the defendants, *Parker, Garrett*, and *Co.*

July 11 *and* 12, 1922.

(Before LUSH AND BAILHACHE, JJ.)

FORD (H.) AND CO. LIMITED *v.* COMPAGNIE FURNESS (FRANCE) AND OTHERS. (*a*)

Charter-party—Arbitration clause—Claim for damage to cargo—Dispute—Limitation of time for appointment of claimants' arbitrator—Terms of arbitration clause not complied with by claimants—Unseaworthiness of ship causing loss—Claim founded on unseaworthiness of ship—Effect of unseaworthiness on the contract—Application of arbitration clause—Jurisdiction of arbitrator—Award set aside.

The claimants were the charterers of the steamship A. under a charter-party which contained an arbitration clause which provided that : " All disputes from time to time arising out of this contract shall, unless the parties agree forthwith on a single arbitrator, be referred to the final arbitrament of two arbitrators carrying on business in London who shall be members of the Baltic and engaged in the shipping and (or) grain trades, one to be appointed by each of the parties, with power to such arbitrators to appoint an umpire. Any claim must be made in writing and claimants' arbitrator appointed within three months of final discharge, and, where this provision is not complied with, the claim shall be deemed to be waived and absolutely barred." The charterers claimed damages for loss of cargo, but they did not appoint their arbitrator within the three months limited in the arbitration clause. The dispute went to arbitration and, notwithstanding a protest by the shipowners, who refused to attend, the arbitration took place in their absence. The arbitrator held that damage to the cargo was caused by the unseaworthiness of the ship and made an award in favour of the charterers.

Held, by the Divisional Court, that the charterers having failed to appoint their arbitrator within the time limited in the arbitration clause, the arbitrator had no jurisdiction to make the award. The loss of cargo having been suffered by reason of the unseaworthiness of the ship, the charterers were entitled to go to arbitration, but only on the terms of the arbitration clause, and as the charterers had failed to comply with the terms of that clause, the award must be set aside.

Atlantic Shipping and Trading Company *v.* Louis Dreyfus and Co. (15 Asp. Mar. Law Cas. 566 ; 127 *L. T. Rep.* 411 ; (1922) 2 *A. C.* 250) *considered and distinguished.*

Observations by Bailhache, J. on the effect upon a special contract of unseaworthiness.

MOTION to set aside an award.

The claimants, the charterers of the steamship *Asiatic*, claimed from the owners damages for loss of cargo. The respondents were the agents of the owners of the steamship, and were treated by the court, for the sake of clearness, as the owners. The ground of the claim was that the loss of the cargo was due to the alleged unseaworthiness of the steamship.

The steamship *Asiatic* was chartered under a charter-party, dated the 13th Oct. 1920, which contained an arbitration clause (clause 39), which provided as follows : " All disputes from time to time arising out of this contract shall, unless the parties agree forthwith on a single arbitrator, be referred to the final arbitrament of two arbitrators carrying on business in London who shall be members of the Baltic and engaged in the shipping and (or) grain trades, one to be appointed by each of the parties, with power to such arbitrators to appoint an umpire. Any claim must be made in writing and claimants' arbitrator appointed within three months of final discharge, and, where this provision is not complied with, the claim shall be deemed to be waived and absolutely barred."

Loss of cargo having been suffered, the charterers claimed damages, but they did not appoint their arbitrator within three months of the date of the final discharge of the ship as provided by clause 39 of the charter-party. The matter was referred to arbitration ; and, although the shipowners formally protested, the arbitration took place in the shipowners' absence. The arbitrator found that the steamship *Asiatic* was unseaworthy at the commencement of the voyage, and that the loss which had been suffered was due to that unseaworthiness. He accordingly made an award of 517*l.* odd in favour of the charterers in respect of the damage.

The respondents, the shipowners' agents, then moved, on behalf of the shipowners, to set aside the award on the ground that the arbitrator had no jurisdiction to make it, having regard to the fact that the claimants' arbitrator had not been appointed within the time limited by clause 39 of the charter-party, and that therefore under that clause the claim must be deemed to have been waived and absolutely barred.

C. R. Dunlop, K.C. and *H. Stranger* for the shipowners.

W. A. Jowitt, K.C. and *W. Van Breda* for the charterers.

LUSH, J. referred to the facts and clause 39 of the charter-party and said : The first question argued before us was whether the award is bad on the ground that the arbitrator had no jurisdiction to make it. It has been contended before us that the decision of the House of Lords in *Atlantic Shipping and Trading Company* v. *Louis Dreyfus and Co.* (15 Asp. Mar. Law Cas. 566 ; 127 L. T. Rep. 411 ; (1922) 2 A. C. 250) is conclusive upon this matter, and that we ought to say, having regard to that decision, that clause 39 does not apply, and that the arbitrator had jurisdiction to deal

(a) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

with the matter. I am of opinion that that decision has no bearing upon the question which we have to decide. I propose to deal with the matter at first without reference to authority, and to consider whether upon the facts and having regard to the terms of the submission to arbitration, the arbitrator had jurisdiction to make the award. Now, treating the question as one not covered by authority, it seems to me to be reasonably clear that clause 39 does apply to the claim which arose in this case, and that the arbitrator had no jurisdiction, inasmuch as the terms of the clause were not complied with. The claim was for damage to cargo, and must be treated as a dispute arising out of the contract. If it was not, then clearly the arbitration clause would not apply, and the arbitrator would have no jurisdiction.

The matter stands thus : The clause deals with any claim ; it does not matter on what founded, nor what its nature may be. Any claim that is a subject of the arbitration must be made in writing, and the claimants must appoint an arbitrator within three months of the final discharge of the ship. If that provision is not complied with the claim " shall be deemed to be waived and absolutely barred." The claimants in this case did not appoint an arbitrator until after the specified time. If that is so it seems to me that, unless some authority binds us to say otherwise, the appointment of the arbitrator was a mere nullity. Once the time had elapsed the claimants had no power to appoint the arbitrator, and the award cannot stand. Now, the arbitrator here finds that the vessel was unseaworthy at the beginning of the voyage ; and it is said that, as the foundation of the claim was the unseaworthiness of the ship, it follows that clause 39, or the limit of time in the clause, does not apply, and that the appointment of the arbitrator was a good appointment. That contention is founded on *Atlantic Shipping and Trading Company* v. *Louis Dreyfus and Co.* (*sup.*), where the arbitration clause was similar to the one in the present case. There were no arbitration proceedings in that case, but an action was brought for damages for loss of cargo caused by the unseaworthiness of the ship at the beginning of the voyage, and the question was whether the arbitration clause prevented the plaintiffs from bringing their action.

There was no question there with regard to the appointment of an arbitrator, nor with regard to the jurisdiction of an arbitrator. But, as a matter of fact, the action was commenced after the expiry of the time limited in the arbitration clause, and the House of Lords held that the action was maintainable. The action was tried before Rowlatt, J., who held that it was not maintainable on the ground, first, that the arbitration clause was not affected by the fact that the claim was for damages for breach of the implied condition with regard to seaworthiness, the arbitration clause being matter of procedure only ; secondly, that arbitration proceedings were a condition precedent to any action ; and, thirdly, that the time limited by the arbitration clause had expired before the issue of the writ.

The Court of Appeal reversed that decision on a ground—namely, public policy—not material to the present matter. The House of Lords disagreed with the view of the Court of Appeal with regard to the ground of public policy, but agreed that the judgment of Rowlatt, J. was wrong on another ground. The ground was this—that the action being founded upon the unseaworthiness of the ship—that is, upon an implied condition of seaworthiness, and not upon a clause in the contract itself—it was maintainable, because that part of clause 39 which dealt with the limit of time did not apply. The point of the decision was that the action was founded upon an implied condition, and not upon the terms of the contract itself.

As I understand the opinions expressed by Lord Dunedin and Lord Sumner, there was nothing in what was said that gives any countenance to the contention in the present case that the power of appointing an arbitrator still existed after the time had elapsed—that is to say, that clause 39 does not apply. The House of Lords were not dealing with that matter at all ; and, so far from being adverse to the view which I have expressed, it seems to me that Lord Dunedin supports it, because he says (15 Asp. Mar. Law Cas., at p. 568 ; 127 L. T. Rep. 411 ; (1922) 2 A. C., at p. 257) : " The test seems to me to be whether the particular clause interferes with the liability which unseaworthiness creates. It is just here that I think Rowlatt, J. did not sufficiently distinguish between the two parts of the clause. So far as it dealt with the procedure I agree with him, and if this clause had been a mere reference to arbitration and had stopped there I do not think it would have been hit. But it goes on and, under certain conditions, destroys liability. If *Tattersall* v. *National Shipping Company Limited* (5 Asp. Mar. Law Cas. 206 ; 50 L. T. Rep. 299 ; 12 Q. B. Div. 297) is right that you cannot in such cases appeal to a limitation of liability, surely it is *à fortiori* to say that you cannot appeal to its destruction."

Lord Dunedin agreed with Rowlatt, J.'s view, so far as procedure was concerned, and therefore was of opinion that in dealing with the matter of procedure the arbitration clause did apply. This provision dealing with the appointment of an arbitrator is a matter of procedure, and applies in this case. Therefore, as the jurisdiction of the arbitrator was only that given him by the consent of the parties, and as the parties agreed that the arbitrator, if appointed at all, should be appointed within a certain time, it seems to me to follow that as that time elapsed neither party had power to appoint an arbitrator unless the other party consented. Therefore the arbitrator had no power to make the award.

I express no opinion on the point whether the applicants contracted as principals or agents. In the result the applicants, the Compagnie Furness (France), succeed, and this award must be set aside.

Bailhache, J.—This is a case in which the owners of a cargo carried by the *Asiatic* have succeeded in getting an award that a certain sum is due to them in respect of damage suffered by the cargo on the ground of the steamer's unseaworthiness. The agents for the shipowners, whom I will treat as the owners for the sake of clearness, say that the arbitrator had no jurisdiction to make the award, because he was not appointed within the time limited by clause 39. Leaving aside the questions of seaworthiness and of legal authority, there is in the clause in question a plain submission to arbitration whose terms must be exactly complied with; and, apart from authority, it is clear that the arbitrator had no power to deal with the matter, for the terms of the submission were not complied with.

It is said that the decision of the House of Lords in *Atlantic Shipping and Trading Company* v. *Louis Dreyfus and Co.* (*sup.*) shows that in the case of unseaworthiness the cargo owner can proceed to arbitration, although the terms of the submission under which the arbitrator has to be appointed within a limit of time have not been complied with, and it is on that subject that I wish to say a few words.

It is, I think, a good working rule to assume that, when a ship is unseaworthy and the unseaworthiness is the cause of damage to the cargo, then, *quâ* that particular damage, the shipowners' position is analogous to that of a common carrier of goods without any special contract, and that the conditions of the contract are gone, subject to this—that it is generally considered that, although this is the position, the freight which is stipulated for by the charter-party is payable, and that payment is not on a *quantum meruit.* While I say that he is in a position analogous to that of a common carrier without conditions, it is obvious that, so far as he himself is concerned, he is not in a position to resist the conditions inserted in the contract which imposes obligations on him, because, if he were, he would be in a position to take advantage of his own wrong. In illustration of this it had been held in two cases before the *Atlantic Shipping Company* case (*sup.*) that when a ship is unseaworthy the whole of the special contract goes, for the reason that the assumption on which the special contract is based has not eventuated. That assumption is that the shipowner provides a seaworthy ship and the charterer says, " If you provide me with a seaworthy ship I will enter into this special contract with you " ; and if a seaworthy ship is not provided the foundation of the special contract goes, and therefore the superstructure, the special contract, goes also.

In the first of those cases, *Tattersall* v. *National Steamship Company* (*sup.*), it was held that where a charter-party contained a limitation with regard to the amount of liability, and the damage was caused through unseaworthiness, that limitation could not avail the shipowner; and in the second case, *Bank of Australasia* v. *Clan Line Steamers* (13 Asp. Mar. Law Cas. 99; 113 L. T. Rep. 261; (1916) 1 K. B. 39), a case for which I was originally responsible, it was further held that where there was in a charter-party a time limit for sending in claims, then that time limit could not avail the shipowner any more than could the limitation of liability.

Then came the case of *Atlantic Shipping and Trading Company* v. *Louis Dreyfus and Co.* (*sup.*). The case arose in this way. The action was for damage to cargo caused by the vessel's unseaworthiness; the shipowners replied that the charterers could not sue them because of this arbitration clause. They said that the charterers must first go to arbitration, and that for that purpose there was a time limit within which they must send in their claim and appoint their arbitrator. In that case the claim had been sent in time; but the appointment of the arbitrator was too late, and the shipowners contended that the effect of this was to bar the action, for although the arbitration clause only related to arbitration, yet the time limit must be applied to the action as it would be to an arbitration. That point was considered by Rowlatt, J. and he held that it was a good one. He also held that the clause itself was a bar to the action on the ground that it related to procedure and did not come within the principles laid down in the cases I have referred to dealing with the limitation of liability and the limitation of time. The case eventually went to the House of Lords, who, having disagreed with the ground of the decision of the Court of Appeal who decided the case on quite a different ground, proceeded to deal with the decision of Rowlatt, J. They reversed that decision on the ground that, following upon the two earlier cases, the arbitration clause must be taken as a whole, and, taking it as a whole, it amounted to a limitation of time within which these claims could be debated, the limitation of time within which to appoint an arbitrator being treated as standing on the same footing as the limitation of the time within which to send in claims; and they said that neither of these limitations availed the shipowner, and that the action would lie.

It must be borne in mind that *Atlantic Shipping and Trading Company* v. *Louis Dreyfus and Co.* (*sup.*) was the converse of the present case. In the present case the shipowners are saying, " We are not bound to go to arbitration because the terms of the submission imposing obligations on the cargo owners were not complied with by them," while in the *Atlantic Shipping Company* case (*sup.*) it was the shipowners who were setting up the condition as a bar to the action. So far, therefore, there is nothing in that case which touches the point in this case. But it is said that in the course of the judgment of Lord Dunedin there is a passage in which he says (15 Asp. Mar. Law Cas., at p. 568; 127 L. T. Rep. 411; (1922) 2 A. C., at p. 257): " If this clause (clause 39) had been a mere reference to arbitration and had stopped there, I do not think it would have been hit " ; and that passage shows that, taking the clause as an arbitration clause pure and simple, not being limited in point of time at

all, it is a matter of pure procedure, and that a clause so worded would still apply, although the ship was unseaworthy. All I want to say about that is that, speaking for myself and with the greatest possible respect to Lord Dunedin, I doubt whether that proposition is correct. My own view is that, so far as shipowners are concerned, in a case of unseaworthiness like the present case, all the stipulations in the charter-party are gone, and that their position is analogous to that of a common carrier without conditions, as I have indicated. But, assuming that I am wrong about that, as I may well be, and that the passage from Lord Dunedin's judgment is right, it does not help the shipowners here for the reason, as Lord Dunedin points out, that clause 39 is not a simple submission to arbitration; and the effect of his judgment is that this clause, taken as a whole, and not splitting it into two parts—namely, a submission to arbitration and a limitation of time—is a clause that operates to limit the time in which claims can be dealt with, and cannot avail the shipowner in a case where the basis of the claim is unseaworthiness. In the present case it is the cargo owners who went to arbitration in virtue of the provisions of the clause, as, I think, they would have been entitled to do, but only upon the terms of complying with all its provisions, including the time limit. As they did not do so I think that the arbitrator had no jurisdiction to make the award.

I do not propose to say anything about the other point, which is one of difficulty. I should only like to say that I was impressed by the cogency of the argument of the junior counsel for the cargo owners, and the clearness with which his points were put. The award will be set aside.

Award set aside.

Solicitors for the claimants, *Downing, Middleton, and Lewis.*

Solicitors for the respondents, *Richards and Butler.*

Friday, July 21, 1922.

(Before BAILHACHE, J.)

SCOTTISH METROPOLITAN ASSURANCE COMPANY v. P. SAMUEL AND CO. (a)

Insurance (Marine)—Loss—Claim by assured—Payment by underwriter under mistake—Mistake of fact—Payment to brokers of assured—Brokers' lien against assured for premiums unpaid—No account stated between brokers and assured—Underwriter's right to repayment from brokers.

A policy of marine insurance dated the 28th Jan. 1920, for 20,000l. was issued on the hull and machinery of a steamship owned by the Talbot Steamship Company. The policy was subscribed by the plaintiffs for 1600l. The defendants were insurance brokers who had acted on behalf of the steamship company in effecting the policy. On the 15th April the plaintiffs paid to the defendants as brokers for the steamship company a sum of 496l. as an interim payment in respect of a particular average loss alleged to have been sustained by the steamship. The plaintiffs subsequently ascertained that other underwriters who had subscribed the policy had refused payment on the ground that the policy was void. They thereupon alleged that they had paid the money under a mistake of fact and claimed its return as money had and received to their use. They alleged that they had paid it under the mistaken belief that the policy was in force and could not be avoided, and that the vessel had been damaged by a peril insured against. The defendants claimed that as brokers they had a lien on the money as against the steamship company, who owed them a larger sum for premiums, and the defendants said that they had appropriated the 496l. as a set-off against the sum due to them from the company in respect of such premiums. No account had been stated between them. By consent, an issue was ordered to be tried as to whether the plaintiffs were entitled to recover, on the assumption that they had paid the money under a mistake of fact.

Held, that if the money was paid under a mistake of fact, it never was the money of the assured, and, therefore, the defendants could not assert a lien on it, and the plaintiffs were entitled to have it repaid to them.

Buller v. Harrison (2 *Cowp.* 565), *considered and applied.*

ISSUE raised by the pleadings tried by Bailhache, J. in the Commercial Court.

The plaintiffs claimed the return of 496*l.*, which had been paid by them in respect of a loss under a policy of marine insurance. They claimed the return of the money on the ground that it was money had and received to their use as being money paid under a mistake of fact.

The defendants were insurance brokers, and they had acted on behalf of the Talbot Steamship Company in effecting a policy of marine insurance on the hull and machinery of the steamship *Dorothy Talbot* owned by the Talbot Steamship Company. The policy was issued on the 28th Jan. 1920, and was for a sum of 20,000*l.*, of which the plaintiffs' proportion was 1,600*l.* The policy was to run from December 1919 to December 1920.

During the currency of the policy, it was alleged that a loss had taken place under the policy, and on the 15th April 1920 the plaintiffs paid to the defendants as brokers for the Talbot Steamship Company, as an interim payment in respect of a particular average loss which was said to have been suffered by the *Dorothy Talbot* by a peril insured against by the policy.

The plaintiffs subsequently ascertained that the other underwriters who had subscribed the policy had refused to make any payment under the policy on the ground that the alleged loss was not a loss insured against and that the policy was void. The plaintiffs thereupon

(a) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

claimed a return of the sum of 496*l.*, alleging that the payment of 496*l.* was made to the defendants without prejudice, and that it was made under a mistaken belief that the steamship *Dorothy Talbot* had been damaged by a peril insured against.

The defendants denied that the payment had been made to them without prejudice, and they claimed that as brokers they had a lien against the Talbot Steamship Company, who owed them a larger sum for premiums, and they had appropriated the sum of 496*l.* in part payment of or as a set-off against the sum due to them from the Talbot Steamship Company in respect of the premiums. There had been no settled account between the parties.

An order was made for the trial of the issue whether the plaintiffs were entitled to recover the money, on the assumption that the money had been paid to the defendants by a mistake of fact.

S. L. Porter for the plaintiffs.

Wallington for the defendants.

The following authorities were referred to:

Buller v. *Harrison*, 2 Cowp. 565;
Holland v. *Russell*, 8 L. T. Rep. 468; 4 B. & S. 14;
Newall v. *Tomlinson*, 25 L. T. Rep. 382; L. Rep. 6 C. P. 405;
Continental Caoutchouc and Gutta Percha Company v. *Kleinwort, Sons, and Co.*, 90 L. T. Rep. 474; 9 Com. Cas. 240.

Bailhache, J.—This is an interesting case, because Mr. Wallington, counsel for the defendants, has raised a new point, which, if it is a good one, has been unaccountably overlooked in a long series of cases going as far back as *Buller* v. *Harrison* (2 Cowp. 565). The facts are very short and simple, and are not in dispute, except as to one minor point which is not material.

The defendants had paid a considerable sum of money amounting to 2,000*l.* to underwriters in respect of premiums on policies of insurance effected on the *Dorothy Talbot* for the Talbot Shipping Company. Some mishap occurred to the steamer, and the average adjusters wrote a letter recommending the underwriters to pay 31 per cent. of the total sum insured. Some of the underwriters paid the loss, including the plaintiffs, who paid 496*l.* to the defendants who, as the brokers effecting the insurance, collected the moneys payable under the policy in respect of the loss. Some of the underwriters, including the Commercial Union Insurance Company, however, refused to pay. This fact became known to the plaintiffs within a fortnight after they had paid the claim, viz., on the 29th April. The plaintiffs' representative met the defendants' representative on the following day and they had an interview with the representative of the Commercial Union Company, who refused to say why he would not pay, except that charges had been made against the owners of the ship.

The plaintiffs thereupon gave notice to the defendants to repay to them the 496*l.* The defendants, however, consistently refused to repay the money. They justified that course for two reasons. In the first place they said that the Talbot Steamship Company owed them a considerable sum of money for premiums; and that they had put the money which they had received from the plaintiffs to the credit of the Talbot Steamship Company and they claimed to retain the money as a set-off against the overdue and unpaid premiums. There had, however, been no settled account between the parties.

Ever since the time of Lord Mansfield, in *Buller* v. *Harrison* (*sup.*), it has been held that the mere passing of money to the credit of an account when there is no settled account is not such a payment by an agent as will excuse him from repaying money which his principal is not entitled to retain. It would be a different matter if an agent had paid money over to his principal without knowing that the principal was not entitled to it. In such a case, the agent would be a mere conduit pipe, and if the money had been wrongly paid to the agent the person who had paid it would have to look to the principal after the settlement of accounts between the agent and the principal.

All this is now old law, certainly 150 years old. But Mr. Wallington, for the defendants, has raised another point. He says that the defendants have a lien upon the money, and that their position has been altered to their detriment because by giving credit to the Talbot Steamship Company to the extent of the amount received from the plaintiffs they had given up their lien; and further, that the defendants gave time to the Talbot Steamship Company for the payment of the premiums which the company owed to them, and therefore the defendants could not, in the circumstances, be asked to repay the money.

Now it seems to me that this is a point which might have been taken in many cases from 1777 down to the present time, but it is now 1922, and no one has hitherto taken the point. That does not, however, necessarily prevent the point from being a good one, but naturally it makes one look at the point more closely. It is true that a broker has a lien for unpaid premiums upon moneys of the assured coming into his hands. But it must be the money of the assured and not the money of other people, and money paid under a mistake of fact, in my opinion, is not the money of the assured, and therefore no lien could attach to it. That seems to be the simple answer to the point, and it is probably the reason why no one has ever taken the point before.

With regard to the suggestion that the defendants have altered their position for the worse I cannot see any evidence of that having taken place. Mr. Wheeler, the manager of the defendant company, said in evidence that he might have issued a writ against the Talbot Steamship Company if he had not received this money from the plaintiffs, but I see no reason

to think that it was his intention to issue a writ, and it is certain that if he had issued a writ it would not have produced results which would have made it worth his while to have done so. The mere fact that time was given to the Talbot Steamship Company is not sufficient. That is a point which might have been raised in very many cases during the last 150 years, and if the point is a good one it is curious that it should not have been raised during that period, or if it had been raised that no mention should have been made of it.

Lord Mansfield in *Buller* v. *Harrison* (*sup.*), said this (2 Cowp. at p. 568): "In this case, there was no new credit, no acceptance of new bills, no fresh goods bought or money advanced. In short, no alteration in the situation which the defendant and his principals stood in towards each other on the 20th April." Lord Mansfield appears to have thought that in order that an agent might be able to say that he had altered his position for the worse there must be a new credit given or something of that sort. It is impossible to say that the mere giving of time—even if time was given in the present case—is the giving of a new credit or the acceptance of new bills, or anything of that kind. In my opinion this case is covered by authority over a long series of years, and the new point which has been raised by counsel's ingenuity fails.

There will therefore be a declaration that, if the sum claimed was paid under the alleged mistake of fact, the plaintiffs are entitled to recover the amount so paid.

Judgment accordingly.

Solicitors for the plaintiffs, *Parker, Garrett, and Co.*

Solicitors for the defendants, *W.* and *W. Stocken.*

Tuesday, Oct. 17, 1922.

(Before Lord Hewart, C.J., Avory and Sankey, JJ.)

Owner v. C. J. King and Sons Limited. (a)

Factories—Ship—Unloading—Fencing of hatchways—Extent of obligation—Factory and Workshop Act 1901 (1 *Edw.* 7, *c.* 22), *ss.* 79, 104—*Regulations for Docks* 1904, *reg.* 19.

The respondents, who were stevedores, were employed to unload the cargo from a ship in dock, and, while unloading the grain from No. 2 *hold was proceeding, the hatch covers were left off No.* 3 *hold, and the hatchway was left unprotected. No.* 3 *hold contained bunker coals and not cargo, and the unloading of the cargo did not involve the respondents' using No.* 3 *hold or its hatchway. The respondents were summoned for failing to fence or cover the No.* 3 *bunker hatchway, as required by reg.* 19 *of the Regulations for Docks* 1904, *made under sects.* 79 *and* 104 *of the Factory and Workshop Act* 1901. *That regulation provides: "Where there is more than one hatchway, if the hatchway of a hold exceeding 7ft. 6in. in depth measured from the top of the coamings to the bottom of the hold, is not in use and the coamings are less than 2ft. 6in. in height, it shall either be fenced to a height of 3ft. or be securely covered." No.* 3 *hold and hatchway were under the control of the owners, master, and crew, and not of the respondents, and while the unloading was proceeding at No.* 2 *hold the crew were removing bunker coal from No.* 3 *hold. The justices found that the hatch covers of No.* 3 *hold were removed by the crew, and, on the ground that the regulations made each employer responsible only for the protection of the hatchways where he had been employed to carry out work, they dismissed the summons.*

Held, that the words of reg. 19, *read in connection with the other regulations, only referred to a case where there was more than one hatchway within the sphere of the activity of the person carrying out the work or of his employees, and therefore the justices were right.*

Case stated by justices for the city of Bristol.

1. An information was preferred by Joseph Owner (the appellant) against C. J. King and Sons Limited (the respondents) under the Factory and Workshop Acts 1901 to 1911, for that they on Friday, the 17th Feb. 1922, were the persons carrying on by workmen employed by them the process of discharging the steamship *Gracia*, being a factory within the meaning of the said Acts, at West Side, Old Dock, Avonmouth, in the city of Bristol, and that on the said date the said ship was not maintained in conformity with the said Acts, and with reg. 19 of the Regulations for Docks dated the 24th Oct. 1904, made by the Secretary of State in pursuance of powers conferred on him by the Factory and Workshop Act 1901, and that the respondents did fail to fence or securely cover, as required by the said Acts and reg. 19, the No. 3 bunker hatchway on the 'tween decks of the said ship, such hatchway not being in use at the time and the coamings on it being less than 2ft. 6in. in height, and the depth of the hold of the said hatchway exceeding 7ft. 6in. measured from the top of the coamings to the bottom of the hold, and there being more than one hatchway in the said ship.

2. The following facts were proved or admitted:

(1) The appellant was one of H.M. Inspectors of Factories and Workshops; the respondents were a company carrying on the business of stevedores.

(2) On or about the 14th Feb. 1922 the steamship *Gracia*, owned by the Donaldson Line Limited, arrived at West Side, Old Dock, Avonmouth, for the purpose of discharging and unloading her cargo. The respondents were employed as stevedores by the owners of the steamship, and on Friday the 17th Feb. 1922 the process of unloading and discharging the cargo was being carried out. In addition to other workmen employed by them for the purpose of discharging and unloading, the respondents also contracted with the Docks Committee

(a) Reported by J. F. Walker, Esq., Barrister-at-Law.

of the Bristol Corporation to discharge and unload the grain in No. 2 hold.

(3) The respondents also employed on the ship a foreman named Winter. On the day in question the unloading of grain was being carried out at No. 2 hold by such workmen employed by the Docks Committee under their supervision. At a distance of some 21ft. from No. 2 hold was a hold known as No. 3 hold, which contained bunker coals and did not contain any cargo, nor did the unloading or discharging of the steamship necessitate or involve the use of the said hold or hatchway by the respondents or their agents, nor did their employment extend to the said hold or hatchway. No. 3 hold was under the control of the owners, masters and crew of the ship, and not of the respondents or their agents. The hatchway of the said hold was closed after complaint had been made by the inspector and it had come to the knowledge of Winter, but it was not proved by whom this was done. No. 3 hold was approximately 20ft. in depth and its coamings were only 6in. in height.

(4) On the 17th Feb. 1922, whilst the work of unloading was proceeding at No. 2 hold, the the hatch covers were off No. 3 hold and the hatchways were left unprotected. The hatchways were situate on the 'tween decks, and the unprotected hatchway of No. 3 hold was practically in the dark, and there was evidence given by the appellant, which was uncontradicted by the respondents, who called no evidence, that the unprotected hatchway constituted a danger to men working on the ship. The crew of the ship were removing bunker coal from No. 3 hold to get to the ship's furnace. A witness for the prosecution stated in cross-examination that he had heard that the crew had removed the hatch covers to obtain ventilation, but there was no direct evidence of this. The justices found as a fact that the hatch covers were removed by the crew. Uncontradicted evidence was given that it was easy to protect the hatchway by a method which would also give ventilation. The crew were under the control of the owners of the ship and not of the respondents or their agents.

3. For the appellant it was contended that on the above facts the offence charged had been proved, and that under the provisions of the said regulations, the respondents were subject to the provisions of reg. 19, as being employed in the process of unloading. For the respondents, it was contended that under the provisions of the said regulations the person employed by the owner of a ship to unload one or more (but not all) of the holds of the ship was not responsible for compliance with reg. 19 as regards the hold or holds to which his employment did not extend, that the removal of bunker coal from No. 3 hold was a process carried on by the owners of the ship, and that under the provisions of the regulations they and not the respondents were responsible for compliance with reg. 19 in respect of that hold.

4. The justices, being of opinion that the meaning of the regulations was that each employer was responsible only for the protection of those hatchways upon which he had been employed to carry out works, and that the respondents had undertaken no work in relation to No. 3 hatchway, dismissed the information.

The Factory and Workshop Act 1901:

Sect. 79. Where the Secretary of State is satisfied that any manufacture, machinery, plant, process or description of manual labour, used in factories or workshops, is dangerous or injurious to health or dangerous to life or limb, either generally or in the case of women, children or any other class of persons, he may certify that manufacture, machinery, plant, process or description of manual labour to be dangerous; and thereupon the Secretary of State may, subject to the provisions of this Act, make such regulations as appear to him to be reasonably practicable and to meet the necessity of the case.

Sect. 104. (1) The provisions of this Act with respect to . . . (iii.) regulations for dangerous trades . . . shall have effect as if every dock, wharf, quay and warehouse and all machinery or plant used in the process of loading or unloading or coaling any ship in any dock, harbour or canal were included in the word "factory," and the purpose for which the machinery or plant is used were a manufacturing process; and as if the person who by himself, his agents or workmen uses any such machinery or plant for the before-mentioned purpose were the occupier of the premises; and for the purpose of the enforcement of these provisions the persons having the actual use or occupation of a dock, wharf, quay or warehouse or of any premises within the same or forming part thereof, and the person so using any such machinery or plant shall be deemed to be the occupier of a factory. (2) For the purposes of this section the expression "plant" includes any gangway or ladder used by any person employed to load or unload or coal a ship, and the expressions "ship" and "harbour" have the same meaning as in the Merchant Shipping Act, 1894.

Reg. 19 of the Regulations for Docks, dated the 24th Oct. 1904, and made under the above Act:

Where there is more than one hatchway, if the hatchway of a hold exceeding seven feet six inches in depth measured from the top of the coamings to the bottom of the hold is not in use and the coamings are less than two feet six inches in height, it shall either be fenced to a height of three feet or be securely covered.

H. M. Giveen for the appellant.

Neilson, K.C. and *H. Claughton Scott* for the respondent.

Lord Hewart, C.J.—In this case the only question which arises is the true interpretation of a regulation made by the Secretary of State under the provisions of the Factory and Workshop Act 1901. I need not read sect. 79 of that Act or sect. 104. There is no doubt that power is given by that statute to make regulations for, amongst other things, the loading or unloading or coaling of any ship in any dock or harbour. Regulations were accordingly made by the Secretary of State in respect of the processes of loading, unloading or coaling any ship in any dock, harbour, or canal, and they are part of the Statutory Rules and Orders of 1904, and the only question is as to the true meaning of reg. 19 in part IV. The scheme of

the regulations is to allot in an orderly series the various duties created to the various persons who are required to perform them. In order to understand the meaning of any particular regulation it is necessary, I think, to read that regulation side by side with what is said in the earlier part of the regulations as to the person upon whom the obligation of performance is laid. Now this particular regulation, relating to loading, unloading or coaling a ship belongs to part IV. of the regulations which provide as regards "Duties," that "it shall be the duty of every person, who by himself, his agents or workmen carries on the processes, and of all agents, workmen, and persons employed by him in the processes, to comply with part IV. of these regulations."

One approaches reg. 19, therefore, with this knowledge, that it is a regulation to be performed by a person employed directly or indirectly in the process of loading, unloading or coaling a ship in dock or harbour. Now reg. 19 is as follows: "Where there is more than one hatchway, if the hatchway of a hold exceeding seven feet six inches in depth measured from the top of the coamings to the bottom of the hold is not in use, and the coamings are less than two feet six inches in height, it shall either be fenced to a height of three feet or be securely covered." What is meant by the introductory words, "Where there is more than one hatchway?" It is contended on the part of the appellant, who is an inspector of factories, that those words are quite general in their meaning, and that there is no limit to them so far as the ship is concerned. They might be expanded, according to his contention, in this way, that where upon any ship there is more than one hatchway, a stevedore who is employed in and about certain holds at one end of a large ship would have the statutory duty put upon him of fencing or securely covering hatchways some hundreds of feet away from where he is working. Is that the true construction to be put upon the regulation? The justices have come to the conclusion that it is not. They have found in this case the facts, which it is not necessary for me to dwell upon, and that each employer is responsible only for the protection of those hatchways upon which he has been employed to carry out work; in other words, those hatchways which have been or are being used or are to be used by the particular persons employed by him or by his agents upon the carrying out of the process. Now it is said that the mere circumstance that a by-law or a regulation may upon its literal interpretation lead to ridiculous or grotesque possibilities is not to be fatal to it. It has been said again and again, as, for example, in *Pomeroy and another* v. *Malvern Urban District Council* (89 L. T. Rep. 555; and in *Kruse* v. *Johnson* (78 L. T. Rep. 647; (1898) 2 Q. B. 91), that on the one hand justices have power under sect. 16 of the Summary Jurisdiction Act 1879 to deal with the matter reasonably, or, again, in the words of Lord Russell of Killowen, C.J., in the latter case, that by-laws "ought to be, as has been said, 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered." But it is to be noticed that observations of that kind are made in cases where the meaning of the by-law which is in question is beyond doubt, and where the question is not what does the by-law mean, but is this by-law, meaning what it obviously does mean, *ultra vires?* It is upon that kind of question that those observations have been made. The question in this case is not that question. It is a question as to what is the true construction of this regulation, and if the words employed, read together with the words in the earlier part of the regulation, which are obviously connected with them, are capable of a meaning that is reasonable and in accordance with commonsense, and are also capable of another meaning that clearly may lead to an absurd and ridiculous requirement, then upon the question of interpretation one would take the reasonable meaning and not the other. Now although I have entertained considerable doubt in the course of the argument, and although nothing would be further from my wish than to subtract in any degree whatever from the protection which statutory regulations have given to persons employed in manual labour in and about ships, I have come to the conclusion that this regulation bears the more limited meaning, as the justices thought. I think that when one reads the earlier part of the regulations which speaks of the persons employed in that particular process and puts that part of the regulations side by side with reg. 19, it is apparent that the regulation means, not "where upon any ship there is more than one hatchway," but "where the person employed upon the process has used or is using or is about to use for the purpose of his employment more than one hatchway," then within that limited sphere of activity he is to fence or securely to cover those hatchways which, being within that sphere, are not at the particular moment in use.

It is, of course, quite clear that that interpretation greatly cuts down the area of the regulation in comparison with the other interpretation, but that is the view which the justices have taken, and for my part I am not prepared to say that that view is wrong. The result is that this appeal by way of a case stated fails.

AVORY, J.—I agree. The justices in this case have found that No. 3 hold was a hold containing bunker coal and did not contain any cargo; nor did the unloading or discharging of the steamship necessitate or involve the use of the said hold or the hatchway thereof by the respondents or their agents, nor did their employment extend to the said hold. Upon that finding of fact they have found that the meaning of the regulation is that each employer is responsible only for the protection of those hatchways upon which he has been employed to carry out work, and that in the circumstances the respondents, having undertaken no work upon, and their employment not extending at all

to No. 3 hatchway, were not within the meaning of this regulation. I am not prepared to say that the justices were wrong, although the literal meaning of the language used in reg. 19 might extend to a case which, on the face of it, would be absurd, and where a liability would be imposed upon a stevedore which it is quite unreasonable to suppose that the authorities ever intended should be imposed. I agree that the appeal should be dismissed.

Sankey, J.—I am of the same opinion.

Appeal dismissed.

Solicitor for the appellant, *The Treasury Solicitor.*

Solicitors for the respondents, *Woodcock, Ryland,* and *Parker,* for *Edward Gerrish, Harris,* and *Co.,* Bristol.

Tuesday, Nov. 14, 1922.

(Before Bailhache, J.)

La Fabrique de Produits Chimiques Societe Anonyme *v.* Large. (*a*)

Insurance (Marine)—Lloyd's policy—"Warehouse to warehouse"—Free of particular average—Goods of different kinds—Separate parcels—Separately valued—Loss of part of the goods—Apportionment of loss—Liability of underwriter for total loss of particular goods—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *s.* 76, *sub-s.* 1.

By a Lloyd's policy of marine insurance, the defendant and other underwriters insured certain goods for the plaintiffs from London to Switzerland. The policy was "free from particular average," and it also incorporated several of the Institute Cargo clauses, including the "warehouse to warehouse" clause, which was as follows: "Including, subject to the terms of the policy, all risks covered by this policy from shipper's or manufacturer's warehouse until on board the vessel, during transhipment, if any, and from the vessel, whilst on quays, wharfs, or in sheds during the ordinary course of transit until safely deposited in consignee's or other warehouse at destination named in policy." The f.p.a. clause provided: "warranted free from particular average unless the vessel or craft be stranded, sunk, or burnt, but the owners are to pay the insured value of any package or packages which may be totally lost in loading, transhipment, or discharge, also any loss of or damage to the interest insured which may reasonably be attributed to . . . warehousing." The plaintiffs, a Swiss company, had bought three cases of chemicals from a London company. There were two cases of vanillin and one of caffeine, and they insured them under the above policy. The three cases were valued for insurance at the total sum of 1100*l., but each case was valued separately; one case of vanillin at* 462*l., the second at* 363*l., and the case of caffeine at* 275*l., total* 1100*l. While these goods were lying in a warehouse pending shipment thieves broke into the warehouse by violence, breaking open the doors with crowbars, and stealing the two cases of vanillin, valued at a total sum of* 825*l.*

Held, that, the theft being a theft by violence, the goods were lost by a peril insured against and the underwriters were not exempted from liability by the f.p.a. clause, because the insured goods, which comprised different species, were separately valued for the purpose of the insurance. Therefore the loss of the two cases of vanillin was a total loss of particular goods and not a particular average loss, and the underwriters were liable.

Quære, *whether, in a warehouse to warehouse policy, the word theft ought to be limited to theft by violence in the same way as it is in a purely marine policy.*

Action in the commercial list tried by Bailhache, J.

The plaintiffs claimed for a loss under a policy of marine insurance, the loss alleged being in respect of two cases of vanillin which the plaintiffs alleged were stolen from a warehouse, where they were lying pending shipment on the 29th Nov. 1918.

The plaintiffs, who were a Swiss company, had bought from a London company, Messrs. A. Johnson and Co. (London) Limited, three cases of chemicals, two of vanillin and one of caffeine, which were perishable goods. The goods were bought on c.i.f. terms. By a Lloyd's policy of marine insurance, dated the 21st Nov. 1918, the defendant and other underwriters insured the goods for the plaintiffs, lost or not lost, at and from London to Bordeaux, while there, and thence to Brougg, in Switzerland. The policy was "free of particular average," and to it was annexed several of the Institute Cargo clauses, including the "warehouse to warehouse" clause which was as follows: "Including, subject to the terms of the policy, all risks covered by this policy from shipper's or manufacturer's warehouse until on board the vessel, during transhipment, if any, and from the vessel, whilst on quays, wharfs, or in sheds during the ordinary course of transit until safely deposited in consignee's or other warehouse at destination named in policy." The f.p.a. clause was as follows: "Warranted free from particular average unless the vessel or craft be stranded, sunk or burnt, but the owners are to pay the insured value of any package or packages which may be totally lost in loading, transhipment or discharge, also any loss of or damage to the interest insured which may reasonably be attributed to . . . warehousing. . . ." The three cases were valued for insurance at a total sum of 1100*l.* but each case was separately valued; one case of vanillin at 462*l.*, the second case of vanillin at 363*l.*, and the case of caffeine at 275*l.*

The goods, pending shipment, were lying in a warehouse in London, which was securely locked and barred, but was unattended at night. Thieves forcibly broke into the warehouse and stole the two cases of vanillin, the

(*a*) Reported by T. W. Morgan, Esq., Barrister-at-Law.

insured value of which was 825*l.* They effected an entrance by breaking down an outer door and two inner gates, all of which were strongly locked, by the use of crowbars.

The plaintiffs claimed under the policy to recover from the defendant the sum of 51*l.* 11*s.* 3*d.*, being his proportion of the sum underwritten, having regard to the value of the goods stolen. The defendant denied liability on the ground, *inter alia*, that there was no total loss of the whole or any severable part of the goods insured, but that the loss of the two cases of vanillin was a particular average loss for which the defendant was under no liability.

The Marine Insurance Act 1906, s. 76, sub-s. 1, provides as follows :

Where the subject matter insured is warranted free from particular average, the assured cannot recover for a loss of part, other than a loss incurred by a general average sacrifice, unless the contract contained in the policy be apportionable ; but, if the contract be apportionable, the assured may recover for a total loss of any apportionable part.

MacKinnon, K.C. and *H. U. Willink* for the plaintiffs.—The goods were lost by a peril insured against and the defendant is not exempted from liability by the f.p.a. clause in this case. It is clear that, under a policy containing such a clause, the assured cannot recover in respect of a particular average loss of the whole of the goods insured : (see *Ralli* v. *Janson*, 6 E. & B. 422). But where the goods insured are of distinct and different kinds or are separately valued, as they are in this case, the assured can recover in respect of a total loss of any part which is severable or apportionable :

Duff v. *Mackenzie*, 3 C. B. N. S. 16 ;
Wilkinson v. *Hyde*, 3 C. B. N. S. 30 ;
Hills v. *London Assurance Corporation*, 5 M. & W. 569.

Leck, K.C. and *James Dickinson* for the defendants.—The goods in this case were not lost by a peril insured against, and therefore the plaintiffs cannot recover. Moreover, the loss of the two cases of vanillin was a particular average loss which is excluded by the policy. The defendant is, therefore, exempt from liability. The contract of insurance was an entire contract and not apportionable. The goods were not of a distinct or different kind, such as in the cases which have been referred to. They were all chemicals and therefore substantially of the same kind. As to the question of valuation, they were valued for a total sum of 1100*l.* The packing in separate cases and the separate valuation of each case was only for the purposes of the f.p.a. clause. The loss here was not a total loss of a separate subject-matter.

BAILACHE, J.—This is an action on a policy of marine insurance, dated the 21st Nov. 1918, covering risks from warehouse to warehouse on three cases of perishable goods, namely, two cases of vanillin, a chemical, and one case of caffeine. The policy is " free of particular average." On the 29th Nov. 1918 the two cases of vanillin were stolen from a transporting warehouse. The defences to the claim by the assured are that the loss was only a particular average loss, and that, as particular average is excluded, the underwriters are not liable. Further, that, even assuming that it is not a particular average loss, but a total loss of a part which can be severed from the rest, there was no " theft " within the meaning of the word in a policy of marine insurance. Now, dealing with the second point first, the facts appear to be that these goods were in a warehouse which was duly locked up at night, and the warehouse was broken into. The thieves, whoever they were, seem to have brought some sort of conveyance to carry away the goods. They broke into the warehouse by breaking down first of all a small door which was securely fastened by a mortice lock and a large padlock. The thieves broke away the padlock by means of crowbars, and they broke away the beading round the door so as to destroy the mortice lock, also by means of crowbars. Having done that, they had to force their way through two big gates, which again were secured with bar and padlock, and that they also did with crowbars.

Those being the facts, counsel for the defendant reminds me that the risk of thieves, in policies of marine insurance, does not cover an ordinary clandestine theft, but only theft accompanied with violence. That certainly is so, when the policy is a policy of marine insurance pure and simple, and he says the same rule must be applied when it is a warehouse to warehouse policy as well as a marine policy, because by clause 5 of the Institute Cargo Clauses which are annexed to this policy, the risks covered are " all risks covered by this policy." He says that that means that the risk of thieves under a warehouse to warehouse policy must have the same construction as in a marine policy ; and he says that there can be no violence in a case like this, where the warehouse from which the goods were stolen was, as this warehouse was, left unattended at night.

I am not sure myself that in a warehouse to warehouse policy the word " theft " ought to be limited to theft by violence, in the same way as it is in a purely marine policy. But, however that may be, in my opinion this was clearly a theft by violence. There was the smashing in of two sets of doors by crowbars, and it seems to me that clearly there was theft by violence. I do not think that the expression " by violence " means that there must be an assault on some person or another. It seems to me that when persons go with crowbars and smash in two doors and they steal some goods from a warehouse, they break in and steal by violence. It seems to me, therefore, that even if Mr. Leck is right in saying that the theft must be of the same character from the warehouse as from a ship (that is to say, by violence and not a clandestine theft), the facts of this case answer the description of a theft by violence.

Then it is said that the policy being free of particular average, and only a portion of these goods (which were insured under one

policy) having been stolen, there is not a total loss of the whole or any severable part, and therefore there can be no claim under the policy. That seems to me to stand—on authority and on the Marine Insurance Act 1906—in this way: Where perishable goods are insured for a lump sum and are insured in bulk, and the bulk is all of the same description, then the total loss of part of the bulk gives no claim under a policy which is free of particular average. It is a particular average loss and no claim can arise upon it. But this case is different in three instances. There are very often express words in the policy which make each package a separate insurance, and in such case the loss of one package is a total loss of that particular package, and the underwriters are liable, although the policy is f.p.a., for the loss of that particular package.

Then sometimes there is an insurance in one sum of goods of actually distinct and very different kinds. An instance was given of the master of a ship who insured all his effects, which were of such different kinds as a feather bed and a chronometer. They were insured within one sum, and it was held that, in such a case, the effects were so distinguishable in kind that the loss of one particular thing, a chronometer or a feather bed, was a total loss of that particular article and not a particular average loss of the whole.

Another instance which was given was that of an emigrant to Natal who had all sorts of equipment with him, and, although in that case there was one general insurance of the whole, it was held that the packages were of such distinct character that the loss of one package was a total loss of that package, and not a particular average loss of the whole.

It has also been held that, even though the species are the same, yet if they are contained in cases or packages which are themselves separately valued, the loss of one of those packages is a total loss of that package, and not a particular average loss of the whole.

Now, in this case, not only are the goods of different species (the two cases lost being vanillin and the one left being caffeine), but, as a matter of fact, each case has a separate value attributed to it, one case being valued at 462*l.*, and one at 363*l.*, and one at 275*l.* It is true that the insurance is for a whole sum of 1100*l.*, but that 1100*l.* is merely the addition of those three separate items.

It seems to me that in this case not only are the goods of different species (which by itself would be sufficient), but they are separately, valued, and that is a double reason for saying that the loss in this case was not a particular average loss of the whole of the goods insured but was a total loss of the particular goods which were stolen, namely, two cases of vanillin.

In those circumstances, in my opinion, judgment must be for the plaintiffs for the amount claimed, namely, 51*l.* 11*s.* 3*d.* with interest from the date of the writ, and costs.

Judgment for plaintiffs.

Solicitor for the plaintiffs, *L. Goldberg.*

Solicitors for the defendant, *Thomas Cooper and Co.*

Dec. 19, 20, 1922, and *Jan.* 16, 1923.

(Before BAILHACHE, J.)

UNITED STATES SHIPPING BOARD *v.* DURELL AND CO. LIMITED; SAME *v.* JOHN EEDE BUTTS AND SON; SAME *v.* DUFFELL. (*a*)

Bill of lading—Claim for demurrage—Cargo of timber—Parcels to various consignees—Time fixed for discharging cargo—Rights and liabilities of the various consignees—Prevention—Implied term—Whether separate owners under similar obligations as to time for discharging cargo.

Where a cargo carried by a shipowner consists of different parcels of goods of the same description, each parcel belonging to a different consignee, an implied condition must be read into the contracts of the shipowners with the several consignees of parcels of the cargo to the effect that each consignee of cargo should be under exactly the same obligation with regard to the time for discharge as all the consignees of cargo. Where a shipowner fixes the lay days within which a bill of lading holder is to discharge the ship on a different basis from that which he allows another bill of lading holder, the two contracts may be so inconsistent as to amount to prevention, and neither bill of lading holder will be bound by the fixed lay period.

ACTIONS tried by Bailhache, J. sitting in the Commercial Court.

The plaintiffs, the owners of the steamship *Bethlehem Bridge* claimed demurrage from the several defendants, who were consignees of the goods and holders of separate bills of lading. The steamship *Bethlehem Bridge* was loaded at Gothenburg, in Sept.–Oct. 1919, as a general ship with a miscellaneous cargo for conveyance to this country, and bills of lading for about 150 consignments were issued.

The majority of the bills of lading had stamped upon them two marginal clauses. The first was in the following terms:

> Cargo to be discharged at the rate of 450 tons, 200 standards per regular working day, with a demurrage of 600*l.* per day payable *pro rata* freights.

The second marginal clause was in these terms:

> Time for discharging to count 24 hours after steamer's arrival in Gravesend Road or other road or roadstead as steamer might be ordered by English authorities whether berth or not available and always irrespective of turn, war circumstances, customs of the port and charter clauses on the contrary.

On some of the bills of lading the second clause was omitted, some of the shippers having objected to it. The effect of the omission was, in those cases, to make the lay days run from

(*a*) Reported by T. W. MORGAN, Esq., Barrister-at-Law

the date when the vessel arrived in berth, whereas, in the cases in which the second clause was included, the lay days ran from arrival in Gravesend Road. The vessel arrived in Gravesend Road some eight days before she got into berth, and delay occurred in unloading the ship for which the shipowners claimed demurrage.

In these circumstances, the defendants contended that the provision for the discharge of the vessel contained in the first marginal clause was part of a general scheme under which each consignee accepted the obligation to be responsible for the discharge of the whole of the cargo of the vessel within the given time or to pay his *pro rata* proportion of the very large sum fixed as the demurrage rate, and that as a consequence of this it followed as a matter of law that the shipowner must include in each bill of lading the same terms in reference to demurrage in order that each bill of lading holder should be under the same incentive to discharge and under the same liability for not discharging as every other bill of lading holder. It was also contended by the defendants that the mere fact that the terms in reference to demurrage were not the same in all the bills of lading was sufficient of itself to get rid of any obligation to discharge within the agreed time.

R. A. Wright, K.C. and *James Dickinson* for the plaintiffs, the shipowners.

Stuart Bevan, K.C. and *Claughton Scott* for the defendants, the cargo owners.

Cur. adv. vult.

United States Shipping Board v. Durell and Co. Limited.

Jan. 16, 1923.—Bailhache, J.—This is one of a series of three claims for demurrage which are remarkable in that they raise an entirely new point in bill of lading law, a feat which I should have thought impossible. The claims arise in respect of the detention of the plaintiffs' steamship *Bethlehem Bridge* in the Port of London in Oct. and Nov. of 1919, and on this wise: the *Bethlehem Bridge* was chartered from her owners by one Jorgensen under a charter-party in the uniform general charter-party form on the 17th Sept. 1919. Jorgensen put her on the berth at Gothenburg as a general ship, and she loaded several parcels of wood goods, both on and under deck, and a miscellaneous cargo in addition.

It is with the wood goods that I am concerned. These defendants were the buyers upon c.i.f. terms of one of the parcels of wood goods. They were the receivers of the goods and the holders of a bill of lading which contained two marginal clauses impressed upon them with a rubber stamp. The marginal clauses are these: "Cargo to be discharged at the rate of 450 tons 200 standards per regular working day with a demurrage of 600*l.* per day payable *pro rata* freights."

The second clause is: "Time for discharging to count 24 hours after the steamer's arrival in Gravesend Road or other road or roadstead as steamer might be ordered by English authorities whether berth or not available and always irrespective of turn, war circumstances, customs of the port and charter clauses on the contrary."

The *Bethlehem Bridge* arrived at Gravesend on the 11th Oct. 1919. Notice of readiness was given, and although she was not in a discharging berth, time under the second clause began to run on the 14th Oct. She had fixed lay days under the first clause, and, allowing for Sundays, they expired on the 24th Oct. She got into a discharging berth on the 22nd Oct., and discharging began on the 23rd Oct. and was finished on the 26th Nov. She was thus on demurrage, according to the terms of the bill of lading, for thirty-three days, and it is for the defendants' proportion of this time at 600*l.* per day that the plaintiffs sue.

It so happened that in two instances the shippers declined to accept the second marginal clause, with the result that in these circumstances time did not begin to run until the 23rd Oct., and in their case lay days did not expire and the *Bethlehem Bridge* was not on demurrage so far as they were concerned, until, at any rate, early in November.

The defendants contend that this fact relieves them from their obligation to discharge the *Bethlehem Bridge* within a fixed number of lay days. The plaintiffs say that each bill of lading is an independent contract with the holder and receiver, and no bill of lading holder has any concern with the terms which the shipowner or charterer chooses to make with any other bill of lading holder. They say, through their counsel, that the terms of the bill of lading are clear and, as I gather, that the defendants' contention is not worth serious consideration.

The defendants are in no way discouraged by this method of meeting their case; on the contrary, they insist that their view is sound. They point out that the contract with each bill of lading holder is that the ship shall be discharged and not his particular parcel of goods, and they say that where that is the case it is essential that the time within which the discharge is to be done must be the same for all the bill of lading holders. Particularly is it said that this must be a case where the first marginal clause suggests a general scheme under which each bill of lading holder is to bear his proportion as to part of the total demurrage. In my judgment, the defendants are right, and that for several reasons I agree that it is implicit in the terms in which the first clause is worded that all bill of lading holders shall be in the same position as regards time for discharging.

Whether it is implicit or not, in my opinion, it must be so from the nature of the case. Demurrage is payable in respect of the detention of a ship from her owner after her lay days have expired, and, obviously, she is not so detained so long as the lay days allowed to some of the bill of lading holders have not expired. Demurrage is not payable in respect of a hold of the ship but of the ship itself. I do not understand how a ship can be both on demurrage and not on demurrage at the same time.

Further, by allowing lay days on one basis to one set of bill of lading holders and on another basis to another set, the shipowner has himself created a position in which it almost inevitably must be, and in this case was, impossible for the holders of the more onerous bills of lading to perform the obligation imposed on them. I think it is true to say that the owners prevented the defendants from performing their contract.

In view of the next case, that against Messrs. Eede Butts and Son, in which I am about to give judgment, it may be useful to deal with this point of prevention a little more in detail, although at the risk of some repetition. When an owner fixes the lay days within which a bill of lading holder is to discharge his ship on a different basis from that which he allows another bill of lading holder, the two contracts may be so obviously inconsistent that it is seen at once that if both bill of lading holders take their full lay days, the holder with the fewer lay days cannot possibly fulfil his contract within the time stipulated. That seems to me a clear case of prevention. The mere impossibility may in other cases not turn out to be absolute until the time for performance has come and gone.

Thus, if the lay days are the same in number but, as here, one set are to begin, whether the vessel is in berth or not, and the other set are not to begin until she gets into berth, it is possible that the vessel may get a berth immediately on her arrival at her port of discharge, and in such a case there would, in my opinion, be no prevention of performance within the fixed time for either bill of lading holder. If, however, the event should turn out otherwise and the vessel should, as here, be delayed in getting a berth, the variance in the contracts would prove to have created an impossibility, and the holder of the bill of lading whose lay days began on the vessel's arrival at port would, in my opinion, be as truly prevented as if the prevention was apparent on the face of the contracts.

If, then, I apply these varying bills of lading to the facts of this case, the plaintiffs contracted with these defendants to discharge the *Bethlehem Bridge* in the events which happened by the 24th Oct., while they contracted with Messrs. Eede Butts and Son that they might keep their goods on board until the 2nd or 3rd Nov. This is, I think, as much a case of prevention as if those dates had been specifically mentioned in the allowed ten days and the other twenty days from the starting date. It is scarcely necessary to add that the effect of prevention of performance within a fixed time by one party to a contract is not to give an extension corresponding with the period of prevention but to delete the time limit and to turn the contract into one to do the contractual work within a reasonable time in the circumstances. Such, in my judgment, was the defendants' obligation, and one of the circumstances to be taken into account is the fact that the owner had himself permitted some of the cargo to remain on board until early November. It will appear from my judgment in the next case why I think the defendants' time to discharge the vessel did not, in the events which happened, expire until she was in fact discharged.

My judgment is for the defendants, with costs.

Judgment for the defendants.

United States Shipping Board v. John Eede Butts and Son.

Bailhache, J.—This is one of the instances where the clause " time for discharging to count twenty-four hours after steamer's arrival at Gravesend " was omitted. The obligation, therefore, upon these defendants as expressed in the bill of lading was to discharge the ship within the same number of fixed lay days as in the last case, but the lay days were not to begin until the vessel was in berth. Upon the evidence I am satisfied that it was. She discharged in the river at the Greenwich Buoys, a berth where cargoes are regularly discharged, though not often timber cargoes, for the reason that the berth is usually reserved for larger ships. The berth was not adapted for quick despatch owing to some difficulty in manipulating the lighters, and although the ship was physically capable of discharging 450 tons a day she could not discharge at that rate in that berth.

Apart from the point that I am about to mention, the fact that in that particular berth the ship could not give delivery at the stipulated rate would not, I think, excuse the defendants. These defendants contend, as did Messrs. Durrell, that their time limit is gone and that their obligation became one to discharge the *Bethlehem Bridge* within a reasonable time under the circumstances.

Now, if one looks at the two bills of lading, and if the contracts as therein expressed both hold good, it is obvious that there is nothing in the terms of the less favourable bill of lading to prevent these defendants from performing their contract as expressed in their bill of lading. I have held, however, that the time limit in the less favourable bill of lading has gone. I, at any rate, must assume that that judgment is right, and it remains to consider what the position of the present defendants is upon that assumption.

The time actually occupied in the discharge after the *Bethlehem Bridge* got into her berth was thirty-five days. There is no evidence that that time was unreasonable, having regard to the berth in which she was and the miscellaneous cargo she carried. Both these circumstances are to be taken into account in considering what was a reasonable time for her discharge, though irrelevant if she was to be discharged in fixed lay days.

I will assume in the owners' favour and without deciding the point, that her time counted as regards the less favourable bills of lading as from the 14th Oct. when she had arrived at Gravesend and given notice of readiness. Thirty-five days from the 14th Oct. carry the reasonable time for discharging to the 18th Nov., later, in fact, if one deducts non-working days ; but the 18th Nov. is late enough for my purpose. She was ready to discharge in a berth

on the 22nd Oct., and as by the terms of this bill of lading these defendants had ten days in which to discharge; their obligation on the face of their contract was to see her clear of cargo by the 2nd Nov., or, excluding Sundays, say, the 4th or 5th Nov.; but the holders of the less favourable bill of lading were not bound to see her clear of cargo until, at any rate, the 18th Nov., always on the assumption that my judgment is right.

In this case, therefore, if the defendants are to be held to the terms of their bill of lading they had to see that the *Bethlehem Bridge* was discharged by the 4th or 5th Nov., while the holders of the other bill of lading were entitled to keep cargo in her in the events which happened for at least a fortnight later. This, too, seems to me to be a case where the owner has, by his two inconsistent contracts, prevented these defendants from performing their contract within the stipulated time. The time limit is gone and the defendants are not liable.

It will be apparent, if my reasoning is sound, that when the time limit is deleted from the bill of lading, and it is ascertained by the event that the defendants' time for clearing the *Bethlehem Bridge* of cargo did not expire until she was in fact discharged, the other bill of lading holders could not be in default at any earlier date.

In my opinion, if a shipowner desires to make one bill of lading holder liable for demurrage for a period during which another bill of lading holder may, without breach of contract, detain the ship, he must do so in express terms; but my imagination is unequal to the task of supposing that, if so expressed, any shipper fit to be in business would accept them. My judgment must be in this case, as in the last, for the defendants, with costs.

Judgment for the defendants.

UNITED STATES SHIPPING BOARD *v.* DUFFELL.

BAILHACHE, J.—This case is the same as *Messrs. Durells*' case, and my judgment is the same. I may, however, mention that it would be probably hard on these defendants were it otherwise, as their barge was in attendance from the 3rd Nov. to the 20th Nov. waiting for their goods.

Judgment for the defendants.

Solicitors for the plaintiffs, *Thomas Cooper and Co.*

Solicitors for the defendants, *Trinder, Capron, Kekewich,* and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Monday, Oct. 23, 1922.

(Before HILL, J.).

THE SYLVAN ARROW. (*a*)

Collision—Jurisdiction—Maritime lien—Motion to set aside writ in rem—*Vessel alleged to have been in the service of a foreign sovereign state at the time of the attachment of the lien—No consent to the motion or agreement as to facts.*

The court will not set aside a writ in rem *claiming damage by collision, and subsequent proceedings, on motion supported by affidavit alleging that at the time of the collision the vessel was under requisition to a foreign sovereign state and in its possession and control, unless the plaintiff consents to that issue being determined on motion, or unless there is an agreement on the facts, or until the issues are defined on the pleadings.*

An action was commenced by writ in rem *against the defendants' vessel in this country claiming damages for collision which took place in Dec.* 1918 *at New York. The defendants sought to set aside the writ and subsequent proceedings on motion supported by affidavit alleging that at the time of the collision their vessel was under requisition to, and under control of, the United States Government, and had been so from the time of completing building. The defendants therefore alleged that no maritime lien had attached to their vessel. It was contended by the plaintiffs in opposition to the motion that the writ could not be set aside until the facts upon which the defendants relied had been proved.*

Held that, the claim being one over which the court had jurisdiction, the writ and proceedings could not be set aside until the issues were defined, either by the pleadings or upon proof of the facts.

MOTION by the defendants, the owners of the American steamship *Sylvan Arrow*, to set aside a writ *in rem* and subsequent proceedings in which the plaintiffs, the owners of the steamship *W. I. Radcliffe*, claimed damages for a collision which took place in New York Harbour on the 1st Dec. 1918.

By their affidavit in support of the motion the defendants alleged that the *Sylvan Arrow* was requisitioned by the United States Government while she was building, and that from the time when she was completed in July 1918 until Jan. 1919 she was under requisition to, and under the control and in the possession of, the United States Government, who appointed and paid her master, officers, and crew.

Raeburn, K.C. and *Dumas* for the defendants. —No maritime lien ever attached to the *Sylvan Arrow*: (*The Tervaete*, 128 L. T. Rep. 176; (1922) P. 259). There is jurisdiction to try the issue now: (see Order XXXVI., r. 7; and

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

see also *Gavin Gibson and Co.* v. *Gibson*, 109 L. T. Rep. 445; 82 L. J. K. B. 1315; (1913) 3 K. B. 379, there cited, where the question of jurisdiction was determined first).

Dunlop, K.C. and *Balloch*.—The motion is premature. There is no agreement on the the facts, and the question of jurisdiction can only be determined on this motion by consent. There are no admissions of fact as there were in *The Tervaete* (*sup.*). The plaintiffs are entitled to deliver a statement of claim. The issues must be made clear upon the pleadings. Until then the question of jurisdiction cannot be tried as a preliminary question. If the ship were under requisition as alleged the defendants may nevertheless be liable as in the case of a chartered vessel.

Raeburn, K.C. in reply.—The court has jurisdiction to set aside a writ on motion: *The Broadmayne*, 114 L. T. Rep. 891; (1916) P. 64; *The Annette and The Dora*, (1919) P. 105; and see *The Petone*, 119 L. T. Rep. 124; (1917) P. 198), where there is no trace of consent.

HILL, J.—This is a motion by the owners of the steamship *Sylvan Arrow* to set aside the writ and all subsequent proceedings. The writ is issued by the owners of steamships *W. I. Radcliffe*. It is a writ *in rem* and was served on board the *Sylvan Arrow* in this country. It is a writ claiming damages in respect of a collision which happened in New York Harbour on the 1st Dec. 1918. An appearance was entered on behalf of the defendants under protest, and the grounds of the present motion are that at the time of the collision, the subject matter of the action, the defendants' vessel, was under requisition to the United States Government and was solely under the control and management of that Government. Mr. Dunlop, for the plaintiffs, objects. He says he is entitled to have the defendants' defence and see whether it is pleaded that the persons who are alleged to be negligent are not the servants of the owners, a private corporation, but are the servants of the United States Government.

Even if they are, Mr. Dunlop says, it will still have to be considered whether the defendants are not liable on the analogy of the case of a ship which is chartered. He says, further, that he is entitled to know what facts are pleaded; and he says at this stage that he does not admit that the negligent persons were not the employees of the present defendants, the owners of the *Sylvan Arrow*, nor that they were the servants of the United States Government. Now that question being in issue and there being no agreement that it should be tried by motion on affidavit, in my view the defendants are not in a position to move to set aside the writ and arrest. This court, no doubt, has jurisdiction under the common law in respect of every cause of action supported by a maritime lien, but the court also has jurisdiction under the Admiralty Court Acts. The Act of 1840 gave it jurisdiction in the case of any damage received by a ship, and the Act of 1861 gave it jurisdiction in respect of damage done by a ship; and sect. 35 of the latter Act says that jurisdiction may be exercised either by proceedings *in rem* or by proceedings *in personam*.

This is a claim in respect of damage done by a ship. It may well be that the action is not sustainable, because, when the facts are investigated, it may turn out that there was no person on board for whom the owners are responsible, and therefore no right to issue a writ *in rem* against the ship. That is a question which must depend upon the facts, and until the facts are ascertained I cannot say whether there is a good cause of action or not. While that matter is in doubt it is certain that the court has jurisdiction to try the action. Mr. Raeburn suggests that at this stage I ought to order the question of whose servants the negligent pe sons were to be tried as a mixed question of fact and law, and I suppose—if Mr. Dunlop wants to raise it—direct to be tried as a preliminary question of law the question whether, even if they were the servants of the United States Government, nevertheless, the owners of the ship are liable for their negligence.

It may well be that if and when these matters appear as definite issues on the pleadings, it will be convenient to order that they should be tried as a preliminary question, and anything that I am saying must not be treated as an expression of opinion pointing to a contrary view.

But it is said that I ought to try this matter on motion, and various cases have been referred to in which this question of jurisdiction has been tried on a preliminary motion. It is perfectly true that that is so in one set of cases with which we are very familiar—not the present case—that is the set of cases in which a government claims immunity from the jurisdiction of the court. The point does not arise here whatever the facts may be as to the control of the ship at the time in question. The immunity from the jurisdiction of the court on that ground can only be claimed by a sovereign government and not by a private owner. In the present case the United States Government is not making any claim, and obviously national rights are not affected by the exercise of the jurisdiction. There is another class of case in which the point arises as merely a point of law—for instance, a case in which the only question is whether the claim as alleged in the writ was within the jurisdiction of the court or within any section of the Admiralty Court Acts. That question clearly can properly be tried on motion.

There is another class of cases of which *The Petone* (119 L. T. Rep. 124; (1917) P. 198) is an illustration where the matter was tried on affidavits. There the facts were undisputed, and the only question was one of law. There is nothing said in the report of that case as to whether that case was tried on motion by consent, but I think it must have been by consent, because no objection appears to have been raised to the trial by motion.

But the present case starts with and mainly depends on a question of fact which is in dispute, namely, Whose servants were in charge of the ship? I do not think I have any power to try that issue upon affidavit on a motion to set aside the writ and arrest.

Therefore I dismiss the present motion with costs.

Solicitors for the plaintiffs, *Thomas Cooper and Co.*

Solicitors for the defendants, *Parker, Garrett, and Co.*

Nov. 13 *and* 20, 1922.

(Before HILL, J.)

THE MAGGIE A. (a)

Ship—Necessaries — Repairs — British ship—Right to sue in rem*—Default of appearance—Whether shown to the satisfaction of the court that the owner is domiciled in England or Wales —Admiralty Court Act* 1861 (24 *Vict. c.* 10), *s.* 5.

A firm of ship repairers commenced an action in rem *against the owners of a vessel which they had repaired. It appeared from the statement of claim that the ship was registered in an English port. No appearance was entered.*

Held that, it not being shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship was domiciled in England or Wales, the court would not refuse jurisdiction under sect. 5 of the Admiralty Court Act 1861.

ACTION for repairs.

The plaintiffs were the New Medway Steam Packet Company of Rochester. The defendants were the owners of the motor schooner *Maggie A*, belonging to the port of Poole.

By their statement of claim the plaintiffs alleged that in the months of June and July 1922, whilst the *Maggie A* was in the port of Rochester, acting upon orders received from the defendants and from the master, they executed certain necessary repairs to the *Maggie A* and equipped her with certain necessary materials. At the time of the institution of their action the *Maggie A* was under arrest of the County Court of Kent at Rochester in an action for wages by her mate. The plaintiffs claimed 215*l.* 14*s.* 11*d.* as their account, and condemnation and sale of the *Maggie A.*

By sect. 5 of the Admiralty Court Act 1861 (24 Vict. c. 10) it is provided:

The High Court of Admiralty shall have jurisdiction on any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales.

Geoffrey Hutchinson, for the plaintiffs, contended that there was jurisdiction under sect. 4 of the Admiralty Court Act 1861. Counsel made no submission upon sect. 5.

Cur. adv. vult.

Nov. 20.—HILL, J. said: This is a claim for 215*l.* odd for repairs by the New Medway Steam Packet Company Limited against the motor schooner *Maggie A*, of Poole. The date of the writ is the 12th Aug. last; it was served on the 14th Aug., and the schooner was arrested by the Marshal. At the time of the arrest by the Marshal she was under arrest in a suit *in rem* by the mate for wages in the Rochester County Court. The difficulty arises as to the jurisdiction of this court. Sect. 4 of the Admiralty Court Act of 1861 gives jurisdiction to the High Court of Admiralty if from the time of the institution of the cause the ship or proceeds are "under arrest of the court." In 1861 there was no County Court having Admiralty jurisdiction. That jurisdiction was given by the County Court Admiralty Jurisdiction Act of 1868. The present claim cannot be brought in the County Court, for though it is within sect. 3 of the County Court Admiralty Jurisdiction Act 1868 in respect of subject-matter, as a claim for repairs, yet as this claim is for 215*l.* it is beyond the County Court limit, which is 150*l.* in respect of such a claim. If this court—the Admiralty Court—has not jurisdiction *in rem* under sect. 4 of the Act of 1861 the result is an absurd one, because though the vessel is properly under arrest by a court in England, having Admiralty jurisdiction, no court has jurisdiction *in rem* in respect of this claim. Nobody has appeared under protest to dispute the jurisdiction of this court.

I am glad to say I need not decide this question, because I am quite satisfied that by sect. 5, under the circumstances of this case, this court has *primâ facie* jurisdiction and there is nothing to displace that *primâ facie* jurisdiction. *Primâ facie* the court has jurisdiction under sect. 5 in respect of claims for necessaries supplied to any ship elsewhere than in the port to which the ship belongs. Repairs are necessaries. Repairs are the subject of the present claim. These necessaries were supplied elsewhere than at the port to which the ship belongs, and therefore *primâ facie* under sect. 5 of the Admiralty Court Act this court has jurisdiction. There is a limitation of jurisdiction. The court has jurisdiction in these circumstances unless it is shown to the satisfaction of the court that at the time of the institution of the cause, any owner or part owner of the ship was domiciled in England or Wales. It is proved that the ship belongs to Poole and nobody has thought it worth while to appear to show whether or not an owner was or was not, at the time of the institution of the cause, domiciled in England or Wales. There is, therefore, nothing to displace the *primâ facie* jurisdiction of the court. That being so, the difficulty which it was quite proper to call my attention to when the case was last before the court does not exist and there will be the ordinary judgment in default for the claimants,

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

with costs, subject to a reference, reserving all priorities. There will also be an order for appraisement and sale of the vessel. It had better be done by the Marshal than by the Rochester County Court. The sale will be either by auction or by private treaty, as the Admiralty Marshal may be advised.

Solicitors: *Ince, Colt, Ince,* and *Roscoe*, agents for *Arnold, Day,* and *Tuff*, Rochester.

Monday, Dec. 11, 1922.

(Before HILL, J.).

THE JUNO. (*a*)

Collision—Action in rem—*Stay of proceedings—Mutual agreements for exchange of bank guarantees to put in bail abroad—Agreements to be void unless proceedings commenced within three months—Proceedings commenced by one party in England—Action subsequently begun by the other party abroad—Motion to set aside proceedings in England—Breach of faith of guarantees given abroad—Action in England oppressive by requiring foreign owners to give bail in two courts.*

On the 13*th June* 1922 *a British steamer and a Finnish steamer were in collision in the river Maas, Holland. After the collision the Finnish owners threatened arrest in a Dutch port. The owners of the British steamer who were anxious that the litigation should take place in England, reluctantly instructed their agents in Holland to provide bail, and although no proceedings were begun, documents in identical terms in the nature of bank guarantees to provide bail if proceedings were commenced within three months were exchanged on the* 29*th July between the owners. On the* 6*th Sept. the Finnish vessel came within the jurisdiction of the of the English courts, and an action was commenced, and the ship arrested and bail given under protest at the suit of the owners of the British ship. At that time no proceedings had been begun in Holland, but on the* 14*th Sept. an action was commenced in Holland by the Finnish owners. The Finnish owners moved that the writ and all proceedings in the action by the British owners should be stayed, on the ground that their action was oppressive because it required the Finnish owners to give bail in two courts, and was inequitable as a breach of faith of the agreement in Holland.*

Held, distinguishing The Christiansborg (5 *Asp. Mar. Law Cas.* 491; 53 *L. T. Rep.* 612; 10 *Prob. Div.* 141), *and following* The Mannheim (8 *Asp. Mar. Law Cas.* 210; 75 *L. T. Rep.* 424; (1897) *P.* 13), *that, no legal proceedings having been commenced when the writ was issued in England, and there being no arrest and no bail given prior to the writ now sought to be set aside, there was nothing to debar the British owners from carrying on proceedings in England.*

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

MOTION to set aside writ and stay all proceedings.

The plaintiffs were the owners of the steamship *Lycaon*, of Liverpool, who had commenced proceedings to recover damage sustained by the *Lycaon* in collision with the defendants' steamer *Juno* in the river Maas, Holland, on the 13th June 1922. The *Juno* was a Finnish steamer. The owners of the *Juno* threatened to commence proceedings in Holland, and to arrest the *Lycaon*, whose owners were anxious that the litigation should take place in England. Ultimately on the 14th July both parties agreed to give bail, and on the 24th July undertakings were exchanged between the parties by which certain banks on behalf of the parties undertook to provide bail if called upon to do so, provided that proceedings were commenced within three months. These undertakings were in the following terms which were identical in the document given by each party:

The undersigned the [naming a bank] established in . . . and also having a registered office in . . . declare that, with renunciation of the privileges accorded to guarantors by virtue of the law, they tender themselves as guarantors for the benefit of the owners of the steamship *Lycaon* (*Juno*), of the master and owners of the steamship *Juno* (*Lycaon*), for the due payment of all such monies as shall appear to be due to the first mentioned from the last mentioned or of one of them by virtue of judgment of a Dutch judge, arbitral award, or amicable settlement in the matter of the collision between the steamships *Juno* and *Lycaon* in the New Water Way on the 13th June 1922, and such to a maximum of eighteen thousand guilders. This guarantee shall be void if within three months after this date, the owners of the steamship *Lycaon* (*Juno*) shall not have commenced proceedings before a Dutch judge, the deed of compromise shall have been signed, or matter shall have been settled amicably.—Rotterdam, 24th July 1922.

No proceedings were commenced in Holland by the owners of the *Juno*. On the 6th Sept. 1922 the *Juno* came to London, where an action was at once commenced by the owners of the *Lycaon*. On the 12th Sept. the undertakings expired, and on the 13th Sept. the *Juno* was arrested. On the following day (the 14th Sept.) proceedings were commenced in Holland by the owners of the *Juno*. In the action by the *Lycaon* in England the owners of the *Juno* moved to set aside the writ and stay all proceedings.

E. Aylmer Digby for the defendants, the owners of the *Juno*.—It is immaterial that the proceedings in Holland were not begun before the arrest of the *Juno* in this country. No matter how unwilling they were to do so, the plaintiffs did give guarantees in the same terms as the guarantees given by the defendants. This case is governed by the authority of *The Christiansborg* (5 Asp. Mar. Law Cas. 491; 53 L.T.Rep.612; 10 Prob.Div.141.) The plaintiffs' action in requiring the *Juno* to give bail in two courts is oppressive. They have obtained the benefit of bail in Holland, and now require bail in this country: (see Lord Esher, M.R., at p. 151

of 10 Prob. Div.) Although no bail had been given in Holland there is no distinction in principle between the undertaking given there and the actual giving of bail, and in this case the undertaking can be treated as bail; (see Baggally, L.J. at p. 154, of 10 Prob. Div.), where he says: "I am unable to see the distinction in principle at least between a ship being released upon bail in the ordinary form and being released by virtue of an agreement come to between the two owners or their representatives." As to the meaning of "released" see Fry, L.J. at p. 156. The only distinction between *The Christiansborg* and this case is that in the former the writ was issued at the time of the commencement of proceedings here. This is not material. *The Mannheim* (8 Asp. Mar. Law Cas. 210; 75 L. T. Rep. 424; (1897) P. 13) is distinguishable. In that case an undertaking was given to provide bail, but the documents in this case are as valuable as an ordinary bail bond. By providing such a document the defendants have purchased the immunity of their ship.

[HILL, J. referred to *The Jasep* (*Shipping Gazette*, the 4th and 31st May, 1896.]

Noad for the plaintiffs.—*The Christiansborg* (*sup.*) and *The Jasep* (*sup.*) are distinguishable upon the same grounds upon which they were distinguished by Gorrell Barnes, J. in *The Mannheim* (*sup.*) *i.e.*, upon the ground that in both these cases proceedings had been actually commenced in the foreign jurisdiction. In this case as in *The Mannheim* (*sup.*) and is governed by it, unless there is something in the undertaking given here which amounts to a commencement of proceedings. There is nothing in the documents exchanged here which does more than confer upon the respective owners a right to bail if it should be decided to commence proceedings in Holland.

HILL, J. said: This is a motion by the defendants, the owners of the steamship *Juno*, asking that all proceedings in an action *in rem* by the plaintiffs, the owners of the steamship *Lycaon*, should be stayed. The *Lycaon* and *Juno* were in collision on the 13th July 1922 in the river Maas, Holland. Apparently arrest of the *Lycaon* was threatened by persons representing the *Juno*, and upon that the owners of the *Lycaon* (who were endeavouring and who continued afterwards to endeavour to have the question of liability for the collision litigated in England) gave authority to their agents to give the necessary bail and further asked their agents to obtain bail from the *Juno*. Bail in the strict sense could not at that time be obtained because no legal proceedings had been decided upon, and there was no arrest, nor could there be any arrest, until proceedings had been begun. Negotiations as to the place of trial broke down, and then there were agreements for a mutual exchange of bank guarantees. Still no action was brought, nor any arrest effected. On the 6th Sept. the *Juno* being in this country, a writ *in rem* was issued against her here by the owners of the *Lycaon*, and after some negotiations the *Juno* was arrested in that action in this court. On the 14th Sept. the owners of the *Juno* began proceedings in the Dutch court against the *Lycaon*. In the action in this country the owners of the *Juno* entered an appearance under protest, and their motion is now before me.

One has to look a little carefully into the agreement entered into in Holland. I am not now concerned with the agreement entered into by the owners of the *Lycaon*. What I am concerned with is the agreement entered into for their benefit, and in regard to any claim they might have against the *Juno* or her owners. The guarantee was to be null and void if within three months the owners of the *Juno* had not commenced proceedings before the Dutch Court, and it was an undertaking which contemplated that proceedings might be taken elsewhere than in Holland.

Mr. Digby, for the *Juno*, says I ought to stay the proceedings in this country because it is a breach of good faith to bring them after that agreement had been obtained in Holland. He relies upon the case of *The Christiansborg* (5 Asp. Mar. Law Cas. 491; 53 L. T. Rep. 612; 10 Prob. Div. 141). Mr. Noad, on the other hand, says that this case is distinguishable from *The Christiansborg*, and is covered by the authority of *The Mannheim* (8 Asp. Mar. Law Cas. 210; 75 L. T. Rep. 424; (1897), P. 13) a decision of Gorrell Barnes, J., and I have already referred to the case of *The Jasep* (1896 *Shipping Gazette*). In that case the Master of the Rolls held that upon its facts the case was indistinguishable from the case of *The Christiansborg*.

Now I have to decide whether the particular facts of the present case come within the principle of *The Christiansborg* and *The Jasep*, or are distinguishable from the facts of those two authorities in the way in which *The Mannheim* was distinguished. Gorrell Barnes, J. in *The Mannheim* said: "Nothing seems to have been done, so far as legal proceedings are concerned, from the time of the collision until the *Mannheim*, being in this country, was arrested in the present suit by the plaintiffs in order to enforce their claim for damages. Upon that arrest being effected the defendants moved the court to release the vessel on the ground that the plaintiffs and the defendants have both entered into agreements in Holland guaranteeing the payment to each other of what may be found due of their respective claims, and the defendants allege that it is contrary to good faith for the plaintiffs now to be allowed to arrest the vessel and proceed against them in this country."

Gorrell Barnes, J. points out that the difference between *The Christiansborg* and *The Mannheim* is this: That in *The Christiansborg* there was no arrest and no writ. I am quite unable to distinguish the facts of the present case from the facts in *The Mannheim*. Therefore, *The Mannheim* is a direct authority, and I shall follow it. I do not wish to be

thought to be expressing any dissent from it or saying that the distinctions between it and *The Christiansborg* are not vital distinctions.

Therefore, for reasons similar to those which led Gorell Barnes, J. in *The Mannheim* to distinguish it from *The Christiansborg*, so I think the present case ought to be distinguished from *The Christiansborg;* and I hold that there is no sufficient reason for interfering with the plaintiffs when they bring their action here. Of course, this has no effect at all upon the agreement that they made in Holland with the owners of the *Juno*, and the owners of the *Juno* will enforce it as they may be advised.

I dismiss this motion with costs.

Solicitors, *Thomas Cooper* and *Co.*, *Stokes* and *Stokes*, agents for *Cameron, MacIver*, and *Davie*, Liverpool.

Dec. 6, 1922, *and* Jan. 15, 1923.

(Before HILL, J.)

THE AMBATIELOS; THE CEPHALONIA. (*a*)

Pilotage — Pilot's dues — Jurisdiction — Right to sue in rem — *Maritime lien — Admiralty Court Act* 1861 (24 *Vict. c.* 10), *s.* 10—*Pilotage Act* 1913 (2 & 3 *Geo.* 5, *c.* 31), *s.* 49.

The High Court of Admiralty had jurisdiction to entertain an action in rem *by pilots for pilotage dues, and the Admiralty Division of the High Court of Justice has, therefore, jurisdiction to entertain such a claim.*

The right to recover in summary proceedings under sect. 49 *of the Pilotage Act* 1913, *which is only conferred upon a limited class of pilots, does not restrict the right of pilots to proceed in the Admiralty Court.*

THE plaintiffs were duly licensed Cardiff pilots, and were employed, in Oct. 1921, to perform certain pilotage services to the Greek vessels *Ambatielos* and *Cephalonia*, in respect of which there was due to them 21*l.* 17*s.* 6*d.* in respect of the former, and 42*l.* 17*s.* 6*d.* in respect of the latter vessel, being their dues at the statutory pilotage rates.

The vessels were under arrest in actions by a mortgagee. In each case the facts were admitted.

Sect. 10 of the Admiralty Court Act (24 Vict. c. 10) 1861, provides:

The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship and for disbursements made by him on account of the ship; provided always that if in any such cause the plaintiff do not receive fifty pounds he shall not be entitled to any costs, charges, or expenses incurred by him therein unless the judge shall certify that the cause was a fit one to be tried in the said court.

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

Sect. 49 (1) of the Pilotage Act (2 & 3 Geo. 5, c. 31) 1913, provides:

The following persons shall be liable to pay pilotage dues for any ship for which the services of a licensed pilot are obtained, namely: (*a*) The owner or master (*b*) as to pilotage inwards such consignees or agents as have paid or made themselves liable to pay any other charge on account of the ship in the port of her arrival or discharge; (*c*) as to pilotage outwards, such consignees as have paid or made themselves liable to pay any other charge on account of the ship in the port of her departure; and these dues may be recovered in the same manner as fines of like amount under the Merchant Shipping Act 1894, but that recovery shall not take place until a previous demand has been made in writing.

Dumas for the plaintiffs.—The Court has jurisdiction. The pilot is a mariner, and he enjoys the same rights as other mariners:

Ross v. *Walker*, 1765, 2 Wilson, 264;
The Prince George, 1837, 3 Hagg. Adm. 376.

There is no suggestion in any decision nor in any text-book that the pilot has no right to sue *in rem*; (see Coote's Admiralty Practice, 1868, p. 136; and Maude and Pollock's Merchant Shipping, 4th edit., p. 86). No objection was taken to the jurisdiction in *The Adah* (1830, 2 Hagg. Adm. 326), nor in *The Dowthorpe* (1843, 2 Wm. Rob. 73), where pilotage was treated as wages, nor in *The Servia* and *The Carinthia* (8 Asp. Mar. Law Cas. 353; 78 L. T. Rep. 54; (1898) P. 36), though it is not certain, in the latter case, whether the action was *in rem*. Subsequent legislation has not affected the jurisdiction of the Court. The right to recover by summary procedure, which is given by sect. 49 of the Pilotage Act 1913, and sect. 680 (ii.) of the Merchant Shipping Act 1894, does not oust the jurisdiction of the Admiralty Court.

Carpmael for the defendants.—Pilots enjoyed summary remedies under the old Pilotage Acts of George III. and George IV. The Admiralty Court Acts contain no reference to pilots, although the rights of seamen are dealt with by sect. 10 of the Admiralty Court Act 1861. By the Merchant Shipping Act 1854 pilots and seamen were given summary remedies, and the right of seamen to sue in the Admiralty Court was limited to cases where the claim exceeded 50*l.* or the ship was under arrest. It would seem, therefore, that at that time it was not contemplated that pilots could proceed in the Admiralty Court. By sect. 49 of the Pilotage Act 1913 pilots have a summary right of recovering their dues even from agents or consignees. It is immaterial that an unconditional appearance has been entered if the court has no jurisdiction:

Joseph Crossfield and Sons v. *Manchester Ship Canal Company*, 90 L. T. Rep. 557; (1904) 2 Ch. 123.

Dumas replied.

Cur. adv. vult.

Jan. 15.—HILL, J., in a written judgment, said: In each of these cases a pilot, duly

licensed by the Cardiff Pilotage Board, brings an action *in rem*, claiming the amount of the authorised dues for piloting the ship from Barry Roads to dock at Cardiff. At the date of the writ each ship was under arrest in a mortgagees' action. The ships are Greek. The Greek owner entered an appearance not under protest. The only defence raised at the hearing was that no action by a pilot is sustainable in this court, whether *in rem* or *in personam* the contention being that the remedy by summary proceedings under sect. 49 of the Pilotage Act 1913 is the only remedy.

I have examined the authorities and the Pilotage Act, and the Acts which preceded it. I have come to the conclusion that the High Court of Admiralty, and its successor, the Admiralty Division of the High Court of Justice, have always entertained actions *in rem* for pilotage remuneration, and that there is nothing in the statutes which has taken away that jurisdiction. A judgment *in rem* can, therefore, be pronounced. *A fortiori* there is nothing to take away jurisdiction *in personam*, and, the defendants having appeared, a judgment *in personam* can be pronounced. It is clear that the High Court of Admiralty entertained suits for pilotage remuneration, and treated the pilot as a seaman, and his remuneration as wages. It is also clear that the courts of common law, at a time when they were most jealous of Admiralty jurisdiction, recognised this jurisdiction of the High Court of Admiralty except in cases where the contract was made and the work done within the body of a county. It is unnecessary to go further back than *Ross* v. *Walker* (1765, Wilson, 264). That was a motion of prohibition in a suit described as "a pilot's suit for wages in Admiralty." The court of common law granted prohibition because the contract was made on land and was to do work on board within "the body of a county" (the pilotage was Sea Reach to Deptford); but in the judgment it was said, "It is established that every officer and common man who assists in navigating the ship (except the master) . . . is a mariner and may sue for wages in the Court of Admiralty." Suits by pilots for remuneration were heard without objection by Sir William Scott in *The Nelson* (1805, 6 C. Rob. 227), and *The Bee* (1822, 2 Dods. 498). A similar suit for conducting an American ship from the Downs to Flushing was dismissed on the ground that the service was illegal as involving trading with the enemy; but there was no suggestion that the High Court of Admiralty had not jurisdiction: *The Benjamin Franklin* (1806, 6 C. Rob. 350). In 1830, in *The Adah* (1830, 2 Hagg. Adm. 350), Sir Christopher Robinson heard a similar suit without objection. Dr. Lushington admitted similar claims in *The Dowthorpe* (1843, 2 Wm. Rob. 73), and *La Constancia* (1846, 4 N. of C. 512), and treated pilotage as on the same footing as wages, and in *La Constancia* as towage also, as giving maritime liens. He was wrong in thinking that towage carried a maritime lien: See *Westrup* v. *Great Yarmouth Steam Carrying Company* (6 Asp. Mar. Law Cas. 443; 61 L. T. Rep. 714; 43 Ch. Div. 241). He was right in thinking that there was a right *in rem* for towage whether there was or was not such a right before the Act of 1840, for towage is mentioned in that Act. Wages and pilotage were not mentioned in that Act, and Dr. Lushington was, therefore, exercising a jurisdiction which did not depend upon statute. Coming to more modern times, a suit for pilotage remuneration was heard without objection in *The Clan Grant* (6 Asp. Mar. Law Cas. 144; 57 L. T. Rep. 124; 12 Prob. Div. 139), and in a note on p. 201 of the third edition of Williams and Bruce's Admiralty Practice there is a reference to *The Limerick*, Nov. 23, 1875. These cases are subsequent to the Admiralty Court Act 1861, which, by sect. 10, provided that the High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board a ship, whether the same be under a special contract, &c. I incline to think that "seaman" and "wages" as used in that section, include pilot and a pilot's remuneration. The original jurisdiction was based on so treating a pilot and his remuneration. It is nothing to the point that the Merchant Shipping Act 1854 and its successors define "seaman" so as to exclude pilot. The question is in what sense was "seaman" used in the Admiralty Court Act 1861. The courts have treated it as used in the wide sense in which it was used in the eighteenth and nineteenth century, when dealing with the words "any claim for wages" in the County Courts Admiralty Jurisdiction Act 1868. In *Reg.* v. *Judge of City of London Court and Owners of the steamship Michigan* (63 L. T. Rep. 492; 25 Q. B. Div. 339), Wills, J., after consulting Butt, J., said: "The right to proceed *in rem* for services rendered on board a ship, apparently extends to every class of person who is connected with the ship, as a ship, as a sea-going instrument of navigation," and in *The Ruby* (*No.* 2) (9 Asp. Mar. Law Cas. 241; 78 L. T. Rep. 235; (1898) P. 59), Sir Francis Jeune, with reference to sect. 10 of the Act of 1861, said: "I agree that the word seaman may be extended to any person who is employed in the practical employment or management of a ship; but the gist of the matter is that the employment must be to do the work of the ship." But whether sect. 10 includes a pilot or not, the jurisdiction in respect of a pilot's claim was not questioned in *The Clan Grant* (*sup.*). That implies that if a pilot's claim was not within sect. 10, then it was within the original jurisdiction of the court. Further, in the third edition of Williams and Bruce, I find this at p. 201: "By the ancient practice of the Court of Admiralty, the privilege of suing in the court extended to every person other than the master employed on board a ship—to the mate, to a surgeon, to a pilot, unless the contract was made and the work done *infra corpus comitatus*, to a purser, to a ship's carpenter, to a boatswain, to a female acting as

cook and steward and to an apprentice. The word "seaman," when used in the Admiralty Court Act 1861, thus appears to include every person other than the master, who may have a claim for wages." And at p. 669 are given forms of writ and warrant of arrest in a pilotage action and a form of statement of claim taken from *The Clan Grant* (*sup.*), and there is a note, "Suits for pilotage are of rare occurrence" and a further note to the statement of claim: "This form was drawn whilst the Merchant Shipping Act 1854 was in force. It can easily be altered to suit a case under the Act of 1894."

But it is said that sect. 49 of the Pilotage Act 1913 gives the pilot his remedy and his only remedy. Let us examine the statutes. At the date of *The Bee* (*sup.*), the Pilotage Act in question was 52 Geo. 3, c. 39. By sects. 57 and 58, together with sects. 71 and 72, pilotage rates were made recoverable according to the amount involved either before Justices or before any of the Courts of Record at Westminster; sect. 73 provided that nothing in this Act should impair the jurisdiction of the High Court of Admiralty. At the date of *The Adah* (1830) (*sup.*), the Pilotage Act in question was 6 Geo. 4, c. 125. Sects. 44 and 45, together with sects. 76 and 77, gave remedies summary or otherwise according to the amounts involved, similar to 52 Geo. 3, c. 39. Sect. 87 provided that nothing in the Act should impair the jurisdiction of the High Court of Admiralty. It will be observed that both these statutes recognised that the High Court of Admiralty had a jurisdiction in matters of pilots. But the saving clauses leaves it open to contend that, without it, the remedies provided would have ousted the jurisdiction of the High Court of Admiralty. The Merchant Shipping Act of 1854, by sects. 363 and 364, gave a qualified pilot a summary remedy for pilotage dues. It was held that in *Morteo* v. *Julian* (41 L. T. Rep. 71; 4 C. P. Div. 216), that this did not extend to the allowances under sect. 357 of the Act of 1894, to a pilot taken out of his district. The Merchant Shipping Act 1894, by sect. 591, re-enacted sects. 363 and 364. The Pilotage Act, s. 49, re-enacts sect. 591, substituting "licensed pilot" for "qualified pilot," and by sect. 34 extends the summary remedy to allowances to a pilot taken out of his district. If sect. 49 of 1913 provides the only remedy then the corresponding sections of 1894 and 1854 provided the only remedy. *The Clan Grant* (*sup.*) and *The Limerick* (*sup.*) ought never to have been heard, and the passages cited from Williams and Bruce are wrong. I see no sufficient reason why they should be held to provide the only remedy. It is to be observed that the Acts of 1854 and 1894, which define a seaman so as to exclude pilot, and provide a summary remedy for seaman's wages, in terms provide that a proceeding for recovery of wages not exceeding 50*l.* shall not be instituted in any superior court of record nor in any court having Admiralty jurisdiction, except in certain cases. See sects. 188 and 189 of the Act of 1854, corresponding with sects. 164 and 165 of 1894. The same Acts give a summary remedy to a qualified pilot, but contain no section corresponding to sect. 189 of 1854, and sect. 165 of 1894, prohibiting proceedings in superior courts of record. Further, if sect. 49 of the Pilotage Act does provide the only remedy, it would produce anomalous results. It applies only to licensed pilots suing for pilotage dues (including allowances when taken out of the district). Pilotage in districts where no licence is necessary would still be within the jurisdiction of the court; claims for pilotage abroad or cases of pilotage to which no dues were applicable, would still remain within the jurisdiction, while the very men whom the statute sets out to protect would be left to their summary procedure. Moreover, while the Merchant Shipping Act would have permitted claims by seamen (exclusive of pilots) of small amount, to be brought in this court when the ship was under arrest, a pilot would have no such right. I hold that a pilot, claiming pilotage remuneration, has a right *in rem*, and can sue in this court. In general, he will be ill-advised to sue when he has a summary remedy, for he is not likely to be given costs if he neglects the cheaper, and pursues the more expensive, remedy. But in cases where the ship is already under arrest, and especially when the ship is foreign owned, it may be a proper thing to sue in this court. In the present case I hold that it was, and I give judgment for the plaintiff with costs. I am not deciding that there is a maritime lien for pilotage dues. It does not necessarily follow that because there was original jurisdiction in the High Court of Admiralty in respect of pilotage that there was a maritime lien for pilotage: (see the judgments of Lords Bramwell and Fitzgerald in *The Heinrich Bjorn* (6 Asp. Mar. Law Cas. 1; 55 L. T. Rep. 66; 11 App. Cas. 270). It is not proper that I should decide in favour of a maritime lien in the absence of the mortgagees. But the amounts are so small that probably the mortgagees and the owners will both recognise that the judgments ought to be satisfied out of the proceeds of the ships if they are realised.

Solicitors for the plaintiffs, *Richards* and *Butler*.

Solicitors for the defendants, *William A. Crump* and *Son*.

House of Lords.

Feb. 1, 2, *and March* 13, 1923.

(Before Lords CAVE, L.C., SHAW, SUMNER, BUCKMASTER, and CARSON).

MERSEY DOCKS AND HARBOUR BOARD *v.* PROCTER. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Negligence—Dock company—Stanchions with chains—Duty of company—Invitee—Fatal accident—Contributory negligence—Onus of proof—Duty of Court of Appeal in case tried without a jury.

A workman employed on board a ship lying in a dock belonging to the appellants left the ship at 4.50 *p.m. on the* 9th *Dec.* 1920 *for the purpose of going to the latrine. There was a dense fog during the whole of that day. The way from the ship to the latrine lay southward across a piece of ground separating the East and West Floats and over a bridge at the southern end, the latrine being on the other side of the bridge. This piece of ground measured about* 85 *yards from east to west and about* 50 *yards from north to south. It was traversed from north to south by two double lines of rails laid flush with the ground in granite setts, and leading to and over the bridge. The site of the railway was used as a public highway, and it was lighted by lamps, which were alight on the evening in question. Round three sides of this piece of ground and at a distance of about* 12*ft. from the dockside, there was a line of stanchions placed at intervals of about* 15*ft. from one another, and chains were provided to hook to these stanchions and hung between them. The chains were often taken down to afford access to the quay, but there was a standing instruction that the chains should always be replaced. The workman never returned. On the* 11*th Dec.* 1920 *his body was found in the West Float. The chain directly opposite the place where the body was found had been detached. The edge of the West Float was about* 45 *yards distant from the lines of rails.*

In an action brought by the widow against the appellants under the Fatal Accidents Act 1846, *claiming damages upon the ground that her husband's death had been caused by the appellants' negligence,*

Held (Lords Shaw and Buckmaster dissenting), that the respondent had failed to prove negligence on the part of the appellants which had caused the death. There had been no breach of duty on the part of the appellants, their duty being to use reasonable care for the workman's safety in those places to which he might reasonably be expected to go in the belief, reasonably entertained, that he was entitled or invited to do so.

Hardcastle *v.* South Yorkshire Railway Company (4 *H. & N.* 67) *and* Walker *v.* Midland Railway Company (55 *L. T. Rep.* 489) *applied.*

Per Lord Cave, L.C.—The procedure on an appeal from a judge sitting without a jury is not governed by the rules applicable to a motion for a new trial after a verdict of a jury. In such a case it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from, and giving special weight to that judgment in cases where the credibility of the witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted and to decide accordingly.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal reversing a decision of Branson, J. at the trial of the action. The appellants were the owners of the Birkenhead Docks, which included two large floating docks called the East and West Floats. On the 9th Dec. 1920 the respondent's husband, Albert Procter, who was a boiler-maker, was working on board a ship then lying in the East Float. There was a dense fog during the whole of that day. At about 4.50 p.m. Procter left the ship saying that he was going to the latrine, and it was understood that he would then return to his work. He was never again seen alive. On the following day his cap was found in the West Float between the bows of two ferry boats, which were moored near the north-east corner of that float, and next day his body was found at the same place. His watch had stopped at five minutes past five o'clock. The respondent brought the present action against the appellants under the Fatal Accidents Act 1846, claiming damages on the ground that her husband's death had been caused by the appellants' negligence. The negligence alleged was that the quay was not fenced or guarded.

The action was tried by Branson, J. without a jury, and after hearing the evidence for the plaintiff, he dismissed the action, stating that he was not satisfied that the omission to have the chain placed in position in the particular spot was negligence, and further, that he was not satisfied that, even if the chain had been there, the accident might not have happened. On appeal, the Court of Appeal (Bankes and Warrington, L.JJ., Atkin, J. dissenting) held that the plaintiff had proved negligence on the part of the defendants, which had caused the death. They, therefore, set aside the judgment of Branson, J. and ordered a new trial. The defendants appealed.

The facts, which are sufficiently summarised in the head-note, are fully set out in the judgment of the Lord Chancellor.

Greaves-Lord, K.C., *Singleton*, K.C., and *D. J. Milner Heling* for the appellants.

Merriman, K.C., *Madden*, K.C., and *J. W. Morris* for the respondent.

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

The following cases were cited :

Montgomery and Co. v. *Wallace-James*, 90 L. T. Rep. 1 ; (1904) A. C. 73 ;
Coghlan v. *Cumberland*, 78 L. T. Rep. 540 ; (1898) 1 Ch. 704 ;
Walker and others v. *Midland Railway Company*, 55 L. T. Rep. 489 ;
Indermaur v. *Dames*, 14 L. T. Rep. 484, L. Rep 1 C. P. 274 ; 16 L. T. Rep. 293 ; L. Rep. 2 C. P. 311 ;
Lendrum v. *Ayr Steam Shipping Company*, 111 L. T. Rep. 875 ; (1915) A. C. 217 ;
Norman v. *Great Western Railway Company*, 112 L. T. Rep. 266 ; (1915) 1 K. B. 584 ;
Thomas v. *Quartermaine*, 57 L. T. Rep. 537 ; 18 Q. B. Div. 685 ;
Wilkinson v. *Fairrie*, 1 H. & C. 633 ;
Latham v. *Richard Johnson and Nephew Limited*, 108 L. T. Rep. 4 ; (1913) 1 K. B. 398 ;
Bolch v. *Smith*, 6 L. T. Rep. 158 ; 7 H & N. 736 ;
Buicks v. *South Yorkshire Railway and River Dun Company*, 8 L. T. Rep. 350 ; 3 B. & S. 244 ;
Wakelin v. *London and South-Western Railway Company*, 55 L. T. Rep. 709 ; 12 App. Cas. 41 ;
Smith v. *The South-Eastern Railway Company*, 73 L. T. Rep. 614 ; (1896) 1 Q. B. Div. 178 ;
Corby v. *Hill*, 4 C. B. (N. S.) 556 ;
Dickson v. *Scott Limited*, 30 Times L. Rep. 256 ;
Carshalton Urban District Council v. *Burrage*, 104 L. T. Rep. 306 ; (1911) 2 Ch. 133 ;
Dominion Trust Company v. *New York Life Insurance Company*, 119 L. T. Rep. 748 ; (1919) A. C. 254 ;
Gantret v. *Egerton and others*, 16 L. T. Rep. 17 ; L. Rep. 2 C. P. 371 ;
Gallagher v. *Humphrey*, 6 L. T. Rep. 684 ;
Smith v. *The London and St. Katharine's Docks Company*, 18 L. T. Rep. 403 ; L. Rep. 3 C. P. 326 ;
Thatcher v. *Great Western Railway*, 10 Times L. Rep. 13 ;
Cooke v. *Midland and Great-Western Railway Company*, 100 L. T. Rep. 626 ; (1909) A. C. 229 ;
Holmes v. *The North-Eastern Railway Company*, 20 L. T. Rep. 616 ; L. Rep. 4 Ex. 254 ; 24 L. T. Rep. 69 ; L. Rep. 6 Ex. 123 ;
Hardcastle v. *South Yorkshire Railway and River Dun Company*, 4 H. & N. 67.

The House took time for consideration.

Lord Cave, L.C.—This is an appeal from an order of the Court of Appeal in England setting aside a judgment of Branson, J. and ordering a new trial.

The appellants are the owners of the Birkenhead Docks, which include two large floating docks called the East and West Floats. On the 9th Dec. 1920 the respondent's late husband Albert Procter, who was a boilermaker, was working for an engineering contractor on board the steamship *City of Genoa*, then lying in the East Float. There was a dense fog during the whole of that day. At about 4.50 p.m. on that day Procter left the *City of Genoa*, saying that he was going to the latrine, and it was understood that he would then return to his work. He was never again seen alive. On the following day his cap was found in the West Float between the bows of two ferry-boats which were moored near the north-east corner of that float, and on the next day his body was found at or about the same place. His watch had stopped at five minutes past five o'clock.

The following further facts should be stated : Procter's way from his ship to the latrine lay southward across a piece of ground separating the East and West Floats, and over a bridge at the southern end called "The Duke Street Bridge," the latrine being just on the other side of the bridge. This piece of ground measured about 85 yards from east to west, and about 50 yards from north to south. It was bounded on the east and west respectively by the two floats, and on the south by the waterway connecting them and the bridge over it. It was traversed from north to south, and slightly to the eastward of the centre of the ground, by two double lines of rails leading to and over the bridge, the rails being laid flush with the ground in granite setts, and the ground on each side of the setts being rough ground. It was said, and was not denied, that the site of the railway was used as a public highway from Seacombe to Birkenhead ; and it was lighted by lamps, which were alight on the evening in question. Round three sides of this piece of ground where it was bounded by the two floats and the waterway between them, and at a distance of about 12ft. from the dockside, there was a line of stanchions placed at intervals of about 15ft. from one another, and chains were provided to hook on to these stanchions and hang between them. Whether the chains were intended for the protection of pedestrians or only for the safety of wheeled traffic using the area of ground, is not stated ; but the latter appears the more probable reason. The chains were often taken down for the purpose of affording access to the quay ; but persons employed about the docks had instructions to see that the guard chains were in position and to replace any which happened to be out of position. The chain directly opposite to the place where Procter's body was found had been detached for some days, apparently for the convenience of some men who were at work on some alterations to the quay, and was curled round the stanchion. so that access to the dock from the area of land was uninterrupted at that point. Some heaps of gravel and other obstructions lay near to, but not directly in front of, the opening. The edge of the West Float was parallel to and about 45 yards distant from the paved way and lines of rails.

Upon the above facts the respondent, the widow of Albert Procter, brought an action against the appellants under the Fatal Accidents

Act 1846, claiming damages on the ground that her late husband's death had been caused by the appellants' negligence. The negligence alleged was that the quay was not fenced or guarded at the place where the deceased walked into the dock, and that no warning had been given to the deceased of the existence of this unfenced or unguarded part of the quay, and that this unfenced part of the quay was in its then condition in the nature of a trap, the existence of which was known to the defendants and their servants and unknown to the deceased. These allegations were traversed by the defendants, who also pleaded contributory negligence on the part of the deceased man.

The action was tried by Branson, J. without a jury; and after hearing the evidence for the plaintiff he dismissed the action, stating that he was not satisfied that the omission to have the chain placed in position in the particular spot was negligence, and further that he was not satisfied that even had the chain been there the accident might not have happened. On appeal, the Court of Appeal by a majority (Bankes and Warrington, L.JJ.; Atkin, L.J., dissenting) held that the plaintiff had proved negligence on the part of the defendants which had caused the death, and accordingly set aside the judgment of Branson, J. and ordered a new trial. Hence the present appeal.

It was contended on behalf of the appellants that the finding of Branson, J., being a finding of a trial judge on a question of fact, should not have been disturbed by the Court of Appeal. In my opinion there is no ground for such a contention. The duty of a court hearing an appeal from the decision of a judge without a jury was clearly defined by Lindley, M.R., in *Coghlan* v. *Cumberland* (*sup.*), and by Lord Halsbury in *Montgomery and Co.* v. *Wallace-James* (*sup.*) and is no longer in doubt. The procedure on an appeal from a judge sitting without a jury is not governed by the rules applicable to a motion for a new trial after a verdict of a jury. In such a case it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of the witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted and to decide accordingly. In the present case there is no question of the credibility of witnesses. The material facts, so far as they are known, are undisputed; and the Court of Appeal was at liberty and, indeed, was bound to draw its own inference from them.

The respondent's case is rested on the well-established principle that where a landowner invited or induces a person to go upon his land, not as a bare licensee but for some purpose in which both have an interest, he must make reasonable provision for that person's safety. This rule was clearly stated in the judgment of Willes, J. in *Indermaur* v. *Dames* (*sup.*) where that learned judge summed up the law as follows: "The class to which the customer belongs includes persons who go, not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied. And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact." In the present case it is not disputed that the deceased man came within the class described by Willes, J. He came upon the dock property and passed to and from the vessel where he was engaged upon the business which concerned both the dock company and himself; and he was entitled, subject to using reasonable care on his part, to expect that the dock company should use reasonable care to protect him from any unusual danger known to the company and not known to or reasonably to be expected by him. If so, the questions of fact which arise or may arise are three, namely: (1) Were the appellants guilty of negligence or want of reasonable care for the safety of the deceased? (2) If so, was their negligence or want of care the cause of his death? and (3) Was there any contributory negligence or want of reasonable care on his part for his own safety?

In dealing with the first question it is important to bear in mind the exact nature of the appellants' duty to the deceased. It was not to give him absolute protection in whatever part of the appellants' premises he might be found, but only to use reasonable care for his safety while he was upon their land and acting in compliance with their invitation; and this duty must be limited, as Lord Selborne pointed out in *Walker and others* v. *Midland Railway Company* (*sup.*) at p. 490), to those places to which he might reasonably be expected to go in the belief, reasonably entertained, that he was entitled or invited to do so. If this test is applied, it appears to me that there was no breach of duty on the part of the appellants. The deceased was not invited or entitled to go to the quayside of the West Float; he had no business there, and it was nearly fifty yards away from his proper route to and from his ship. Nor could the dock company be expected to foresee that he would wander so far from his way, even in a fog, and to provide for his safety in so doing. If it be the fact that he lost all sense of direction in the fog and, missing the rails and lamps which would have guided him to the bridge, and not seeing any of the obstacles lying about the area of ground or even the stanchions on each side of the space from which the chain had been removed, walked straight through

this narrow opening into the dock, this was an extraordinary mischance which no one could be expected to foretell or provide for; and I do not think that the failure of the company to do so argues any want of reasonable care on their part.

It is said that whatever may be the case in other dockyards, where the docks are generally left unfenced, the fact that in this case the area over which the deceased had to pass was in fact protected by chains, makes a difference, and accordingly that he was entitled to expect that the chains would remain up; and the "trap" cases are referred to. In my opinion, the principle of those decisions has no application to this case. When a person is invited or licensed to pass by a particular way, and the landowner without warning to him does something which makes it dangerous for him to use that way, liability may no doubt be incurred. But this is because the use of the permitted way itself is subjected to an unknown and unexpected danger; and where, as here, the danger zone is far removed from the permitted way, the same considerations do not apply. To say that a landowner who permits an element of danger to exist in a place to which he neither invites nor expects a person to go thereby sets a trap for that person, would appear to me to be a strange use of language. In *Hardcastle* v. *South Yorkshire Railway and River Dun Company* (*sup.*), where a man had wandered from a highway and had fallen into a reservoir on the same land, the court held the owner of the land not liable; and Pollock, C.B. made the following observations, at p. 74: "When an excavation is made adjoining to a public way, so that a person walking upon it might, by making a false step, or being affected with sudden giddiness, or, in the case of a horse or carriage way, might, by the sudden starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences; but when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different. We do not see where the liability is to stop. A man getting off a road on a dark night and losing his way may wander to any extent, and if the question be for the jury no one would tell whether he was liable for the consequences of his act upon his own land or not." It is true that these observations had reference to a public way, but the reasoning appears to me to apply equally to a way which a person is invited or permitted to use.

The result is that, in my opinion, no negligence on the part of the company was proved; and if so, the other questions do not arise. But I think it right to add that, even if negligence by the company be assumed, I do not consider it proved that their negligence was the cause of the accident. No doubt it is a probable surmise that the deceased man lost his way in the fog, and unhappily missing all the signs which would have shown him his mistake, and either not knowing of or not remembering the gap in the chains, walked straight through it into the dock. But the court does not deal with surmises but with proofs; and the known facts are equally consistent with the view that, knowing that he had left the line of rails and lamps and had got on to soft ground, he failed to take reasonable pains to regain a place of safety and so lost his life by his own imprudence, or with the view that knowing of the gap in the chains (which he must have seen twice a day at least for several days before the accident), he purposely passed through it intending to speak to someone on the ferry boats and stumbled into the dock. Of course neither of these hypotheses is proved, but neither is excluded by the evidence; and it is for the plaintiff, who alleges that loss has been caused by the defendant's fault, to establish that case beyond reasonable doubt. Upon this point *Wakelin* v. *London and South Western Railway Company* (*sup.*) is directly in point. In that case a widow sued a railway company under the Fatal Accidents Act for damages for negligence causing her husband's death; and it was proved that the dead body of the man was found on the railway line near a level crossing not guarded by a watchman, and that the man had been killed at night by a train which carried the usual head lights, but did not whistle or otherwise give warning of its approach. On these facts this House, affirming the Court of Appeal, held that, assuming (but without deciding) that there was negligence on the part of the company, there was no evidence to connect the negligence with the accident, and accordingly that there was no evidence to go to the jury. Lord Halsbury, L.C. stated the principle as follows: "It is incumbent upon the plaintiff in this case to establish by proof that her husband's death has been caused by some negligence of the defendants, some negligent act, or some negligent omission, to which the injury complained of in this case, the death of the husband, is attributable. That is the fact to be proved. If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition: *Ei qui affirmat non ei qui negat incumbit probatio*." Similar expressions are to be found in the judgments of the Court of Appeal in *Norman* v. *Great Western Railway Company* (*sup.*), and I think that they apply with great force to the present case.

It is impossible not to feel compassion for the respondent in her loss; but she has undertaken to prove that the appellants are responsible for it, and in my opinion she has failed to do so. This being so, I am compelled to hold that this appeal should succeed, and I move your Lordships that the order of the Court of Appeal be set aside and the order of Branson, J. restored; but as the respondent has been a great sufferer, and in view of the differences of opinion in the

Court of Appeal and (as I understand) in this House, I would propose to your Lordships that there should be no costs of the proceedings in the Court of Appeal or in this House.

Lord Shaw.—I am so entirely satisfied with the judgments pronounced in this case by Bankes and Warrington, L.JJ. that I could be well content to adopt these opinions without presuming to add anything thereto. In view, however, of the difference of view in your Lordships' House, I may be permitted as briefly as possible to put the case in my own way.

The action is founded upon negligence, and negligence must be proved. It is raised by the widow of a boiler-maker, who met his death in the circumstances described, and whose position on the dock-side was that of an invitee. He was in the service of engineering contractors on board the Steamship *City of Genoa*, then lying in the East Float of Birkenhead, one of the appellants' docks. He had been for some weeks engaged on that job, and he had the right, of course, to reach it from Birkenhead, proceeding over a promontory in the form of a parallelogram which was surrounded on three sides by water.

The accident occurred during his working hours, which lasted till 7.30 in the evening. He left the ship to proceed to a latrine, the workmen not being permitted to use the latrine accommodation on board. While so proceeding, he went over the dock-side and was drowned. He entered the shed and made his exit from the door of that for five or six yards by the aid of lamp-light. His correct course was to have sheered to the left at an angle of about seventy-five degrees. The night, however, was very dark and there was a fog so thick as to prevent one even seeing one's own hand. Such lamps as there were shed only light to a distance of five or six yards ; the rest of the parrallelogram was shrouded in fog.

To approach the question of negligence it is necessary to consider what was the duty of the defendants, the dock board, with regard to that piece of ground. That they had a duty, and were properly conscious of that, is, I think, beyond question. The three sides, in so far as these abutted on the water, were protected by posts with chains slung between them. As the square was used in part as a thoroughfare both for pedestrian and vehicular traffic, this precaution taken by the board is not to be wondered at. I should not be prepared, however, without further argument to affirm that the board were bound to fence that square. The open face of docks in such neighbourhoods is familiar to all inhabitants. It may, of course, be, that a square of this description, having to be crossed and recrossed by men working on ships under repair in all weathers and by day and night, involved as a necessity that precaution which the board properly took. But, as I say, it is not necessary to pronounce in this case upon that in the abstract.

The case, however, that comes before the House is a different and very distinct case, namely, that of a square open on three sides to a water danger and fenced therefrom as a matter of general precaution, but negligently left unfenced in circumstances of extreme and exceptional peril. In my opinion, the leaving of a part of the fencing open was in itself the creation of a danger of a very serious kind. In a dark and foggy night a passenger across the square reaching the chain is by that guided to the point of safety when he can cross the bridge. To remove the guidance and to leave a gap through which the passenger may step on to and over the dock-side into deep water and be drowned is a negligent omission for which the dock board is responsible.

A satisfactory feature of this case is that the appellants seem thoroughly to have realised that fact themselves. Their prescriptions by regulation appear in these proceedings. On the subject of keeping the guard chains in order interrogatories addressed to the dock board are produced in answer to questions as to what precautions are taken. The answer is as follows, viz. : " There are no special precautions taken by the board's officials in foggy weather beyond seeing, as far as is reasonably possible, that the guard chains are all in position."

In response to a question as to whether there are any regulations or instructions issued by the appellants in reference to the protection of the quay in foggy weather. The answer is : " The guard chains and stanchions at the North East corner of the West Float on the 9th Dec. last were under the control of the pier master in charge. There are no written regulations defining whose duty it is to remove and replace guard chains. If the chains are removed by anyone it is his duty to replace them, or to see that they are replaced. Further, the officials of the Harbour Master's Department and the police have instructions to see, as far as practicable, that the guard chains are in position and to replace any which happen to be out of position."

Then there come certain entries which come near to the circumstances of the present case. A circular from the Harbour Master, dated the 26th Jan. 1912 is printed. It is as follows : " Guard chains.—The board having recently settled a claim for personal injuries, etc., caused through the breaking of a guard chain upon which a man was sitting and which had been tied up temporarily with a piece of cord, I have to direct that strict attention be given to the following instructions on the subject of guard chains generally : (1) The working-dockman must examine daily all guard chains and afterwards record in the shed book particulars of any guard chains broken or otherwise out of order. (2) In the event of guard chains or hooks being found broken, immediately send word to the foreman scuttler, who will have repairs effected without delay, and report the matter to me in due course."

Still further, and almost directly bearing upon the issue of the present appeal, there is a copy of the head constable's order : " It seems that there is some misunderstanding about the duty of the police in the matter of the guard chains

at the docks. Although it is not their duty to go round their beats for the purpose of putting them up, it certainly is their duty to put up any chain which they may find down without necessity when there is the least chance that its being left down is a source of danger."

It appears to me to be demonstrated by these citations that the appellants having placed chains in position, were alive to the peril of not keeping them in position, and were anxious to recognise as a matter of duty the replacement of the chains whenever a particular purpose of removal was ended, and to a report of accurate replacement being made and of all being in order. I do not, accordingly, have any difficulty in finding that a violation of these orders involves negligence, nor is there any doubt in the present case as to such a violation having occurred. One of the chains was removed, it was wrapped round the adjoining post, and knotted; the gap thus left was left for days, the knotted chain beginning to rust. All that is clearly proved; the orders and precautions on the regulations and orders had been violated. I think this clearly points to negligence. I think that Atkin, L.J., who dissented, was right when he said: "Whether or no it is their duty to have some means of protection, I think that their legal duty is altered when once they do take upon themselves the position of protecting the approach to the water, because under those circumstances they do allow a person who knows the position to rely upon that protection being there in the circumstances in which it ought usually to be there." In my opinion these propositions are sound in law. This induces me to refer at this stage to a notable circumstance in connection with the judgments of the court below. Branson, J., and, I also gather, Atkin, L.J., are not satisfied that Procter walked through the gap referred to and so met his death. I do not gather that there is any difference of opinion among your Lordships on this point. His cap, and afterwards his body, were found in the water immediately opposite the gap. There is no suggestion that he got to the dock-side by any other access or that there was any current in the water which would have made his body drift to the point where it was found. Of course, it follows, however, that if a judge holds it not to be sufficiently proved that the deceased went through the gap, the rest of the case suggesting negligence is mere surplusage. I incline to the opinion that if the learned judges, to whom I have referred, had been satisfied, as your Lordships are, they might not have come to the opinion which they reached, and in any event it is pretty clear that Branson, J. would not, as he did, have stopped the case at the end of the plaintiff's evidence. An outstanding feature of the case is the precautions demanded even under the rules of the dock for seeing that the chains were up, but if the learned judge was not satisfied that the deceased passed where a chain was down, then from that point of view he need have gone no further. The whole of this case, unfortunately, is thus subject to that judicial mischance. Had the case proceeded to its natural termination and the dock authorities had been asked to explain the rule, the necessity for it, the history of the absence of chains when they should have been there and so on, no doubt the position of this gap which turned it into a trap might have been most completely verified. All that we have is that the dock board was scrupulous as to having the chains always up because of one previous accident which is put on record. How many more accidents there were caused by the condition of the chains, we do not know, or whether there were any. But the whole of that enquiry has been excluded mainly, though not entirely, because the judge who tried the case saw no necessary connection between the gap and the death. In these circumstances I incline to the opinion that it would be a complete failure of the law to reach a remedy for a wrong or to ascertain whether a wrong was committed to keep back the case from full investigation. A legal problem of complexity, however, remains, namely, that assuming that Procter, the deceased man, was an invitee, did the duty of the board extend to that particular man. But although keeping on to the square he had proceeded in the fog and darkness off his route. When he did so, it is urged, he lost the status of a person to whom the dock board owed a duty and his rights were not those of an invitee, but at the most that of a bare licensee, if so much.

The refinements of distinctions between these categories are notorious and one general rule as laid down by Esher, M.R., may be said to apply to both. In *Thatcher* v. *Great Western Railway* (*sup.*), Lord Esher puts it thus: "If a person was on the premises of another with that other's consent, the latter had a duty to take reasonable care not to act in such a way as to cause personal injury to the former." That would apply to both categories. In *Holmes* v. *The North-Eastern Railway Company* (*sup.*), the discrimination between the position of a licensee from a person present on certain premises to whom the occupant has a duty to take care, is thus expressed by Cleasby, B.: "as soon as you introduce the element of business, which has its exigencies and its necessities, all idea of mere voluntariness vanishes." And so in *Smith* v. *The London and St. Katharine Docks Company* (*sup.*), the company was held liable, they being the owners of the docks, who provided access to vessels by means of gangways over. To quote Bovill, C.J.: "The gangway being placed there as the means of access to all persons having business on board the ship, it amounts to an invitation to persons having business on board the ship to go upon it."

In my opinion (1) the appellants were bound to provide a reasonably safe access and exit across the square of land in question for workmen employed at the docks. (2) The workmen so employed were entitled to consider the square fenced by posts and swing chains and may be taken to have known or properly assumed that this was so; and (3) The removal of the chains

constituted a trap into which, unfortunately, the deceased was led and so met his death.

It is now necessary to see exactly what the deceased did. Having emerged from the shed adjoining the ship where he was working, he advanced a few paces by the light of a lamp and then sheered to the left. All this was right, but instead of sheering at an angle of 75 degrees and walking on admitting no impediment and being safe, he sheered only at an angle of 45 degrees and walked on and met no impediment and was drowned. Branson, J. thinks that: "Now that shows that all the surroundings and the approaches to this place where the chain was down were, one might say, almost completely guarded by the obstructions which were put there. The opening which was left was a small one, and, so far as the evidence goes, there is no evidence to show that those persons who had the authority of the board on the spot had any reason to expect that anybody would come along blundering in among those dumps of material in such a way as to cause the chains being down to constitute any risk that anybody would come to mischief."

This in no way represents the true state of matters with regard to the unchained gap. It appears clearly from the evidence, to use the language employed by the witness Forsyth: "You could walk straight from Hall Shed to where the body was found without meeting any incumbrance whatever." Had the chain been on he would not have been drowned; he would have been guided to safety. He was not guilty of contributory negligence; that is not suggested. The ambit, accordingly, in my opinion, of the responsibility in such cases extends on the part of the dock commission to all invitees legitimately on the ground: "as soon as you introduce the element of business which has all its exigencies and necessities." The route from the ship, all on dock ground, in this case seems to be entirely the opposite of that put by Bowen, L.J. in *Thomas* v. *Quartermaine* (*sup.*), at p. 697: "where the danger is one incident to a perfectly lawful use of his own premises, neither contrary to statute nor common law, where the danger is visible and the risk appreciated, and where the injured person, knowing and appreciating both risk and danger, voluntarily encounters them, there is, in the absence of further acts of omission or commission, no evidence of negligence on the part of the occupier at all." The circumstances of the present case are that the danger was not visible; that the risk was not appreciated; that the injured person did not know or appreciate either and did not voluntarily encounter either; that there was no absence of act of omission, but that on the contrary it was a further act of omission, the permitting the chain to remain removed, that constituted the negligence and caused the death.

I cannot refrain, in connection with the general doctrine of liability involved in such a case as the present, from showing how far the law has gone, even in regard to bare licensees. In *Gallagher* v. *Humphrey* (*sup.*), Cockburn, C.J., says: "A person who merely gives permission to pass and repass along his close is not bound to do more than allow the enjoyment of such permissive right under the circumstances in which the way exists; that he is not bound, for instance, if the way passes along the side of a dangerous ditch or along the edge of a precipice, to fence off the ditch or precipice. The grantee must use the permission as the thing exists. It is a different question, however, where negligence on the part of the person granting the permission is superadded. It cannot be that, having granted permission to use a way subject to existing dangers, he is to be allowed to do any further act to endanger the safety of the person using the way. The plaintiff took the permission to use the way subject to a certain amount of risk and danger; but the case assumes a different aspect when the negligence of the defendant—for the negligence of his servants is his—is added to that risk and danger." The latter portion of this passage, which may be held as applying not only to invitees but even to licensees, seems clearly to point to liability in such a case as the present.

This authority, coupled with *Indermaur* v. *Dames* (*sup.*), and numerous other authorities (their number in this branch of the law is legion) appear to me amply to confirm the judgment of the majority learned judges of the Court of Appeal. I cannot doubt that any other decision will be accompanied with practical danger in results, and I highly deprecate what, in my humble opinion, would be the mischance to which I have referred, in which the learned judge, having stopped the case and given a decision, had in an important element in deciding on such a course, taken a mistaken view of one of the fundamental facts of the case. In my view that mischance should be rectified, and the case should be fully tried.

Lord Sumner.—It is common ground that the deceased, while at work on the *City of Genoa*, was an "invitee" of the dock board, for, as undertakers, the board desires and is bound to admit ships to the docks, and that involves the admission also of persons, whom the shipowners or their contractors engage to work upon the ships. It is also common ground that the expression "while at work" involves a certain margin and includes going to and coming from the ship for the purposes of the employment, and also going to and coming from the latrines, provided by the board for such persons. This is common sense and, not having been in dispute, calls for no further comment. It may be, however, that the use of the public highway, which crosses the dock property, is no part of this invitation, but that the workman, even when using it for the purposes above mentioned does so merely as one of the public. The point need not be decided.

I think the very idea of an invitation to come upon the board's premises, considering their character and extent, connotes some local limit within them. A free range over the whole

estate is not given to every invited workman. The respondent, recognising this, suggested two forms of limitation—the first, that the line of the stanchions and chains formed that limit; the second, that the limit varied according as the day was clear or foggy. As to the first, there is no evidence that the stanchions and chains were put up with any such purpose and, as a fact, I am sure they were not. As to the second, it amounts to this, that a man, who can see where he is going, enjoys the rights of an invitee within modest boundaries; but a man, who cannot, carries them with him as far as the limits of his actual error. Both suggestions are ingenious, but they are suggestions *ad hoc.* There is no decision to support them. The observations of Neville, J. in *The Carshalton Urban District Council* v. *Burrage* (*sup.*), are the nearest that I can find, but they are directed to sect. 30 of the Public Health Acts Amendment Act 1907, while, in general, what is said in the *Hardcastle* case (4 H. & N., at p. 74) is much to the contrary.

The leading distinction between an invitee and a licensee is that, in the case of the former, invitor and invitee have a common interest, while, in the latter, licensor and licensee have none. The common interest here is that ships in the docks should, when necessary, be able to employ boilermakers on board of them. In the other case, the licensee has an individual interest in being allowed to pass, while the licensor, the leave being gratuitous, has no interest in the matter at all, so long as the licensee does not get into trouble or into mischief. I cannot see what common interest between the board and the deceased is involved in his expatiating at will over the open ground between the East and West Floats. He was indeed at liberty to cross it to Gee's Dining Room, but we know that he was not going there and never did go there. The common interest involved in his being able to do his work in comfort extended to his visiting the latrine, but he was not visiting the latrine on this occasion, though he was probably trying to do so. He was actually going where he had no business to go at the time of the accident, though his mistake was alike innocent and accidental. How can a workman extend the board's liabilities, indicated by this term "invitation," by making a mistake of his own and getting lost in a fog? What legal reason can there be for the board's inviting him to go somewhere in a fog where he does not want to go at all, and would certainly not be invited to go in clear weather, and where, moreover, the board has no interest or desire to invite him at any time? There is none: the suggestion is a mere impulse of compassion.

There is no question here of nuisance to a highway or of a specific obligation, general or particular, to erect and maintain fences. The place, where the deceased's body was found, was in no sense adjoining the highway. No statutory obligation to erect or maintain the stanchions and chains was referred to, and they may have been erected for many other purposes than that of preventing people from falling into the water in the dark: (see the elaborate survey of the cases by Farwell, L.J., in *Latham* v. *Richard Johnson and Nephew Limited* (*sup.*).

If then, the deceased's position was at best that of a licensee, what duty did the board owe to him? What is charged against the board is a pure act of omission, namely, an omission to put up the chain. What the plaintiff must show is a duty towards her late husband to put it up or keep it up and an injury to him caused by the omission. To say that the board provided chains and made regulations, under which this chain ought to have been put up, and omitted to have it replaced, in circumstances involving danger to the deceased, constitutes no cause of action by English law, unless a duty to the deceased can be made out upon grounds of law, and not a mere failure to do what would have made things safer if done.

A licensee takes premises, which he is merely permitted to enter, just as he finds them. The one exception to this is that, as it is put shortly, the occupier must not lay a trap for him or expose him to danger not obvious not to be expected there under the circumstances. If the danger is obvious, the licensee must look out for himself: if it is one to be expected, he must expect it and take his own precautions; if he will walk blindfold, he walks at his peril, even though he is blindfolded by the action of the elements. As usual in cases of duties of care, the reasonable man is the standard on both sides. The licensor must act with reasonable diligence to prevent his premises from misleading or entrapping a licensee, who on his side uses reasonable judgment and conduct under circumstances that can be reasonably foreseen. The licensee is to take reasonable care of himself and cannot call a thing a trap, the existence of which a reasonable man would have expected or suspected, so as to guard himself from falling into it.

What were the facts? The deceased was a sober, experienced workman in the prime of life, not shown to have been unobservant or lacking in self-possession. He was an inhabitant of Birkenhead constantly employed within the area of the docks, and he had actually been in regular employment on the *City of Genoa* for the previous fortnight. On leaving the shed to go, as he said, to the latrine, he found himself in a dense fog after dark. A fog I take to be the typical case of a fortuitous but expected hazard, in which everyone must, and knows that he must, walk warily.

Especially is this so when, as the man knew, the water of the dock lay within from 100ft. to 300ft. on three sides of him. As his fellow-workmen say, you must then be very careful; as they say also, the way to the bridge, for which he had to make, could be found by noting the run of the railway lines underfoot, the character of the paving and the sound made by footsteps upon it. Within 30ft. or 40ft. of the shed door the deceased must have

crossed eight, if not twelve rails, but, instead of following the line of them, he crossed the special paving of the railroad tracks and the marginal paving beyond and got on to rough macadamised ground. He must also have got away from the lamps, which, if he had followed the rails, would at short intervals have become visible. It seems to me that a reasonable man, so circumstanced, could not have failed to know, before he had got halfway to the West Float, that he was lost in the near neighbourhood of deep water.

In these circumstances what did it behove him to do as a reasonable man, and by what reasonable course on his part is the board entitled to have the measure of its duty fixed? This is not a question of charging the deceased personally with contributory negligence. The question is, What was to be expected in such circumstances by the deceased on the one hand and by the Dock Board on the other?

It behoved the deceased at once to take stock of his position. I say nothing of the possibility of calling out to find out the direction of persons on the roadway or of trying back to strike the rails, which he had so recently left. I think that he should have said to himself that the quays, which were steep-to and had deep water against them, were a pressing danger to a man who could not see where they were. True there were the posts and chains, but he must have known, as his mates knew, that they were often let down, and indeed are made detachable for that very purpose, and that, having been let down by stevedores and others not in the board's employment, as well as, though less frequently, by the board's own servants, it is in the ordinary course of human nature that they should often be left as they lie and not be replaced, until one of the board's servants finds time to put them up again. As Willes, J. observes, a trap means something like a fraud. Now, though the board may have represented that when the chains were taken down they would be replaced as soon as possible, it never represented by word or deed that the chains would not be down at any time or at all, or that they actually were in position at the time in question. It is not to the point to say that the deceased had a right under the regulations (if indeed he knew anything about them) to contend that the chains ought to be replaced at once, for a licensee cannot be heard to say that an actual danger, of which he knows, is a danger that is concealed from him because it arises from somebody's neglect of his duty. *Omnia præsumuntur rite esse acta* has no application here. Neither is this a case of a person who has an absolute right of user seeking his remedy for the infringement of it by another who has neglected to observe his duty not to infringe. If the gap may probably be there and the wanderer knows it, the knowledge is none the less knowledge, because there ought not to be any gap at all. On the other hand the possibility that a man could fortuitously make his way through such an entanglement of obstructions without being brought up by the fullest warning, seems to me so remote a contingency that I much doubt if any practical man of whatever class would have expected the board's servants to be on their guard against it if the accident which resulted in this case had not been a fatal one.

Concealed dangers, as the term shows, are relative to the knowledge and the capacity of the person who suffers by them, and in this matter he must use his knowledge and his good sense reasonably and must act accordingly (see per Lord Atkinson in *Cooke* v. *Midland and Great Western Railway Company* (*sup.*); (1909) A. C., at p. 238). What must the deceased be taken to have known? He was no child. He knew that the fog prevented him from using the sense of sight for his protection. From his senses of feeling and of hearing he had the means of knowing that he had got beyond the road to the bridge. He knew that the chains were his only protection from the water, towards which he might quite probably be going, and he knew that they were sometimes properly put down and sometimes were left down, though improperly. If he did not know what work was going on at the quay and the West Float, he knew that chains might be down in connection with any ships that might be lying there: if he did, he knew that they might be down in connection with the construction work that was actually going on, as indeed proved to be the case. If, knowing the risk, he elected to go on and chance it, *volenti non fit injuria.* He might have elected to try back. It is said that the effect of fog is so bewildering that one loses all sense of direction. I rather think that varies a good deal with the man, the fog, and the nature of the ground, but let it be so; he might still have advanced step by step, feeling the ground before him with his foot before committing himself beyond the power of recall. The ground near the line of chains was littered with materials of various kinds, and, if we are to infer what is probable from evidence of what is certain, we ought to infer that the deceased more probably struck upon some of these obstructions than that he somehow cleared them all, and, if he did so, he ought reasonably to have inferred either that he was getting near the line of chains, supposing that he knew what work was going on, or, supposing that he did not, then that he had got on to ground in a condition wholly unusual and strange, and had better sit down and wait or shout for direction than go striding on, confident that, wherever he was and wherever he went, there would be a chain in position to keep him safe.

Evidence was given to show that this chain had been down for some days. This rather goes to increase the probability that a prudent workman would not rely on a chain always remaining in position or always being promptly replaced, but, for the rest, I think it is irrelevant under the circumstances of this case. If the board is liable, it is liable because the chain

was not up at the time when the deceased approached the edge of the quay. The board is none the more liable to his widow because the chain was not up when he was not there, and none the more, whether the omission to put it up was long or short.

My conclusion is that there was no trap, because in the deceased's place a reasonable man would have known that, such as it was, the danger was one to be reckoned with. That the odds were against the deceased's hitting off the precise gap in the line of chains no more helps the respondent than it does the appellants. The danger was one of which a reasonable man had expectation or notice sufficient to have enabled him to avoid any evil consequences arising from it. I do not think it necessary to go through the cases, for the principle involved is familiar and only the application is contentious, but I think Lord Selborne's reasoning in *Walker's* case (*sup.*) strongly supports the above conclusions. I would like to add that, if I have not dwelt on the melancholy circumstances of this accident, it is not that I am not sincerely sorry for the widow or that I mean in any way to blame the deceased, but merely that, in a question of law, which is not without its difficulties, I only find myself embarrassed by considerations distressing in themselves, which every lawyer knows to be logically irrelevant.

Branson, J. was not satisfied that the deceased met his death because the chain was down. We need not consider whether this conclusion should be left undisturbed. I agree that the question is open to review, nor should I go further than to say that, if the learned trial judge declared that the plaintiff's evidence did not satisfy him of a conclusion essential to be proved by the plaintiff, I should give earnest consideration to his doubt before adopting an opposite conclusion. I think, however, that in justice to him it is worth while to recall how little we actually know in this case, as distinguished from what we may conjecture. The deceased told two men that he was going to the latrine; why he did so I cannot imagine, since it was none of their business. He was lost in the fog, and was not seen alive again. Whether he had any further purpose; whether he relieved himself in the darkness on finding that he had missed his way, and then went on for some unknown, though not impossible, reason of his own; whether he passed through the gap unconscious of being in the line of the chains at all, or was near enough to either stanchion to know where he had got to, but proceeded, thinking that he had now got his bearings again; whether he fell into the water in trying to follow the line of stone-paving along the quay edge, or because he had no idea how near the water was; whether he ever caught sight of either of the lamps, which would lie near his route, if he went straight from the shed door to the quay—these and many other such things are beyond our knowledge. I doubt if one view of any one of them is really more probable than another. It is not a case of the accident speaking for itself. The chains are about 12ft. from the water's edge. The gap in the chains and fall into the water, at least 12ft.—four or five strides—beyond it, have to be casually connected by just inference from the plaintiff's evidence, and, for my part, I am not surprised that the learned judge was not satisfied that this connection was made out.

I should allow the appeal.

Lord Buckmaster.—I am unable to agree with the view expressed by Branson, J. and by Atkin, L.J. that it is a pure conjecture as to the way in which Albert Procter met his death on the 9th Dec. 1920. I think the circumstances established by the evidence are sufficient to warrant the reasonable inference that the disaster arose by his walking across the quay for a perfectly legitimate purpose, missing his way in the fog, and passing through the gap where the chains were down that fenced the quay from the water. Upon this view the Court of Appeal are unanimous that liability would be established, and the question is whether the appellant has succeeded in showing that they were wrong. I do not think he has.

I refer, for the purpose of this opinion, to the statement made by Lord Selborne in the case of *Walker and others* v. *Midland Railway Company* (*sup.*). It is the nearest case in point, and the guiding principle laid down must be accepted. In that case, as in this, the accident occurred to a man lawfully upon the premises by invitation.

In that case, a guest at an hotel in search of a lavatory at night entered a room and fell down the well of a service lift. Lord Selborne stated the duty of the hotel proprietors in these words: "The duty must, I think, be limited to those places in to which guests may reasonably be supposed to be likely to go, in the belief, reasonably entertained, that they are entitled or invited to do so."

In the present instance there was a dense fog. The distance from the shed to the place where Procter fell into the water is in a straight line about 85 yards, and away from the place to which he was going. The difficulty that this case presents is in determining what are the limits of the area where a man might reasonably be expected to be in such a spot as this quay during a dense fog. It is impossible to reconstruct in the light all that may happen in the darkness. I recognise that Procter must have crossed the rails and that if these were once crossed on the western side he was off his track, but in the fog every sense is obscured, and I find it difficult to believe that a man must necessarily have known that he crossed the rails at the point opposite the shed, or, even if he did, that it was easy for him to get back, or that it was unreasonable to expect, in the circumstances, that he might wander where he did.

In these cases it must always be a matter of degree. Had the quay been narrower so that the water was nearer to the railway, there would, I apprehend, be little doubt of the liability of the defendants. The actual distance does not seem to me so great as to affect their liability. The matter is one of considerable

difficulty, but I should have answered the question put by Lord Selborne in favour of the respondent, and I am fortified in this opinion by the knowledge that that also is the view of the members of the Court of Appeal.

Lord CARSON.—I am of opinion that this appeal should be allowed.

The principle of law applicable is clearly laid down by Lord Selborne in the case of *Walker and others* v. *Midland Railway Company* (*sup.*) already referred to. "This is not a question of any act done by the respondents—it is one of alleged neglect or default—wrongful neglect or default there could not be unless a duty which was not performed was previously owing by the respondents towards the plaintiff's husband or towards persons in the same situation in respect of the place when the accident happened." In the present case I can find no such duty. It was not contended that the defendants were under any obligation to erect or maintain fences round the dock, but it is argued that having erected the stanchions and the chains the absence of the chain in this particular place constituted an unusual danger and was *quoad* the deceased something in the nature of a trap. In other words, as I understand the argument, it amounts to this, that the deceased, being employed on a ship lying in the East Float at Birkenhead, finding himself involved in a fog and losing his way, was reasonably entitled to assume, and did assume, that the chains everywhere attached to the stanchions would be in their proper places, and that he could therefore proceed to wander over the *locus in quo* with the expectation of finding such chains as a protection from falling into the water. As regards the appellants, on the other hand, the question I think is, ought they reasonably to have anticipated that a man or men working in the East Dock, as the deceased was, might, if a fog arose, take the risk of wandering over the promontory under a reasonable belief that he or they could rely upon the chains affording him or them protection? I so entirely agree with Lord Sumner in his analysis of the facts so far as we know them, and of the tests to be applied in forming a judgment on the question of reasonableness, that I think it is unnecessary for me to attempt to recapitulate them. In the words of the noble Lord, "My conclusion is that there was no trap because in the deceased's place a reasonable man would have known that such as it was the danger was one to be reckoned with."

I should like also to express my concurrence with the views expressed by Atkin, L.J. on the finding of Branson, J. that he was not satisfied that the deceased met his death because the chain was down.

I do not doubt that this House has the right to find the fact proved which the learned judge thought was not proved, but in a case such as this, where so little is proved and so much is left to conjecture, I cannot but think that the conclusion of the judge was justified and reasonable, and I should certainly be very slow to reverse it unless I had a very clear conviction in my own mind, which I have not, that the fact was satisfactorily proved.

Appeal allowed.

Solicitors for the appellants, *Rawle, Johnstone, and Co.*, agents for *W. C. Thorne*, Liverpool.

Solicitors for the respondent, *Helder, Roberts, Giles, and Co.*, agents for *John A. Behn*, Liverpool.

Dec. 4 *and* 5, 1922; *and March* 16, 1923.

(Before Lords FINLAY, ATKINSON, SUMNER, WRENBURY, and CARSON.)

LARRINAGA AND CO. LIMITED v. SOCEITE FRANCO AMERICAINE DES PHOSPHATES DE MEDULLA, PARIS. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party—Severability of contracts—Frustration.

By a charter-party dated the 25th *April* 1913 *made between the appellants as owners and the respondents as charterers, it was provided that the owners should provide six steamships to carry parcels of phosphates from T. to D. in the spring and autumn respectively of the years* 1918, 1919, *and* 1920. *By reason of the war and the conditions prevailing at the time the first three shipments were not made, but in Oct.* 1918 *the charterers wrote to the owners demanding fulfilment of the charter-party. The owners refused to nominate a vessel and stated that the contract was at an end. The dispute was accordingly referred to arbitration, and the arbitrator held that there was no frustration or abrogation of the charter-party.*

Held, that there was nothing in the nature of the contract or in the conditions prevailing at the time it fell to be performed, making it impossible for the contract to be performed, and the charter-party was never frustrated. It was a contract for six separate and independent voyages, and although there was a mutual understanding between the parties not to call for the provision of tonnage or cargoes for the first three shipments under the contract during the period of hostilities the rights of the charterers remained intact as regards the three later shipments.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal (Bankes and Scrutton, L.JJ., Atkin, L.J., dissenting) dated the 1st June 1922 affirming a judgment and order of McCardie, J. on an award in the form of a special case stated by an arbitrator.

The appellants were shipowners who before the war had a line of cargo steamers running from the southern ports of the United States of America to Europe. The respondents owned mines in the United States of America from which they shipped phosphates to buyers in

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

Europe. On the 5th April 1913 a charter-party was made between the appellants as disponents of six steamships to be named fourteen days before readiness to load, and the respondents as charterers. It was for the carriage of six parcels of phosphates from Port Tampa or Tampa in charterers' option to Dunkirk at the rate of 15*s.* 3*d.* per ton. Each of the six parcels was to be 3000-3300 tons, margin in owners' option. The loading dates were the 15th March/15th May, and the 15th Sept./15th Nov. respectively in each of the years 1918, 1919, and 1920. Clause 15 provided that should the steamer not arrive at her loading port, and be in all respects ready to load under the charter on or before the stated dates, the charterers should have the option of cancelling the charter. Clause 20 provided that all disputes which might arise relating to the charter-party should be submitted to arbitration in the usual manner. At the time when the charter-party was entered into two similar contracts dated respectively the 26th July 1912 and the 10th Sept 1912 were in course of fulfilment, and at the outbreak of war in Aug. 1914 there were respectively three and ten voyages as yet unperformed under the said two contracts.

In consequence of the change of circumstances caused by the war the charterers waived their right to the first three shipments.

By letters dated the 25th Oct. 1918 and the 21st Nov. 1918 the respondents reminded the appellants that they were under contract to carry parcels in 1919 and 1920, and intimating that if peace was signed before the date fixed for the first 1919 voyage they would demand fulfilment of the charter-party, as the Dunkirk buyers had notified that they were expecting delivery.

The Treaty of Peace between Great Britain and Germany was signed on the 28th June 1919.

On the 27th Aug. 1919 the respondents again wrote to the appellants asking them to name a steamer for the second 1919 voyage. On the 4th Sept. 1919 the appellants replied that they were advised that the war and its incidents had put an end to the contract.

The dispute having been referred to arbitration, the arbitrator made an award, holding that there was no frustration, and assessing the damages at 29,137*l.* 10*s.* McCardie, J. affirmed the award.

On appeal to the Court of Appeal (Bankes and Scrutton, L.JJ., Atkin, L.J., dissenting) held that having regard to the course of business between the parties, the contract should be treated as a series of separate contracts embodied in one document, and that, although frustrated as to part it might have to be performed as to the remainder and therefore there was no frustration of contract.

The shipowners appealed.

R. A. Wright, K.C., *A. T. Miller*, K.C., and *Valentine Holmes* for the appellants.

Jowitt, K.C. and *James Dickinson* for the respondents.

The following cases were cited:

Taylor v. *Caldwell*, 3 B. & S. 826;
Appleby v. *Myers*, 16 L. T. Rep. 669; L. Rep. 2 C. P. 651;
Metropolitan Water Board v. *Dick, Kerr, and Co. Limited*, 117 L. T. Rep. 766; (1918) A. C. 119;
Distington Hematite Iron Company Limited v. *Possehl and Co.*, 115 L. T. Rep. 412; (1916) 1 K. B. 811;
Krell v. *Henry*, 89 L. T. Rep. 328; (1903) 2 K. B. 740;
The Moorcock, 6 Asp. Mar. Law Cas. 357, 373; 60 L. T. Rep. 654; 14 Prob. Div. 64;
Re Arbitration between F. A. Tamplin Steamship Company Limited and Anglo-Mexican Petroleum Products Company Limited, 13 Asp. Mar. Law Cas. 284, 467; 115 L. T. Rep. 315; (1916) 2 A. C. 397;
Hamlyn and Co. v. *Wood and Co.*, 65 L. T. Rep. 286; (1891) 2 Q. B. 488;
Jackson v. *Union Marine Insurance Company Limited*, 2 Asp. Mar. Law Cas. 435; 31 L. T. Rep. 789; L. Rep. 10 C. P. 125;
Bank Line Limited v. *Arthur Capel and Co.*, 14 Asp. Mar. Law Cas. 370; 120 L. T. Rep. 129; (1919) A. C. 435;
Ertel Bieber and Co. v. *Rio Tinto Company Limited*, 118 L. T. Rep. 181; (1918) A. C. 260;
Honck v. *Muller*, 45 L. T. Rep. 202; L. Rep. 7 Q. B. Div. 92.

The House took time for consideration.

Lord FINLAY.—The appellants in this case are a Liverpool shipping company owning steamers running between Europe and the southern ports of the United States of America. The respondents are the owners of phosphate mines in Florida. A dispute arose between them with reference to a contract made in April 1913 for the chartering of vessels to bring phosphates from Port Tampa in Florida to Dunkirk. An agreement, dated the 19th Dec. 1919, was entered into for reference to arbitration of this dispute, and the matter comes before your Lordships' House upon an award in the form of a special case.

The claim of the phosphate company was for failure to provide vessels for the carriage of phosphates to Dunkirk from Port Tampa, and the main case set up on behalf of the Larrinaga Company was "frustration" by reason of the war. The arbitrator by his award, subject to the opinion of the court on points of law on the case stated by him, found that the Larrinaga Company was liable to the phosphate company in damages for their failure to provide steamers for the last three voyages and assessed the damage at 29,137*l.* 10*s.* The case in the first instance came before McCardie, J. who confirmed the arbitrator and gave judgment for the amount assessed. His decision was confirmed in the Court of Appeal by Bankes and Scrutton, L.JJ. (Atkin, L.J. dissenting).

The material facts lie in small compass.

Three contracts for chartering vessels were entered into between the appellants and the respondents. The first (*a*), dated the 26th July 1912, was for the carriage of four consignments of phosphates, each of 3000 tons, ten per cent. more or less, from Port Tampa to Dunkirk at dates ranging from the 1st July 1913 to the 30th Sept. 1915. The second (*b*), dated the 10th Sept. 1912, was for eleven consignments, some of 3000 tons ten per cent. more or less, and some of 4500 tons, ten per cent. more or less, of phosphates, also from Port Tampa to Dunkirk, at dates ranging from the 15th March 1914 to the 28th Feb. 1918. Neither of these two contracts is in question in the present proceedings.

The third contract (*c*) is that to which the present proceedings relate. Its date is described sometimes as the 5th April and sometimes as the 15th April 1913. It provides for the carriage of six consignments of 3000-3300 tons each of phosphate from Port Tampa to Dunkirk at dates ranging from the 15th March 1918 to the 15th Nov. 1920. There is an ordinary form of charter-party for carriage from Port Tampa to Dunkirk, and on the back there is a note that it applies to the six parcels with their several dates. By the fifteenth clause in the body of the charter it is provided that should the steamer not arrive at her loading port and be in all respects ready to load under this charter on or before the day stated in the note on the back, the charterers have the option of cancelling, the same to be declared when the vessel is ready to load. It seems clear that this option applies only to a cancellation so far as the particular voyage is concerned.

It is stated in the special case that in consequence of the confusion caused by the war the charter-parties for shipments during the early period of the war were declared by both sides to be null and void. This has no reference to the charter-party now in question (*c*).

In Feb. 1916 the phosphate company desired to recommence shipments, and inquired whether the Larrinaga Company were willing to execute their contracts. The Larrinaga Company replied that after the war started they had agreed to cancel all charters dates of which came within the period of the war (this referred, it was admitted, to charters so far as they related to voyages, the dates of which fell within the period of the war), and went on to say that a large amount of their tonnage had been commandeered by the Government, and that it did not seem reasonable to ask them to send boats to Dunkirk, having regard to the risk of damage. On the 24th of the same month (Feb. 1916) the charterers replied, "Naturally we do not insist upon Messrs. Larrinaga and Co. sending their steamers to Dunkirk during the period of hostilities."

The arbitrator, after setting out this letter, proceeds, "This reply was transmitted to the owners, and thereafter both parties acted with regard to all the charter-parties for parcels of phosphate to Dunkirk on the basis that owners were not to be compelled to nominate tonnage nor charterers to be compelled to ship during the period of the war."

The case goes on to state that in consequence of this arrangement no further correspondence took place between the parties until the 25th Oct. 1918, when, the Germans being in full retreat, the charterers wrote to the Larrinaga Company the following letter:

> As the war through which we are passing may now very shortly terminate, we take the liberty to remind you that in pursuance of the charter-party of the 15th April 1913, you are to carry during the course of the years 1919 and 1920 cargoes of phosphates land pebble with consignment to Dunkirk. The first cargo is arranged for the 15th March to the 15th May 1919, and we at once notify you that if the peace is signed at that date we shall demand the execution of your engagements, our buyers having notified to us that they expect to receive at Dunkirk the phosphate which we have sold to them. Awaiting the favour of your acknowledgment hereof.

No reply having been received, this letter was repeated and confirmed by the charterers on the 21st Nov. 1918, and on the 2nd Dec. the Larrinaga Company replied as follows:

> We have your favours of the 25th Oct. and the 21st Nov. informing us that your buyers are now prepared to receive phosphate at Dunkirk and asking us to fulfil charter-party for cargo the 15th March to the 15th May 1919. We take note of your advice, but all shipping is still under Government control and may remain so a long time, but even if the Government commenced releasing ships in the near future, it appears to us the war and Government control have interfered to such an extent with a charter such as ours that the question may well arise whether the charter is still binding. It is, however, not necessary to go into this at present.

On receipt of this letter the charterers wrote on the 7th Dec. the following: "We note your remarks, with regard to which we make our reservations."

The special case finds specially that phosphate was so valuable as a fertiliser that its import into Europe was encouraged by the Allies, and quotes a passage from the report for 1919/1920 of the Chamber of Shipping of the United Kingdom, in which it is remarked that the Government have directed that tonnage should be provided for the carriage of phosphates. The special case also points out that from the shipping point of view phosphate is a most desirable consignment, having regard to its small bulk relatively to its weight.

Summing up the effect of the correspondence, the special case states as one of the findings of fact the following:

> That a mutual agreement was established by the correspondence referred to above in which it was agreed between the parties that the owners were not to be compelled to furnish steamers nor charterers to ship the cargoes of phosphate during the period of hostilities or the period of the war, and that the period of this agreement was extended by the charterers' letter of the 27th Aug. 1919 (*semble* the 25th Oct. 1918), to the date upon which peace should be signed, and the charterers accordingly made no claim for tonnage to be provided for the 1918 voyages, and I also find that charterers have no

claim against the owners for their failure to provide a steamer for the first voyage of 1919.

This first voyage of 1919 would have been for the carriage of consignment No. 3 in the contract (*c*), loading date the 15th March to the 15th May 1919.

On the 27th Aug. 1919 the charterers repeated their demand for a steamer to carry lot No. 4, the 15th Sept. to the 15th Nov. 1919. and the Larrinaga Company replied on the 4th Sept that there was no change in the situation since their letter of the 2nd Dec. was written. They added, and it is this which brought matters to a head, " We have, however, been taking legal advice as to the position, and we are advised that the war and its incidents have put an end to the contract." On the 19th Dec. 1919, the arbitrator was appointed.

The thirteenth finding of fact by the arbitrator is most important. It is as follows :

So far as it is a question of fact I find that there was nothing in the nature of the contract or in the conditions prevailing at the time it fell to be performed making it impossible for the contract to be performed and that the charter-party of the 15th April 1913 was never frustrated nor abrogated and that in refusing to nominate steamers to load the three parcels arranged for the 15th Sept. to the 15th Nov. 1919, and for 1920, owners committed a breach of the charter-party.

And in dealing specifically with the submissions of fact made by the owners, the arbitrator finds that the charter-party was a speculative charter-party and both parties took the risk that different conditions might prevail when the charter-party came to be performed ; that there was no frustration of the contract, and that the alteration in trade conditions in consequence of the war was not fundamental as regards the charter-party obligations, such alteration being one of the risks taken by the parties on entering into a contract which was not to be performed until a lapse of five years ; that the Government would have permitted the shipment of these cargoes and that there was nothing to prevent the owners from chartering neutral tonnage for the voyages in question, and that after the 15th Feb. 1919 there was no requisition or direction imposed by the British Government upon the owners' tonnage preventing the carriage of the phosphates contracted for during the years 1919 and 1920 ; that the conditions prevailing in 1918, 1919, and 1920 were not in contemplation of either party, but that each party, having regard to the speculative nature of the contract, took the risk of such conditions prevailing ; that the contract sought to be enforced was in substance and effect the same contract that was entered into in 1913. The findings of the arbitrator which I have thus summarised are set out at length in the special case.

The arbitrator's award was that, subject to the opinion of the court on any point of law, the owners were liable to the charterers in damages in respect of the last three voyages.

The Larrinaga Company have submitted in argument at the Bar of your Lordships' House that in point of law the award ought to have been in their favour.

The doctrine of " frustration " as a defence to an action for breach of contract has been very much discussed in recent years. If a man contracts absolutely to do a certain thing he is liable on his contract, even if the performance of it has since the contract become impossible. When certain risks are foreseen the contract may contain conditions providing that in certain events the obligations shall cease to exist. But even when there is no express condition in the contract, it may be clear that the parties contracted on the basis of the continued existence of a certain state of facts, and it is with reference to cases alleged to be of this kind that the doctrine of " frustration " is most frequently invoked. If the contract be one which for its performance depends on the continued existence of certain buildings or other premises, it is an implied condition that the premises should continue to be in existence, and their total destruction by fire without fault on the part of those who have entered into the contract will be a good defence. Such a contract does not as a matter of law imply a warranty that the buildings or other property shall continue to exist. (*Taylor* v. *Caldwell*, *sup.* ; *Appleby* v. *Myers*, *sup.*)

I share the doubts which have been expressed (see Pollock on Contracts, 8th edit., p. 439, and the following pages) as to the extension of this doctrine to such cases as *Krell* v. *Henry* (*sup.*) and the other cases known as the Coronation cases. In each case the question must be, What was the basis on which the contract proceeded ? It may be that the parties contracted in the expectation that a particular event would happen, each taking his chance, but that the actual happening of the event was not made the basis of the contract.

If, in consequence of war, there is a compulsory cessation of the execution of a contract for construction of works of such a character and duration that it fundamentally changes the conditions of the contract and could not have been in the contemplation of the parties when it was made, to hold that the contract still subsists would be " not to maintain the original contract but to substitute a different contract for it." (*Metropolitan Water Board* v. *Dick Kerr and Co. Limited* (*sup.*) and the judgment of Rowlatt, J. in *Distington Hematite Iron Company Limited* v. *Possehl and Co.* (*sup.*)

It is quite clear from the findings of the arbitrator that performance of this contract was not made impossible by the war. The conduct of the parties, as stated in the special case, shows that they did not regard the outbreak of war as effecting any fundamental change in the incidents of the charter-parties. Inconvenience and danger there was, no doubt, but the parties, taking a business view of the matter, were content to agree that the shipments should not be required while the war continued. They obviously contemplated resuming them when peace should have been concluded.

We are asked to review the findings of the arbitrator as being on a mixed question of fact and law, and, therefore, subject to review by the court. Upon the facts of the special case, the view to which these facts lead me is, that the conclusions of the arbitrator were right, both in fact and in law. This is the view which was taken by Bankes, L.J., and by Scrutton, L.J.

It is true that Atkin, L.J. dissented. With the greatest respect for any opinion of his, I am unable to agree with him in this case. His judgment rests upon two propositions : the first is, that the contract was dissolved on the doctrine of frustration. I have already given my reasons at length for thinking that there was no frustration in the present case, and that the parties themselves recognised this.

The second ground on which the Lord Justice proceeds is that which was taken at the Bar as a second point completely separate from "frustration," It was this, that apart from frustration altogether the defendants are entitled to say, we contracted for six shipments—we did not get them, and we did not contract for three. This ground appears to me untenable on the facts of the present case. It was by the consent of both parties that the first three shipments under this contract were not made. How can this be said to affect the right of the charterers to have the remaining shipments carried out? The case presents a totally different aspect from that which it would have borne if the shipments Nos. 1, 2, and 3 under this contract had not been made in consequence of a wrongful repudiation by the charterers of these shipments, and an assertion of a right to convert the contract for six shipments into a contract for three. They did nothing of the kind. As a matter of business convenience the first three shipments, which would have been during the continuance of the war, were dispensed with by common consent. The right under the remaining contract was intact so far as this point is concerned, and, as I have already stated, I think that the main contention on the ground of frustration fails.

I wish to add that I entirely agree with the observations made by McCardie, J. as to the dangers attending any undue extension of the doctrine of frustration as a defence to actions of contract. The doctrine is perfectly sound and thoroughly established, but care is very necessary in its application to particular cases.

In my opinion the appeal should be dismissed with costs.

Lord Atkinson.—The facts have already been fully stated. But for the division of opinion in the Court of Appeal, I should have been of opinion that this was a plain case. Any difficulty one may feel in deciding it is due to the unscientific and careless way in which the parties have framed the instrument in which they designed to embody the agreement at which they had arrived.

On the 5th or 15th April 1913 they, through their agents, executed a charter-party in a printed form, upon the proper construction of which, coupled with the endorsement on its back, the question for decision mainly, if not entirely, depends. It begins with a provision that the appellants are disponents of six good steamships not named. No flag is named, no measurements given. And then it proceeds as if it dealt with one ship, a steamer, and only one, and provides that she shall repair to Tampa in Florida and there load and carry from thence to Dunkirk phosphate in bulk from the mines of the respondents, in no case "exceeding" "as stated hereafter tons," and not less than "as stated hereafter tons."

No number of tons are stated in the body of the charter-party, but it must, I think, be taken that the words "as stated hereafter" refer to the endorsement on the back of the charter-party in which latter the tons are stated. By clause 15 of the charter-party it is provided that "should the steamer not arrive at her loading port and be in all respects ready to load under this charter on or before the day of 'as stated hereafter' the charterers have the option of cancelling the same (*i.e.*, the charter-party), to be declared when the vessel is ready to load." On the back of the charter-party one finds the following endorsement :

The within charter applies to six (6) parcels, the three last of which were as follows, the first three having been abandoned by consent: No. 4.—3000/3300 tons, margin in owners' option, loading dates the 15th Sept. to the 15th Nov. 1919. No. 5.—3000/3300 tons, margin in owners' option, loading dates the 15th March to the 15th May 1920. No. 6.—3000/3300 tons, margin in owners' option, loading dates the 15th Sept. to the 15th Nov. 1920. The cargo to be discharged by charterers' stevedore at steamer's expense and at lowest current rate including the cost of tubs if same required by charterers. Should steamers load at Tampa, captain to report to charterer's agents who will be named three months before lay days commence on each parcel. (Signed) H. G. T. and Co.—Société Franco-Américaine des Phosphates de Médulla, Un Administr, (Signed) L. Menage.

It is not disputed that the charter-party plus the endorsement on its back together contain the contract of the parties. It is an advance contract. The first service under it is not to be rendered till about five years after its date and the last till about seven-and-a-half years after its date. It is difficult to see upon what principle the charterers must not be held to have taken the risk of what might happen in these periods of years. It will also be observed that the endorsement deals not at all with ships but with the cargoes which are to be carried by them, so that the appellants could perform their part of their contract by providing ships to carry these cargoes no matter to whom the ships belonged. The fact that the appellants' own ships were requisitioned by the Government would not by itself relieve them from the obligation to supply ships to implement their contract, unless they proved in addition that it was commercially impossible for them to procure other suitable ships by charter or otherwise to do so.

I concur with the Court of Appeal in thinking that by executing this charter-party and the endorsement on its back, the appellants and respondents entered into one contract, not six contracts; but this one contract dealt with six wholly distinct, separate, and severable adventures between which there was no interdependence in the sense that the carrying out of any one of them was made to depend in any way upon the carrying out or abandonment of any of the others. The six adventures were not united into one composite adventure by any condition of that kind.

The appellants' counsel admitted that though clause 15 of the charter-party purports to give to the respondents the right to cancel the charter-party itself, this must mean only the right to cancel it *quoad* the particular ship which arrived late. As I understood Mr. Wright, he contended that this fact had no significance because it was a provision of the contract. It is in my mind just because it is part of the contract that it has significance. It shows that the six adventures do not form such a composite whole that they may not be separately dealt with, the one abandoned or dispensed with without affecting the others.

Since the case of *Re Arbitration between F. A. Tamplin Steamship Company Limited and Anglo-Mexican Petroleum Products Company Limited* (*sup.*) was decided, it has, I think, been generally accepted that the principle upon which the courts of law act in absolving persons from the further performance of their contract by reason of the frustration of its objects, is correctly stated by Lord Loreburn in his judgment in that case, at pp. 403-4 of the report. After dealing with the authorities he says: "In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at bottom the principle upon which the court proceeded." It is, in my opinion, the true principle, for no court has an absolving power; but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation upon which the parties "contracted." It is not enough, however, that this inference should be merely a reasonable inference to draw and nothing more. It must be an inference which it is necessary to draw in order to effectuate the intention of the parties as revealed by the language they have used. In *Hamlyn and Co.* v. *Wood and Co.* (*sup.*) and the case of *The Moorcock* (*sup.*) the law upon the point was laid down thus. "A stipulation must not by implication be introduced into a written contract unless, on consideration of the contract in a reasonable and business-like manner, an implication necessarily arises that the parties must have intended that such a stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be an implication which is necessary in order to effectuate the intention of the parties." Again it is impossible to imply in a contract any term or condition inconsistent with its express provisions, or with the intention of the parties as revealed by those provisions. In *Re Arbitration between F. A. Tamplin Steamship Company Limited* v. *Anglo-Mexican Petroleum Products Company Limited* (*sup.*) Lord Parker, dealing with this question, said at p. 422: "It is, of course, impossible to imply in a contract any term of condition inconsistent with its express provisions, or with the intention of the parties as gathered from those provisions. The first thing, therefore, in every case is to compare the term or condition which it is sought to imply with the express provisions of the contract and with the intention of the parties as gathered from those provisions, and ascertain whether there is any such inconsistency." The phrase "frustration of a contract," is an incorrect phrase. It is the performance of the contract which must be frustrated, with the result that the contract itself is thereby dissolved. In the case of a charter-party, it is the maritime adventure with which the charter-party deals that must be "frustrated." This is obvious from the judgment of Bramwell, B. (as he then was) in *Jackson* v. *Union Marine Insurance Company Limited* (*sup.*). Lord Sumner, in his judgment in *Bank Line Limited* v. *Arthur Capel and Co* (*sup.*) points out what was the origin of the phrase "frustrate the commercial object of the contract," and what would be the effect of such a frustration upon the contract of the parties. During the argument addressed to your Lordships on behalf of the appellants, though I listened to it most attentively, I failed to apprehend precisely what was the unexpressed condition which, to use Lord Loreburn's language, formed the foundation of the contract entered into by the appellants and respondents on the 13th April 1913. It certainly was not, it would appear to me, to be that England should not be at war with any power, European or other, during this period of seven-and-a-half years from its date. Nor was it a condition that the appellants should be relieved from the obligation to provide ships to implement their contract if their own ships should be requisitioned by the Crown. In my view, there is nothing in the contract or in the surrounding circumstances to induce any court to infer that these conditions or either of them formed the foundation of the contract of the parties. If the appellants had contracted that they would employ in the stipulated adventure none but ships belonging to themselves, it might possibly be contended that there was an implied condition upon which this written contract was based, to the effect that if they should be deprived of the use of these ships by *force majeure*, such as a requisition by the Crown, they should be relieved from the further performance of their contract. But the parties never entered into a contract of that kind. The arbitrator, a commercial man and not a lawyer, has found as a fact that there was nothing to prevent the appellants from chartering neutral tonnage for the three voyages in respect of

which the respondents claim relief, namely, those in Nov. 1919, and May and Nov. 1920. Had they done this, they would have had a complete answer to the respondents' claim. The correspondence which passed between the parties clearly supports, in my view, the finding of the arbitrator, that it was agreed between the parties that the appellant should not furnish steamers nor the respondents ship cargoes of phosphate during the period of the war, and that this agreement was, by respondents' letter of the 27th Aug. 1919, extended to the date at which peace should be signed.

It may well be that these mutual agreements could not be enforced at law, but they show clearly that the parties regarded the agreement of the 5th April 1913, not as dissolved, but as existing and being valid and binding; but that owing to the condition of things prevailing, they were willing to abstain from enforcing each against the other the rights which this contract conferred respectively upon them. For these reasons I think that the appeal fails, that the decision appealed from was right, and should be upheld and the appeal be dismissed with costs.

Lord SUMNER.—The rights of the parties in this case must depend upon the original charter of the 15th April 1913, for no agreement was afterwards entered into which would vary them. Neither the communications which actually passed, nor the suspension of communications, shows more than that both acquiesced in dropping the first three voyages.

The charter-party provides for six separate voyages, each being a distinct commercial adventure. There is no reason why a single contract should not provide for many adventures, nor why those adventures should not be entirely independent of one another. That the voyages are to be made at fixed and regular intervals; that the cargo is to be always of the same material; that the ports of loading and discharge, the rate of freight and the contractual terms are to be the same throughout, only show that the adventures are severally as like one another as possible, not that they are not several adventures. For anything that appears the suppression of one or more voyages would not affect the others, though it might affect the shipowners' profits one way or the other. If there was a lump sum freight for the six voyages, different considerations would arise.

It is said that, when the time for the first voyage arrived, the first adventure was frustrated, war having caused a supersession of active relations between the parties, and that the whole of the contract adventures were thereupon frustrated also, being all bound up together, because the consideration for performing any one voyage was the promise to perform it and five others, and that a six-voyage charter cannot be turned into a three-voyage charter, for this would be a different contract. I think this argument begs the question. I see no difficulty in the considerations being as separate as the voyages. The rate of freight is the same, it is true, though the commercial results of the voyages may differ widely, but the advantage of securing a dead-weight cargo in advance at a port of initial loading so adjacent to United States loading ports as Port Tampa is, deliverable at a port of final discharge, so close to British and Continental discharging ports as Dunkirk is, may well compensate for a rate of freight which is not always profitable *per se*. Indeed, in a contract made in 1913 and possibly only to be completed in 1921, a rate of freight fixed in 1913 could hardly be anything but a speculation, and might as well be a flat rate as not.

It is of some importance to observe that, among the many cases of frustration decided in the last few years, this case can find no comparable precedent. Neither party to the contract here is an alien enemy. Nothing to be done under the contract became illegal at any time. Nothing was prohibited by legal authority. Neither the port of loading nor the port of discharge was under blockade and, if the appellants' own ships were under requisition, they could have fulfilled their contract with other ships, of which they might be able to obtain the disposition. Clearly, they took the risk of being able to get the stipulated vessels when wanted. Your Lordships are not concerned in this case with the uncertain duration of a war still continuing, for the question arises only after the cessation of hostilities, and there is no question of any "postponement of the voyages now in dispute for an inordinate time" or at all. Here is no charter "dependent for the possibility of its performance on the continued availability of a specific thing," for nothing more specific than the ports of Tampa and Dunkirk is involved, and they remain in being. So far as the ships are concerned, this is not a contract *de certo corpore* at all. Nor can it be said that "the foundation of what the parties are deemed to have had in contemplation has disappeared and the contract itself has vanished with the foundation." As regards the last three voyages, every "subject-matter which is essential to the performance of the contract" is available. The ports are there and so is the phosphate, and it is not even shown that no ships conformable to the charter could have been obtained. The contract, if the last three voyages had been made, would, in my opinion, have been the same contract as that originally contemplated, for the first three might, within its terms, have been prevented and excused by excepted perils, and a contract for six voyages which results in only the second three being made is the same contract, whether the first three fail by reason of matters expressly excepted in the contract or excepted by the parties impliedly under the doctrine of frustration in its modern form. The argument always gets back to the same question, namely, whether this is a contract for six separate adventures or for one composite adventure carried out in six stages.

The most favourable way in which the appellants' case was put was this. Ultimately

frustration is a question of fact, and that question must be answered as at the time when the frustrating facts arise, for if the adventure is frustrated the contract is dissolved then and there without any further election or notice on either side, and it is important that the parties should be able to know forthwith how they stand. Accordingly, if, in the circumstances as they appeared to be, when the time for commencing the first voyage arrived, the true conclusion is that, in the supposed intention of the parties when they entered into the charter, such circumstances, so viewed, would defeat the whole contract, then the contract was forthwith discharged, no matter what happened afterwards when the dates of the later voyages were reached.

Even on this footing the same difficulty still arises that, if the voyages were really intended to be separate and independent voyages, the parties cannot have intended the failure of one to involve the failure of all. They may have been entitled to say that the circumstances which led to the failure of the first seemed likely to continue in existence when the time came for the second and so on, but to my mind, that of itself leads only to the conclusion that the time for deciding whether each separate adventure is frustrated arises in this case when the time for performing it has substantially arrived and not before. To hold otherwise would be to convert a contract for separate adventures into a contract for one composite adventure to the prejudice of one party or the other.

It was argued on the strength of what was said in the case of *Ertel Bieber and Co.* v. *Rio Tinto Company Limited* (*sup.*) by my noble and learned friend, Lord Dunedin (at p. 270), and by Lord Parker of Waddington (at p. 283), that if a given construction, quoting Lord Dunedin's words, "would be to turn a contract for two million tons into a contract for far less," the construction so described must be rejected outright, and so, in this case, a construction which results in the shipowners being bound to three voyages, having contracted for six, must be bad also. It is plain that in that case both noble Lords were dealing with the question in hand, viz., whether a suspensory clause applying, among other things, to the event of war, could, as between subjects and enemies of his Majesty be an answer to the dissolution of the whole contract on the outbreak of war, which would naturally be the result in law of that relation and could leave standing such part of the contract as would not eventually become performable till after the conclusion of peace. It is, indeed, a cogent reply to such a contention to say that it makes a new contract between the parties, but no such argument applies where the question is whether the intention of the parties themselves, neither being an enemy of the King, is not to drop such voyages as cannot be performed and to retain such as can. It may be thought unlikely that they would have intended three voyages to be obligatory when three others had been abandoned, but from the nature of this contract I am assured that it is not. These are distinct voyages, not an out-and-home voyage as in the case put by Bramwell, L.J. in *Honck* v. *Muller* (*sup.*) (at p. 99), nor a single voyage as in *Jackson* v. *Union Marine Insurance Company Limited* (*sup.*).

Atkin, L.J. observes in his dissentient judgment that "this is a typical case of frustration. Substantially the whole of the existing circumstances which formed the basis of the contract had disappeared during the war . . . the possibility of regular service, and regular shipment, which alone gave the mutual obligations of fixed shipments at a fixed price a commercial basis, had by common consent disappeared. . . . At the root of the doctrine of frustration lies the necessity for relieving commercial men of suspense." With great respect I venture to question this. In the case of a contract like this, which is an extreme case of commercial providence, everything was so obviously liable to be upset, more or less, by changes of circumstances of all sorts as to make it very difficult to say that in 1913 the parties intended even the Great War to involve the dissolution of the contract five years afterwards, though till 1918, at any rate I suppose, it would remain in force. In effect most forward contracts can be regarded as a form of commercial insurance, in which every event is intended to be at the risk of one party or another. Each party is likely most to need the maintenance of such a contract exactly when the other would most wish to be rid of it. If, as here, neither party wished the first three voyages to be performed, the remedy was to let them drop one by one, as they did, and to see how things went on. To relieve the shipowners of suspense by dissolving the entire contract would, after all, only plunge them into a new suspense, namely, how to get deadweight cargo, and at a pre-war rate of freight, too, if ships should be once more at their disposal. The charterers again, unless this charter stood, would not be able to sell their product c.f. and i., when the prospect of restarting the Dunkirk mills improved, except at the cost of speculating on the freight element in the price, so that they, too, would necessarily be exposed to some suspense one way or the other. If the suspense is unilateral the result of putting an end to it by dissolving the contract may only be to deprive the other party of the chance of administering a not unprofitable squeeze. All the uncertainties of a commercial contract can ultimately be expressed, though not very accurately, in terms of money and rarely, if ever, is it a ground for inferring frustration of an adventure that the contract has turned out to be a loss or even a commercial disaster for somebody. If a contract is really a speculative contract, as this plainly is, the doctrine of frustration can rarely, if ever, apply to it, for the basis of a speculative contract is to distribute all the risks on one side or on the other and to eliminate any chance of the contract falling to the ground, unless, indeed, the law has put an end to it. Even the outbreak of war does not

necessarily result in the frustration of commercial adventures. It may dissolve a contract as involving a trading with the enemy, which is a totally different ground, but, apart from this and in spite of the uncertain duration of war, it must depend on the facts whether there is a frustration of the contemplated adventure in reality. No one can tell how long a spell of commercial depression may last; no suspense can be more harassing than the vagaries of foreign exchanges, but contracts are made for the purpose of fixing the incidence of such risks in advance, and their occurrence only makes it the more necessary to uphold a contract and not to make them the ground for discharging it.

I would dismiss this appeal.

Lord Wrenbury and Lord Carson concurred.

Appeal dismissed.

Solicitors for the appellants, *Charles Lightbound* and *Co.*

Solicitors for the respondents, *William A. Crump* and *Son.*

Supreme Court of Judicature.

COURT OF APPEAL.

Dec. 18 *and* 19, 1922.

(Before Bankes, Warrington, and Scrutton, L.JJ.)

Moss Steamship Company v. Board of Trade. (a)

APPEAL FROM THE WAR COMPENSATION COURT.

Indemnity Act—Charter-party—Voyage directed by Government—Voyage to be for charterers' account—Loss to charterers—Compensation —Interference with business—" Regulation of general application "—Indemnity Act 1920 (10 & 11 *Geo.* 5, *c.* 48), *s.* 2, *sub-ss.* 1 (*b*), 2 (*iii.*) (*b*) ; *Schedule, Part II.*

By sect. 2, *sub-sect.* 1 (*b*), *of the Indemnity Act* 1920, *any person who has, otherwise than by requisition of a ship, " sustained any direct loss or damage by reason of interference with his . . . business . . . through the exercise . . . during the war of any power under any enactment relating to the defence of the realm . . . shall be entitled to payment of compensation in respect of such loss or damage." By sub-sect.* 2 (*iii.*) (*b*), *if the claimant would apart from the Act have no legal right to compensation, the compensation is to be assessed according to the principles set forth in part II. of the schedule to the Act; by which " The compensation to be awarded shall be assessed by taking into account only the direct loss and damage suffered by the claimant by reason of direct and particular interference with his property or business, and nothing shall be included in respect of any loss or damage due to or arising through the enforcement of any order or regulation of general or local application, or in respect of any loss or damage due simply and solely to the existence of a state of war."*

The claimants, a shipping company, chartered a ship for the purpose of their ordinary business, namely, running a line of steamers to the Mediterranean. Clause 32 *of the charter-party provided that if the ship was directed by the Government for some voyage the direction was to be for the charterers' account. The Government directed the ship to Cuba to load a cargo of sugar. The voyage was not profitable to the charterers, nor did they earn the profits which they would have made if the ship had been employed in the Mediterranean trade. In consequence of the rise of shipping rates owing to the war it was impracticable for the charterers to charter another ship in substitution. They claimed compensation, under the Indemnity Act* 1920, *for the loss sustained by the Government's interference with their business.*

Held, that they were not entitled to compensation.

By Bankes, L.J.: On the ground that the loss was due to the " enforcement of a regulation of general application."

By Warrington and Scrutton, L.JJ.: On the ground that the loss was occasioned by the fact that the charterers' own contract with the shipowners bound them to carry out the direction of the Government on their own account, and that consequently there was no direct interference with their business.

By Scrutton, L.J.: Also, on the ground that the loss resulted from the fact that it was not profitable to employ a substituted ship in the charterers' business because of the high rates charged for ships owing to the existence of a state of war.

Appeal by the Board of Trade from a decision of the War Compensation Court.

The claimants owned a line of steamers engaged in the Mediterranean, Black Sea, and Egyptian trade. On the 16th July 1919 they chartered from the Adam Steamship Company the steamship *Abelour* on time charter for fifteen months. The charter-party fixed the trade within the limits " United Kingdom, Continent, Black Sea, Mediterranean Trades, including Egypt to United States of America and United Kingdom, and for other trades as per owners' warranties attached." The charter provided by clause 32 that: " If during the currency of this charter steamer is directed by the British Government . . . for some voyage or voyages this direction is to be for charterers' account and this charter-party with all its conditions to remain in force between the charterers and owners. Should steamer be requisitioned by the British Government this charter to be null and void." By a reg. 39bbb, made in July 1917, under the powers conferred

(a) Reported by W. C. Sandford, Esq., Barrister-at-Law.

by the Defence of the Realm Act, the Shipping Controller was empowered to make orders restricting or giving directions with respect to the nature of the trades in which ships were to be employed, including directions requiring ships to proceed to specified ports; and by reg. 39DD, made in Feb. 1919, British ships were prohibited from proceeding to sea without a licence of the Shipping Controller. The Shipping Controller on the 3rd Jan. 1920, refused a licence to the *Abelour* to proceed to the Mediterranean and directed the Adam Steamship Company to send her to Cuba to load a cargo of sugar. As the *Abelour* was not requisitioned no hire became payable by the Government to the claimants, who had to pay the full charter hire to the owners, and lost thereby the sum of 14,758*l.* They also lost the profit, amounting to 6198*l.*, which they would have made if the ship had been allowed to make the proposed voyage to the Mediterranean. The claimants could not minimise that loss by hiring another ship in the place of the *Abelour*, owing to the high rate of hire ruling at the time. The claimants sought to recover the above two sums as compensation under sect. 2, sub-sect. 1 (*b*), of the Indemnity Act 1920. The majority of the Compensation Court found that: "The charterers' business was that of a carrier of goods by their line of steamers to the Mediterranean, Black Sea and Egypt, and the *Abelour* was chartered as a vehicle for carrying on that business and no other." They held, on the authority of the *Elliott Steam Tug Company* v. *Shipping Controller* (15 Asp. Mar. Law Cas. 406; 126 L. T. Rep. 158; (1922) 1 K. B. 127) that the direction to the owners to send her on a voyage for which she was not chartered was an interference with the business of the charterers which directly caused a loss to them of money thrown away and profits, and accordingly awarded to the claimants the two sums claimed. The dissentient member of the court distinguished the *Elliott Steam Tug Case* (*sup.*) on the ground, amongst others, that the charter there did not contain a clause similar to clause 32 of the present charter; and he was of opinion that the effect of that clause was to make the Cuba voyage a part of the charterers' business, so that the loss flowed from their own contract and not from any interference by the Controller.

The Board of Trade appealed.

Sir *Ernest Pollock*, K.C., *MacKinnon*, K.C., and *Darby* for the Board of Trade.—By clause 32 of the charter-party, the charterers had made provision for a direction by the Government, and the voyage to Cuba when directed was not an interference with their business, but was the result of their own voluntary act done in anticipation of the regulation being applied to this particular ship. The case is distinguishable on that ground from the *Elliott Steam Tug* case (*sup.*).

Sir *Leslie Scott*, K.C. and *Le Quesne* for the charterers.—The question whether the voyage to Cuba was an interference with the charterers' business is not open, for the Compensation Court by a majority decided that question of fact in the affirmative; and there being an interference with the charterers' business, the case is governed by the *Elliott Steam Tug* case (*sup.*). Clause 32 is *res inter alios acta* and does not affect the position between the charterers and the Government. If the Government is going to cause a loss to either A. or B., and A. agrees with B., that if the loss is caused, A., as between A. and B., shall bear it, that agreement does not in itself take away from A. the right he has to compensation from the Government. Further, the loss would have fallen on the charterers in the first place and not on the shipowners, if the clause had not been inserted, and it is therefore immaterial as regards the charterers' claim against the Government whether it was inserted in the charter-party or not. The proximate and direct cause of the loss to the charterers was the Government's direction, and not the insertion of clause 32 in the charter-party.

BANKES, L.J.—Before dealing with the facts of this case, I wish to say a word about the case of *Elliott Steam Tug Company* v. *Shipping Controller* (15 Asp. Mar. Law Cas. 406; 126 L. T. Rep. 158; (1922) 1 K. B. 127), because I think that case has been supposed to have decided something more than it did in fact decide. A tug was chartered to the claimants for an indefinite period on very favourable terms, the charterers having the option of determining the charter-party at any time by giving fourteen days' notice to the owners. The tug was requisitioned by the Government, and was under requisition for a considerable time. The charterers, having a favourable charter, thought it to their interests not to determine it, so that they might have the use of the tug when the requisition should cease.

In these circumstances, they claimed compensation for loss of profits which they would have made by the use of the tug during the period of the requisition. The Compensation Court awarded them compensation for loss of profits for thirty days, considering that they were entitled to that time to consider their position, but refused them any further compensation for loss of profits after the thirty days on the ground that they ought to have minimised the loss by putting an end to the charter, in which case they would no longer have to pay hire to the owners. The case then came to this court, and the only point discussed was whether upon the facts the charterers had proved any "direct loss" to their business within the meaning of sect. 2, sub-sect. 1 (*b*), of the Indemnity Act 1920. It was contended for the respondent that there was no direct loss at all, but that, if there was, inasmuch as compensation was to be awarded upon the principles upon which the Commission had hitherto acted, and as the Commission had never previously allowed loss of profits, it could not be recovered. Warrington, L.J. and I both thought, contrary to the opinion of

Scrutton, L.J., that the loss of profits claimed by the charterers was a "direct loss" within the meaning of the sub-section. No question was raised before us upon the construction which ought to be put upon the language of part II. of the schedule. But as from the judgment of the Compensation Court it was doubtful whether they had refused to allow compensation for loss of profits after the thirty days on the ground that it was not a direct loss, in which case the majority of this court thought they were wrong, or on the ground that the allowance of such loss would have been in contravention of the express language of part II. of the schedule, we remitted the case to them so that they might find the necessary facts relating to that question.

[The report of the Compensation Court was that the claimants in normal times would have had no difficulty in hiring another tug in the place of the *Frank*, and would consequently have suffered no loss; that they failed to obtain another at a commercially practicable rate solely owing to the existence of a state of war. The Court of Appeal held that upon the above facts it was impossible to say that the Compensation Court had gone wrong as matter of law, and dismissed the appeal.]

I pass now to consider the facts of the present case. The claim is by the Moss Steamship Company for compensation for direct loss which they have sustained by interference with their business under the following circumstances. The claimants, who run a line of steamers to the Mediterranean, chartered the steamship *Abelour* on a time charter for fifteen months dated the 16th July 1919. At that time regs. 39BBB and 39DD were in force, the former having been made in 1917 and the latter early in 1919. After the passing of those regulations it appears to have become the practice for persons entering into charter-parties, whether owners or charterers, to insert in the contracts some provisions as to what was to happen in the event of the vessel being requisitioned or directed upon a particular voyage, it being uncertain at the date of the contract whether the requisition or the directed voyage would turn out profitable or not. In this charter-party it was provided by clause 32 that: "If during the currency of this charter steamer is directed by the British Government . . . for some voyage or voyages this direction is to be for charterers' account, and this charter-party with all its conditions to remain in force between the charterers and owners." The vessel was subsequently directed by the Shipping Controller during the currency of the charter to proceed on a voyage to Cuba, instead of on the voyage which the charterers had contemplated, and which, in the opinion of the Compensation Court, would have been a profitable voyage. The directed voyage resulted in a substantial loss. The majority of the Compensation Court came to the conclusion that compensation was recoverable for that loss, being of opinion that, on the authority of the *Elliott Steam Tug* case (*sup.*), it was to be treated as a direct loss by reason of interference with the charterers' business.

I am quite prepared to deal with this case on the footing that the charterers' business included the chartering of vessels to take the place of any of their regular line which for some cause or other were not available, and the working of such vessels when chartered, and I am quite prepared to adhere to my view expressed in the *Elliott* case that a loss of profit experienced by charterers as the result of such interference would be a direct loss within the meaning of sect. 2, sub-sect. 1 (*b*), provided it satisfied the other conditions of the statute.

In the present case three questions of law arise for decision upon the facts stated by the Compensation Court: First, was there any interference with the business of the charterers through the exercise or purported exercise during the War of any power under any enactment relating to the defence of the realm or any regulation made or purported to be made thereunder? Secondly, if there was such an interference, was it a "particular interference" within the meaning of part II. of the schedule? And thirdly, if there was an interference and it was particular, was the loss complained of due to the "enforcement of any order of general . . . application"? Upon the first of those questions it was contended for the respondent that there was no interference with the charterers' business because, before the regulations were put in force in reference to this particular ship, the charterers had, in consequence of the making of the regulations, decided to carry on their business so far as this particular ship was concerned in a certain way, that is to say, to treat any voyage which she might be directed to undertake as being undertaken on their own account; and it was said that the voyage when so undertaken was not the result of any interference with their business, but was brought about by their own voluntary act done in anticipation of the regulation being applied to this particular ship. Speaking for myself, I think there is great force in that argument, and if it were necessary to do so I should be prepared to accept it and act upon it. But I prefer to rest my judgment upon a different ground which I will deal with presently.

Upon the second question, whether, assuming that the direction was an interference, it was a "particular interference," I do not propose to say anything, because the true interpretation to be put on those words may have to be considered in some later case and I do not wish to say anything which may embarrass the tribunal in dealing with a claim which may depend upon facts very different from those in the present case. But I may say that in all cases falling within sect. 2, sub.-sect. 2 (*iii.*) (*b*), that is to say, cases in which there would be no legal right apart from the Act, special attention must be directed to the language of part II. of the schedule; for that is the part of the Act to which you must look to ascertain the principles upon which compensation is to be assessed in

such cases. Although a particular claimant may be *primâ facie* entitled to compensation under sect. 2, sub-sect. 1 (*b*), on the ground that he has sustained a direct loss by reason of interference with his business through the operation of a regulation made under an enactment for the defence of the realm, if you find, when you come to consider part II. of the schedule, that his claim is not covered by the language of that part his claim to compensation will fail. It provides that: "The compensation to be awarded shall be assessed by taking into account only the direct loss and damage suffered by the claimant by reason of direct and particular interference, but it indicates certain kinds of loss which are to be excluded from consideration, one of which is loss "arising through the enforcement of any order or regulation of general . . . application."

That brings to me the third question. Assuming that the loss here was a direct loss caused by a particular interference with the charterers' business, was it due to the enforcement of a regulation of general application? I think that it was, and it is on that conclusion that I prefer to found my judgment. Those words appear to me to cover this case completely, whether it be looked at from the point of view of the charterers' having anticipated its application by the manner in which they conducted their business, or from the point of view of its actual application to their particular case. In either view the loss was due to the enforcement of a regulation of general application. On that ground I think that the majority of the Compensation Court were wrong in awarding the compensation claimed, and the appeal should be allowed.

WARRINGTON, L.J.—I am of the same opinion, but I prefer to base my judgment on what I think is the proper inference to be drawn from the facts with reference to the question whether the claimants' loss was caused by interference with their business through the exercise by the Shipping Controller of the powers conferred upon him by the regulations complained of within the meaning of sect. 2, sub-sect. 1 (*b*). The facts, as found by the tribunal and which I unreservedly accept, are that the regular and ordinary business of the claimants consisted in trading to Egypt and the Mediterranean, and that the *Abelour* was expressly chartered for that business. If those facts stood alone it might well be that the claimants' loss was the result of an interference with that business. But then we are faced with another fact: that the parties to the *Abelour's* charter contemplated the possibility of her being directed by the British Government on a voyage different from that which she would undertake if she were employed on the charterers' ordinary business, and they accordingly made special provision in the charter-party that if she were so directed the voyage should be on the charterers' account; in other words, they determined in anticipation of such a direction that if she were so directed their business should be carried on in such a way as to include that voyage. If that be so it cannot be said that the direction when it took place involved an interference with business, for it became part of their business to comply with the direction, and take the chance of its turning out profitable or the reverse. It, in fact, turned out unprofitable and they sustained a loss, but they sustained it as a business incurred in the prosecution of their business in the particular way in which, in regard to this ship, they contemplated that it would be prosecuted. Therefore it seems to me that there was no direct interference with their business.

With regard to the schedule I should prefer to reserve my view as to what is meant by "damage due to or arising from the enforcement of any order or regulation of general or local application." I think it is unnecessary to express a definite opinion upon that, for it seems to me sufficient to found my decision upon the language of sect. 2, sub-sect. 1 (*b*). But I should like to say this, that if it is contended that the insertion of clause 32 in the charter-party was a consequence of the possibility of a direction being given under regs. 39BBB and 39DD, and that the loss of which the claimants complain results from the insertion of that clause, then I think that any interference that they might rely upon in that view of the case would not be a particular interference with their business, but the loss would be due to the apprehension of such interference by reason of the general powers vested in the Government, and that, it seems to me, would be excluded by the terms of part II. of the schedule. I agree that the appeal must be allowed.

SCRUTTON, L.J.—My own private opinion is still that which I expressed in the *Elliott Steam Tug* case (*sup.*), that compensation for Government action on requisitioning a ship is to be assessed to the owner according to the principles in part I. of the schedule, and that any loss to the charterer, who has only a contractual right in the ship, cannot be given in addition under part II. That, if I were at liberty to act on it, would be an answer to the charterers' claim here; but I am precluded from acting on it by the decision of the majority of this court in the *Elliott* case (*sup.*), and I must assume that a charterer is entitled to recover for a direct loss to his business under part II. But in this case I think that he does not show such a loss, and for two reasons: first, the loss is occasioned by the fact of his own contract binding him to carry out the direction on his own account; and, secondly, the loss results from the fact that it was not profitable to employ a substituted ship in the business because of the high rates charged for ships owing to the existence of a state of war. I agree that the appeal should be allowed.

Appeal allowed.

Solicitor for the Board of Trade, *Treasury Solicitor*.

Solicitors for the claimant, *Hill, Dickinson, and Co.*

Jan. 29, 30, *and Feb.* 13, 1923.
(Before BANKES, SCRUTTON, and ATKIN, L.JJ.)

THE COLORADO. (*a*)

APPEAL ADMIRALTY DIVISION.

Mortgage — Necessaries — Foreign mortgage duly executed and registered according to foreign law—Necessaries claims—Judgment in England for necessaries claimants and for mortgagees—Necessaries claims preferred to claims of the mortgagee by the law of the foreign place where the mortgage was made—Lex fori—*Effect of mortgage deed—Mortgagee having* jus in rem *in vessel by foreign law—Priorities.*

Where a foreign mortgagee obtains judgment in the Admiralty Court on a mortgage made according to foreign law which gives to the mortgagee such rights as would in English law rank on a question of priorities in the same class as a maritime lien, or the right created by an English mortgage, his claim will be preferred to that of necessaries men, notwithstanding that by the law of the place where the mortgage was made it would have been postponed to a necessaries claim. The effect of the mortgage deed is determined by the lex loci contractus *and the question of priorities by the* lex fori.

Judgment was obtained in the Admiralty Court against a French vessel by (i.) *a firm of ship repairers for necessaries;* (ii.) *mortgagees under a French deed of mortgage duly executed and registered according to the law of France. It appeared that by French law claims for necessaries take priority over the claims of mortgagees.*

Held (*affirming Hill, J.*), *that the rights of the mortgagee under French law, being equivalent to the rights of a holder of a maritime lien in English law,* i.e., *to follow the* res *into whosesoever hands it may come, the claims of the mortgagees were preferred to those of the necessaries claimants.*

APPEAL from an order of Hill, J. on a motion to determine priorities as between claimants against the proceeds of the French vessel *Colorado.*

The claimants were Hill's Dry Docks and Engineering Company Limited, who had obtained judgment, on the 14th Nov. 1921, for 5964*l.* 3*s.* 10*d.* for necessaries against the *Colorado*, and the Crédit Maritime Fluvial as mortgagees under a French deed of mortgage on the *Colorado* who had obtained, on the 8th May 1922, judgment on their mortgage, and pronouncing for the validity of the mortgage, against the *Colorado* for 40,797*l.*

By art. 7 of the mortgage deed, which was executed in France and duly registered according to French law, it was provided :

As a guarantee for the payment of all sums which might become due to the Crédit Maritime et Fluvial de Belgique by virtue of the present credit by way of principal, interest, &c., Mr. Dorange in the name of the Société Française d'Armement et d'Importation mortgages for the benefit of the Crédit Maritime et Fluvial de Belgique and which is accepted by Mr. Joseph Eugene Neve as such a ship described as follows : [There followed a description of the *Colorado*] on which ship the borrower agrees that there should be taken and renewed from time to time at the expense of the Société Française d'Armement et d'Importation all necessary entries of registration.

Art. 17 of the mortgage deed provided :

All costs duties and charges of the present document and those which may be due hereafter, together with all charges and costs of renewing the mortgage inscriptions if it is necessary, and the charges of all necessary documents concerning the lending company which might have to be furnished at all customs offices and elsewhere by reason of the registration which has to be taken on the mortgaged ship by virtue of these presents, or for all other causes, will be borne by the borrower, and the Crédit Maritime et Fluvial de Belgique is authorised to make such advances by means of realisation.

It appeared that the French law governing mortgages on ships is contained in arts. 190 and 191 of the Code de Commerce, as amended by the law of the 10th July 1885, and that if any question arose which could not be wholly determined by reference to these articles, reference was to be made to the Code Civil, the relevant articles of which are arts. 2114 and 2115, by which mortgages other than mortgages on ships are governed.

Art. 190 of the Code de Commerce provides :

Ships and other sea going vessels are movables. Nevertheless, they are subject to the debts of the seller and especially to those which by law are entitled to priority.

Art. 191 of the Code de Commerce, as amended by the law of the 10th July 1885, provides :—

The debts set out herein are entitled to priority and rank for payment in the following order :

1. Court fees and other expenses incurred in with reference to the sale and in the distribution of the price.
2. The fees for pilotage, towage, tonnage dues, &c.
3. The wages of the watchman and expenses of looking after the vessel from the time of her entry into port to the time of sale.
4. The rent of the warehouses in which are deposited the rigging and gear.
5. The costs of maintenance of the vessel, her rigging and gear from the time of her last voyage and her entry into port.
6. The wages and salary of the captain and other members of the crew employed on the last voyage.
7. Monies lent to the captain for the needs of the vessel during the last voyage and the return of the price of the cargo sold by him with the same object.
8. Monies due to the vendor, to the necessaries men and workmen employed in the building of the ship, if the ship has not yet made a voyage, and the monies due to the creditors for stores supplied, for work and labour done, for repairing, for victuals, for fitting out and equipment of the vessel before sailing, if the ship has already made a voyage.
9. (*Repealed through the operation of the Law of* 1885.)

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

10. The amount of insurance premiums of policies affected on the hull, keel, rigging and gear fitting and equipment of the vessel for the last voyage of the vessel.

11. Damages due to the cargo owners for failure to deliver the merchandise they have put on board, or for the making good of damage suffered by the said merchandise through the fault of the crew.

By the law of the 10th July 1885:

The creditors comprised in each of the sections of this article will take equally and *pari passu* in case of insufficiency of the price.

The mortgagees (*créanciers hypothécaires*) rank in the order of their registration after the above priority creditors.

Art. 2114 of the Code Civil provides :

Mortgage is a *jus in rem* (*droit réel*) over the immovables appropriated for the purpose of acquitting an obligation.

It is in its nature indivisible, and exists as a whole over all the immovables charged therewith and over each portion thereof, and allows such immovables, no matter through whose hands they pass.

Art. 2115 of the same provides :

Mortgage only exists where the law gives such a right, or when made according to the forms authorised by law.

Art. 2116 of the same provides :

A mortgage may either be a "law mortgage," "a judgment mortgage," or "a contract mortgage."

The following extracts are taken from the transcript of the examination of M. Duhamel, a member of the French Bar called by Messrs. Hill's Dry Docks and Engineering Company Limited to give evidence of French law :

Q. Under a French *hypothèque*, such as is effected by the instrument you have seen, what are the rights of the lender ? First of all can he enforce his rights with the assistance of a Court of Justice, that is to say, what are his rights as regards the vessel mortgaged ? A. To answer the last part of your question I should say No, because the rights of the French mortgagee do not rank as high as those of the English mortgagee. I understand that the English mortgagee has a right of possession.

Q. According to the English law the mortgagee of a ship has a right to take possession of the ship and to sell without the assistance of the court ? A. Exactly, that is what I am driving at. The French mortgagee cannot do so. He cannot take possession without the authority of the court.

Q. Can he sell without the authority of the Court ? A. No.

Q. If a French lender wishes to realise his security in the case of a trader to repay the amount due, what are his rights and remedies ?

HILL, J.—The mortgagee's rights are what ?

Q. What are his rights, do you know ? A. In order to ascertain the French mortgagee's rights, one must seek the inspiration of the Code Civil. If I may quote one or two translations of the Code Civil by Blackwood Wright, we shall know immediately what are the rights of the French mortgagee.

Q. It is art. 191 ? A. It is art. 2114 in the Code Civil. This is Blackwood Wright's translation. It explains what is a French mortgage and of course its explanation, which is good for what they call immovables in the Code Civil, is just as good for ships. Unfortunately there is some Latin in Blackwood Wright's translation. "Mortgagees' *jus in rem* over the immovables appropriated for the purpose of—"

Q. Is this a translation you are reading ? A. That is Blackwood Wright's translation. Putting it shortly, I should say a French mortgage is a *jus in rem*. Secondly it obtains priority from the day that creditor has had it registered according to the form required by the law. It travels with the *res* into whosesoever possession it may come.

Q. If the lender wishes to enforce his security what steps has he got to take ? A. As according to the French law, he has not got the property of the thing, he has got to apply to the court, in the case of a ship, for her arrest and consequently for her sale.

Q. He has to apply to the court ? A. He can arrest without the intervention of the court, but the sale must take place with the authority of the court.

Q. Tell me about that—how can he arrest ? A. That is done by means of an officer called the *huissier*, who is a minor official of the court.

Q. The arrest is done through an official of the court without judgment ? A. Yes, without judgment—that can be procured by a creditor or by a mortgagee.

Q. Then having arrested the ship through that official of the court, has he then to commence proceedings ? A. Yes, exactly.

Q. And after these proceedings, if he is successful in getting judgment, can he obtain the sale of the ship ? A. Quite so. And the money is distributed under the authority of the court amongst the various creditors and according to the priorities as recognised by French law.

Q. I will come to that in a moment or two, but apart from the seizing through an official of the court, and getting judgment in court for an order for the sale of the vessel and for the proceeds to be brought into court, is there anything else that he can resort to as a remedy against the ship ? A. I should think that is his only remedy.

Q. But supposing such steps have been taken, and a vessel has been seized and sold by order of the court, the question of priorities between the different claimants may arise—how is that regulated ? A. As regards ships that is regulated mainly by arts. 190 and 191 of the Code de Commerce combined with the law of the 10th July 1885, covering the *hypothèque maritime* or maritime mortgage.

Q. Very good, then let us look at the articles to which you refer. I think art. 191 is the one ?

[The witness explained that there was no process in French law corresponding to proceedings *in rem* in English law, the arrest by the *huissier* not being a part of the action.]

HILL, J.—How is the action instituted ? Say that the mortgagees or the necessaries men or somebody have by the hand of the *huissier* seized the ship. Is that what you call a *saisie conservatoire* ? A. It may be a *saisie conservatoire*. Yes, my Lord.

Balloch.—Then how is the action begun ? A. The French law says, at the suit of the most diligent of the creditors.

Q. How does he do it, is there something corresponding to a writ ? A. Yes, there is something corresponding to it—notification must be given, you see.

Q. Is that given personally to the debtor ? A. Yes, to all concerned.

Q. To all concerned ? A. All concerned.

Q. Can you serve it upon the ship and treat that as a service upon the owner of the ship ? A. After failing to find the debtor, yes, you can.

Q. Here you have a right *in rem* by serving the writ upon the ship and nailing a copy upon the mast.

That is a service upon the ship. Do you say you do the same in France? A. Yes.

Q. And do the proceedings go on at the peril of the owner if he does not choose to appear? A. Yes.

Q. Then what is the judgment given—is it a judgment given against him or against the ship? A. The judgment is given against the ship because the security of the holders of these *privilèges*—of the mortgagees—is the ship, and not the person of the owner.

Q. After judgment against the ship, what is the next step, if it is wished that the vessel should be sold—what is the next step taken? A. The court will, after having heard all concerned, order the sale—it has nothing else to do. That is the object of the proceedings and the sale takes place immediately.

Q. Who effects the sale—who is the ship sold by? A. The ship is sold by auction under the authority of the court.

Q. And then when she is sold what happens to the proceeds of the sale? A. The proceeds are divided by the court, according to the priorities.

Q. Who holds the proceeds from sale up to the time of division? A. They are held by some authority equivalent to the Marshal here.

Q. By some authority of the court? A. They are held by the court.

Hill, J.—The court sells, and the court divides the proceeds? A. That is right.

Balloch.—Then they are divided according to the priorities? A. Quite so.

Hill. J.—Now where is it that you get the law that the right of the mortgagee as regards the ship travels with the *res* into whosesoever possession it may come? A. My Lord, this is a general law concerning the *hypothèque.*

Hill, J.—Do you mean that is a deduction from the Civil Code? A. Yes. As you know the Code de Commerce was introduced in 1807, immediately after the Code Civil. It is well known, too, that the Code Civil was drawn up with extreme care, but not so the Code de Commerce. Of course the Code Civil still holds good because the changes in the civil law have been few in the course of the last century, while on the other hand commercial changes have been tremendous and the Code de Commerce has been amended time after time in order to suit the times. The general rule we are supposed to follow in France when the Code de Commerce is insufficient or obscure, is to refer to the Code Civil and the Code Civil by arts. 2114-15-16 explains the general meaning of *hypothèque.*

Hill, J.—We must look at those must not we? A. Yes, I am afraid I quoted them a little shortly before, but I can elaborate it if you like. The *hypothèque* is a *jus in rem* and it obtains priority as from the day when the creditor has had it registered according to the form required by law.

Hill, J.—Now I want it a little more particularly. A. It travels with the *res* into whosesoever possession it may come.

Hill, J.—That is what the code says? A. Quite so, my Lord. This is a most important provision, as the French mortgagee has no property in the mortgage. His only security is that his right travels with the *res.* Now those main dispositions are supplemented by the law of 1885 whose main provisions have just been read out to your Lordship. . . . Combining art. 191 with one or two of the provisions of the law of 1885, and with the main provision of the Code Civil, you arrive at a very clear understanding of what is a French mortgage and also a very clear understanding of what are the priorities and the way in which they are marshalled. The most important provision of art. 191 is that contained in the last paragraph which does not belong to the original article but has been taken out of the law of 1885 and incorporated into art. 191 in order to make that article complete, so that now art. 191 gives the list and rank of the French *privilèges*—let us call them liens, if you like, although it is not quite the same thing. This article in its last paragraph expressly provides that the mortgagees come in the order of their registration after the holders of preferential claims. These preferential claims are all set out here and from the whole of the article it is very clear that No. 8, which concerns the ship repairer, comes before the *créanciers hypothécaires* which are mentioned last.

Hill, J.—Does the privileged claim of a ship repairer, for instance, travel with the *res* into whosesoever possession it may come? A. Oh, yes, absolutely.

Q. Where do all the claims that are specified in art. 191 of the Code de Commerce Maritime travel? A. They travel with the *res*, but of course, not for ever.

Balloch.—What is the limit—does it depend on diligence? A. No, it is what is called the last trip.

Q. You mean there are periods of limitation? A. There are periods of limitation.

Q. And there are different periods of limitation for different claims? A. Yes, but most of them expire once the last trip has been established, and once the ship has started on a new one, otherwise there would be an enormous accumulation of *privilèges,* of course; the *créanciers hypothécaires,* or mortgagees, would never have a look in at all—their position is bad enough as it is. That is the reason why the law of 1885 has not been a success if France. When the legislature evolved that law its intention was to facilitate maritime credit in France. Unfortunately, it omitted to do away with these many liens or *privilèges* with a result that has been rather disastrous so far as the intention of the legislature of 1885 was concerned. Between 1885 and 1910—that is to say in the course of 25 years—the gross amount of moneys lent on the security of ships by means of mortgages has not exceeded 100,000,000 francs, that is to say, at the pre-war rate of exchange, 4,000,000*l.*, which, of course, is a ridiculous sum.

Messrs. Hill's Dry Docks and Engineering Company moved that their claim should be preferred to that of the mortgagees. The motion was argued before Hill, J. on the the 11th Dec. 1922.

Balloch for Messrs. Hill's Dry Docks and Engineering Company.

J. R. Ellis Cunliffe (*Dumas* with him) for the Credit Maritime et Fluvial de Belgique.

Hill, J. said:—This is a simple point. Having heard the evidence, the useful evidence, which has been called by Mr. Balloch, I feel myself compelled to come to the conclusion that in this case, and in this court, the Crédit Maritime et Fluvial de Belgique, who had obtained judgment for over 40,000*l.*, must have priority against the proceeds of the *res* over Messrs. Hill's Dry Docks and Engineering Company Limited, whose claim is for necessaries. Messrs. Hill had no possession, and could not rely on a possessory lien. Their only right is a right given them by statute to proceed *in rem* against the ship. Until the moment of the

arrest in their action they had no right in the ship at all. At that moment, and for some little time before, the ship was subject to a mortgage which was granted by the owner to the Crédit Maritime et Fluvial. There can be no question that as between competing creditors of the owner of the *res*, the priority of claims against the *res* is governed by the law of this court, the *lex fori*. Of course, no one can come into that competition at all unless he has either a property of some sort or other in the *res*—I include therein a maritime lien, which gives him a right to sue *in rem*—or by statute or otherwise has a right to sue *in rem*. If his right is merely a personal right against the owner then he is not entitled to come into that competition at all. Therefore, the court always has, as a preliminary step, to ascertain whether the claimant is one who has at least a right *in rem*. The next step is, as regard priorities, to ascertain whether he has something more than a mere right *in rem*—that is, a mere right to sue the ship. In this case, the mortgagees obtained judgment without objection in a suit *in rem*. It is said, however, that it was a mortgage upon a French ship (it is true, a registered mortgage on a French ship) and that the holder of a registered mortgage on a French ship acquires no sort of property in the ship, and though he may come in, he only has a right to proceed against the ship by legal process, similar to the right which by English law the necessaries man has.

Upon the evidence, I think that is not sound. The French mortgagee by French law has what has been described as a *jus in rem*, which apparently involves no right to take possession but only a right to proceed by legal process for the seizure and sale of the ship. But that is a right which travels with the *res* into whosesoever hands it may come. I was referred to the general law of mortgages contained in the Code Civil, sects. 2114 to 2116. I was told that in matters which are not specifically dealt with by the law relating to ships' mortgages, the French courts apply the principles of the Code Civil. I think I do not need to go to the Code Civil, because the matter is dealt with by sect. 17 of the law of the 10th July 1885, which is the law specially dealing with maritime mortgages, and that provides that a creditor having a registered mortgage upon a ship follows the ship into whosesoever hands it passes.

That right seems to me to be very much more than a mere right to proceed by legal process against the ship: it is a right which can be enforced whether the ship at the time of enforcement belongs to the debtor or belongs to someone else; it is in the nature of a right of property—a limited right of property it is true, but still a right of property. It seems to me, therefore, that at the moment when the necessaries men first acquired any interest in the ship, namely, at the moment of their arresting the ship, the mortgagee already had in that ship a right of property of the kind which I have described. In substance that right of property seems to me to be not very different from the right of property of the mortgagee under an English mortgage, as to which, by sect. 34 of the Merchant Shipping Act 1894, it is provided that "Except as far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be the owner thereof."

I therefore think that I am bound in this case to apply to that right the English law of priorities, and, applying it, I am bound to say that the holder of the French registered mortgage has priority over the necessaries men.

Messrs. Hill's Dry Docks Limited appealed.

R. A. Wright, K.C. and *Balloch* for the appellants.—The mortgagee in English law has no maritime lien. The court has, therefore, to determine the question of priorities as a matter of substantive law. The learned judge has assimilated the English and French mortgages, but they cannot be so assimilated because the English mortgagee by statute has a superior right to that of a necessaries claimant, because he has some property in the ship, whilst a French mortgagee enjoys no right of property in the ship. The article of the French code regulating the distribution of proceeds is not part of the *lex fori*, but is part of the *lex loci contractus*. Reference was made to:

Simpson v. *Fogo*, 2 L. T. Rep. 594; 1 John & H. 18;
The Tagus, 9 Asp. Mar. Law Cas. 371; 87 L. T. Rep. 598; (1903) P. 44;
The Manar, 89 L. T. Rep. 26, 218; (1903) P. 95;
Clark and others v. *Bowring and Co.*, 1908, S. C. 1168.

Dunlop, K.C and *Dumas* for the mortgagees.—The necessaries men brought their action under sect. 5 of the Admiralty Court Act 1861, against the ship as she is, *i.e.*, subject to maritime liens or mortgages existing upon her. The mortgagees were thus enabled to bring their action. The question of substantive rights has already been determined by the President when he pronounced for the validity of the mortgage and gave judgment against the proceeds of sale for the amount claimed. Once the English court has pronounced for the validity of the mortgage the priority in which the mortgagee's claim is entitled to rank must be determined in accordance with English law. The evidence shows that the French law does not substantially differ from the English law, and it shows that the mortgagee has either a *jus in rem* or a maritime lien.

The *lex fori* governs the distribution of the assets. Once the court has pronounced for the validity of the mortgage the *lex fori* begins to apply:

The Union, 3 L. T. Rep. 280; 1860, Lush. 128.

There is also authority that in an English court priorities must be determined in accordance

with English law in *The Andre Theodore* (10 Asp. Mar. Law. Cas. 94; 93 L. T. Rep. 184).

Balloch replied.—Any right which would give the mortgagee priority to the necessaries man must detract from the owner's property in the ship:

> *The Two Ellens*, 1 Asp. Mar. Law Cas. 40, 208; 26 L. T. Rep. 1; L. Rep. 3 A. & E. 345; L. Rep. 4 P. C. 161.

It is the essence of a maritime lien that it detracts from the property in the ship:

> *The Tervaete*, 128 L. T. Rep. 176; (1922) P. 259.

The evidence here shows that there was by French law no such detraction. The rights of the mortgagee are therefore no greater than the right *in rem* of the necessaries claimant.

Cur. adv. vult.

Feb. 12.—BANKES, L.J.—This is an appeal from an order of Hill, J. deciding the question as to priorities in respect of the payment out of the net proceeds of the sale of the steamship *Colorado* as between the Hill's Dry Docks and Engineering Company, claimants for necessaries, and a French bank claiming as mortgagees under a French deed of mortgage. The learned judge decided the question in favour of the French bank. There is, I think, no doubt as to the rule of law applicable to the case. The difficulty arises in the application of the law to the facts, and in giving the true interpretation to the French law.

The facts are as follows: Messrs. Hill had no possessory lien; they commenced an action to recover the amount due to them for repairs, and the vessel was arrested in their action. They recovered judgment on the 14th Nov. 1921. The French bank also commenced an action, but they did not recover judgment until May of the following year. Reliance has been placed upon the form of this judgment. It is said that because in their judgment the bank's security is described as a mortgage deed, it must, therefore, for all purposes of priority, be treated without further enquiry as an English mortgage, and given priority as such. I do not agree with this suggestion. The judgment is expressed to be without prejudice to other claims against the vessel, and all questions of priorities are reserved. This, in my opinion, leaves the question quite open as to what the rights created by the so-called mortgage deed are. This question must be determined according to French law, as the contract was made in France; though the question of priority must be decided by English law. The reason for this rule is, I think, well and clearly stated in a passage in the judgment of Marshall, C.J. in the case of *Harrison* v. *Sterry* (5 Cranch., at p. 298) where he says: "The law of the place where contract is made is, generally speaking, the law of the contract, *i.e.*, it is the law by which the contract is expounded. But the right of priority forms no part of the contract. It is extrinsic, and rather a personal privilege dependent on the law of the place where the property lies, and where the court sits which is to decide the case."

The arguments for the appellants in this court, as I understand it, raised one question which is not referred to in the judgment of the learned judge. It was to the effect that the right created by a French mortgage as the result of the amendment of art. 191 of the Code de Commerce by art. 34 of the law of the 10th July 1885, was a limited right only, and limited to a right to follow after the creditors given priority by art. 191, among whom are the creditors of the class of Messrs. Hill's Dry Docks Company. I do not think that this contention is well founded. Both article and amendment appear to me to deal with remedies as opposed to rights, and they cannot, therefore, be taken into consideration for the purpose of ascertaining what the rights of the appellants are under the document referred to in these proceedings as the French mortgage. If this is the correct view the only remaining question is whether the learned judge put the true interpretation upon the documents, and upon the evidence of the French lawyer who was called to state what by French law the rights of the appellants were under the mortgage deed.

I do not think that the evidence left the question entirely free from doubt, but, in my opinion, the learned judge was quite justified upon the evidence in taking the view he did, namely, that the right created by the mortgage deed was a higher right than the mere right to proceed *in rem*, and though not capable of exact description in terms applicable to well-recognised English rights, it yet had attributes which entitled it to rank on a question of priorities in the same class as maritime lien or the right created by an English mortgage. For these reasons the appeal, in my opinion, fails, and must be dismissed with costs.

SCRUTTON, L.J.—The French ship *Colorado* was arrested in a proceeding *in rem* in this country, and sold. The proceeds were claimed (1) by a Cardiff repairer claiming as necessaries man for repairs done to the ship at Cardiff; (2) by a foreign bank claiming under a French *hypothèque*. By the law of England the necessaries man, who had no possessory lien, had only a right to proceed against the ship *in rem* for a debt of her owner at the time of the arrest, and he would rank in priority after a claimant who had by the law of England a maritime lien, that is to say, a right to proceed against the ship *in rem* in the hands of subsequent owners for a debt incurred by a previous owner. Still more after an English mortgagee who had a right of property in the ship: (See the case of *The Two Ellens* (1 Asp. Mar. Law Cas. 40, 208; 26 L. T. Rep. 1; L. Rep. 3 A. & E. 345; L. Rep. 4 P.C. 161). But in this case the necessaries man contended that by the law of France the *hypothèque* was postponed to the claim of a necessaries man, and should therefore, also be postponed by the law of England.

It is clear law in England, as stated by Lord Brougham in the case of *Don* v. *Lapmann* (5 Cl. & Fin. 1) that " whatever relates to the remedy to be enforced must be determined by the *lex fori*, the law of the country to the tribunals of which appeal is made." The nature of the right may have to be determined by some other law, but the nature of the remedy which enforces the right is a matter for the law of the tribunal which is asked to enforce the right. Thus in the case of *The Milford* (1858, Swa. 362) where an American master of an American ship claimed in England a lien on the freight for his wages, Dr. Lushington declined to consider whether by United States law he had no such lien, but applied the *lex fori*, saying: " The proceeding originated in this country; it is a question of remedy, not of contract at all." This was followed by Phillimore, J. in the case of *The Tagus* (9 Asp. Mar. Law Cas. 371; 87 L. T. Rep. 598; (1903) P. 44) where the learned judge excluded the law of the flag which gave the master a lien only for wages for his last voyage, and applied the *lex fori*, which gave him an unlimited lien. Hamilton, J. in the case of the *American Security Company* v. *Wrightson* (103 L. T. Rep. 663) applied the same principle when he excluded evidence of the remedies given on an American contract by American law, saying that " as contribution between co-insurers depends not on contract, but on equity, the law governing the matter must be the law of the tribunal to which the party who is required to do equity is subject," and not the law of the domicile or the law of the contract. It is clear that priorities of creditors in bankruptcy, or intestacy, are dealt with by the *lex fori*, and not by the law of the countries where the debts are contracted, except so far as such laws are necessary to establish that there are debts. The same result follows in the case where an English court divides amongst creditors the proceeds of a ship arrested and sold in England.

Now the English court has a claim from an English necessaries man who has no possessory lien, but merely in England a right to arrest the ship *in rem* to satisfy its claim against the owner of the ship. It has also a claim by a person who has a " hypothec," and may legitimately consult the foreign law as to what a *hypothèque* is. It is proved to be, not a right of property in the ship, but a right to arrest the ship in the hands of subsequent owners to satisfy a claim against a previous owner. But such a right is the same as a martime lien as described by Dr. Lushington in the case of *The Two Ellens* (*sup.*); by Gorell Barnes, J. (as he then was) in *The Ripon City* (8 Asp. Mar. Law Cas. 304; 77 L. T. Rep. 98; (1897) P. 226); and by this court in the case of *The Tervaete* (16 Asp. Mar. Law Cas. 48; 128 L. T. Rep. 176; (1922) P. 259). And the English courts administering their own law would give a claim secured by a maritime lien priority over the claim of a necessaries man, who cannot arrest the ship against a subsequent owner.

The fallacy of the appellants' argument appears to be when they argue that because the French courts would give a French necessaries man, or a necessaries man suing in the courts of France, priority over the claimant under a " hypothec " therefore an English court should give an English necessaries man similar priority. The answer is that their client is not asking for French remedies, but English remedies; and the English law postpones him to a person who has what is equivalent to a maritime lien.

For these reasons I think the judge below came to a right conclusion in postponing the English necessaries man to the *hypothécaire*, and that the appeal should be dismissed.

ATKIN, L.J.—I have found considerable difficulty in this case, but with some hesitation have come to the conclusion that the appeal should be dismissed. The relevant principles of law are not in dispute; their application is contested. Where parties are litigating in this country in respect of rights created elsewhere, to ascertain their rights we may look in appropriate cases to the law of the country where the contract was made, or the thing over which rights are claimed was situate, or the person claiming the right is domiciled, but to ascertain the remedies which the court will give to enforce the rights we have to look to the law of this country, the *lex fori*.

When an action *in rem* has been brought in these courts in respect of a ship, the court by its decree controls the money which represents the *res* as the result of sale or bail, and directs payment to be made to such claimants as prove their claim in the order of priority directed by the court. To give the necessary directions the court may have to consider foreign law in order to ascertain whether the claimant has any and what right in respect of the *res* at all. For instance, the claimant may claim a right of property in the ship granted to him abroad. The court must examine the *lex loci contractus*—I assume for argument's sake this to be relevant law—to see whether any right of property is so given, and the nature of it. A claimant claims as an English necessaries man; his right is only to have the court award him a particular remedy. He has no right to the ship or the proceeds independent of the remedy. A claimant claims as possessing a maritime lien. This might appear to be an intermediate case as a maritime lien does give a right against the ship, which continues notwithstanding a change of ownership. Nevertheless, in determining whether there exists a maritime lien, the court will apply the *lex fori*, and will give effect to the lien as it exists by English law: (see the case of *The Milford, sup.*; *The Tagus, sup.*).

I think it follows that *primâ facie* when the court is ordering that payment should be made to claimants in particular order it is merely awarding a remedy, and therefore will apply the *lex fori*. But as I have said it must first ascertain whether there is any claim at all. Now when a claimant comes forward alleging that he holds a right given to him by agreement, which is something other than a maritime

lien, he must prove what that right is by the law of the place of the contract. This raises the difficulty in this case. The appellants say that the respondents' right is to be determined by French law, and by that law it is not a right of property, but a right to have the ship seized and sold by judicial authority, and to be paid the proceeds—not absolutely, but after payment has been made to certain classes of creditors, including necessaries men. They say that such a right differs essentially from a right such as is given by an English mortgage; and admitting that the *lex fori* determines their own right, and would postpone it to a true mortgage, they say that the claimants make no title at all to anything except to payment in the order prescribed by French law.

I think that the argument is attractive. It seems a narrow distinction to say that the right to be paid out of the proceeds is to be determined by the *lex loci*, but the right to be paid out of the proceeds in a prescribed succession by *lex fori*; and I hesitate to say what should be the result had the written document on the face of it contained an express limitation of a right to be paid only after a certain named classes of creditors.

I think myself that the question is one of fact, viz., the nature of a "*hypothèque*" on a ship as created by French law. One has to deal with such questions remembering the presumption that unless there is proof to the contrary foreign law will be presumed to be the same as English. I do not think that the French law on the subject was very clearly elicited, and I am not prepared to differ from the finding of the learned judge who, I think, came to the conclusion that the only right given was the right to have the ship seized, and the proceeds applied to payment of the *hypothèque*, notwithstanding a change of ownership—a right closely resembling a maritime lien—and that the right of priorities was a provision as to the remedy that would be given by French law, and therefore would not be followed in an English court.

It is plain that the appellant can only succeed by showing that the respondent has no right to which the English court could award a prior remedy, and on the judge's finding he fails. Whether on some other occasion some other view of the French law could be maintained it is unnecessary to consider, In the present case I agree that the appeal should be dismissed.

Solicitors for the appellants, *Ingledew, Sons, and Brown*, agents for *Ingledew* and *Sons*, Cardiff,

Solicitors for the respondents, *Denton, Hall, and Burgin.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

July 28, *Nov.* 14, *and Dec.* 19, 1922.

(Before HILL, J. and TRINITY MASTERS.)

THE MANORBIER CASTLE. (a)

Collision — Wreck — Wreck-marking vessel — Wreck-marking lights negligently displayed— Liability of wreck-marking authority—Negligence of the colliding vessel—Contributory negligence — Apportionment of blame — Whether wreck and wreck-marking vessel were "vessels" for purpose of apportioning blame under Maritime Conventions Act 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *s.* 1.

The plaintiffs' claim was for damage sustained by their steamer in collision with a submerged wreck at night in the entrance channel to the Grimsby docks. At the time of the collision the wreck, which had been abandoned to underwriters, was marked by a wreck-marking vessel. The lights exhibited by this vessel were placed and maintained by the wreck-marking authority acting under its statutory powers, but in certain other directions the owners of the wreck continued to maintain a measure of control over her. The owners of the wreck counterclaimed for the damage sustained by the wreck. It was held that there was negligence on the part of those in charge of the steamer in failing to keep clear of the wreck, and in the wreck-marking authority for exhibiting lights in a wrong position upon the wreck-marking vessel.

Sect. 1 *of the Maritime Conventions Act* 1911 *provides : "Where by the fault of two or more vessels damage or loss is caused to one or more of those vessels . . . the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault."*

Held, that the only negligence of the wreck-marking authority being the showing by their servants on board the wreck-marking vessel of lights in a wrong position, such negligence was not a cause of the collision. The collision was thus solely caused by the fault of the plaintiffs' vessel.

Dicta by Hill, J. to the effect that both the wreck-marking vessel and the wreck were vessels within the meaning of sect. 1 *of the Maritime Conventions Act* 1911 *for the purpose of apportioning blame for the negligence of their owners, and therefore that if the negligence of the wreck-marking authority had been a contributory cause of the collision, the rule for apportioning blame under the Maritime Conventions Act* 1911, *and not the common law rule of contributory negligence, would have been applicable as between the plaintiffs and the wreck-marking authority. The owners of the wreck, having surrendered control of the wreck for the purposes of marking, were in the event entitled to recover on their counterclaim against the plaintiffs.*

(a) Reported by GEOFFREY HUTCHINSON, ESQ., Barrister-at-Law.

ACTION of damage.

The plaintiffs were the owners of the steamship *Tinto*, her cargo and freight, and the defendants were Charles Dobson, the owner of the steam trawler *Manorbier Castle*, the Humber Conservancy Board, who were the wreck-marking authority for the entrance channel to the Grimsby docks, and the Lincolnshire Steam Trawler Mutual Insurance Company Limited, to whom the *Manorbier Castle* was abandoned by her owner.

The following statement of facts is taken from the judgment of Hill, J. delivered on the 28th July 1922:

"On the 5th Feb. 1920 the trawler *Manorbier Castle* sank in the entrance channel to Grimsby docks, and the wreck was still lying there on the 28th Feb. 1920. It was partly exposed at low water, but at high water only the funnel was exposed. It was marked by a vessel, the *Pioneer*, as a wreck-marking vessel. At about eleven minutes to five on the 28th Feb. 1920 the plaintiffs' steamship *Tinto*, of 757 tons gross, 200ft. long, inward bound with cargo from Norway, and in charge of a pilot, while proceeding in from the anchorage ground to the docks at Grimsby, ran on the wreck. She was much damaged and subsequently sank, and her cargo was destroyed or damaged. On the 4th March 1920 the plaintiffs issued their writ against Mr. Dobson, as owner of the *Manorbier Castle*. On the 24th June 1920 they amended the writ by joining as defendants the Humber Conservancy Board—the conservancy authority for the locality—and also the Lincolnshire Steam Trawler Mutual Insurance Company Limited, which, by accepting abandonment, had become owner of the wreck. The *Pioneer* was hired by the insurance company and they had two men on board. The Humber Conservancy Board selected the position of the *Pioneer* for marking the wreck and supplied the necessary apparatus —a yard, and balls, and lights; and had a man on board whose duty it was to see that the proper lights were exhibited, and to keep a log. The action as against Mr. Dobson was discontinued. As against the other defendants the plaintiffs alleged: (1) That the *Pioneer* exhibited misleading lights, with the result that the *Tinto* attempted to pass to the northward of the *Pioneer* and close to the wreck; (2) that as the *Tinto* approached, those on board the *Pioneer* hailed the *Tinto* to keep more to the northward, and the *Tinto*, which otherwise would have passed all clear, obeyed by hard-a-porting and ran on the wreck. The defendants denied the alleged negligence and traversed the alleged duties, and the insurance company counterclaimed for damage to the wreck. It was not disputed by the Humber Conservancy Board that they were under a duty adequately to mark the wreck. The duty of the insurance company was disputed."

The learned judge found that the wreck-marking lights exhibited by the servants of the Humber Conservancy on board the *Pioneer* did not sufficiently clearly indicate upon which side of the wreck approaching vessels ought to pass, owing partly to the character of the yard-arm used on board the *Pioneer* for exhibiting the lights. There was, therefore, a want of reasonable care by the Humber Conservancy in exhibiting the lights. He found further that the navigation of the *Tinto* was negligent, because the pilot of the *Tinto* attempted to pass too close to the wreck, the position of which was known to him, and should have given the wreck a wider berth if the lights exhibited by the *Pioneer* did not sufficiently clearly indicate to his mind which side of the wreck he was required to pass. There was, therefore, a want of reasonable care by the plaintiffs in the navigation of the *Tinto*.

Stephens, K.C., *Dunlop*, K.C., and *Dumas* for the plaintiffs.—Two questions remain for argument on the findings: (1) Is the Admiralty rule of division of loss under the Maritime Conventions Act 1911 applicable to this case, or is the common law rule of contributory negligence? (2) Is the insurance company entitled to recover for the damage to the wreck? It is submitted that the Admiralty rule applies. The *Pioneer* was a vessel within the meaning of sect. 742 of the Merchant Shipping Act 1894: (see *The Harlow* (15 Asp. Mar. Law Cas. 498; 126 L. T. Rep. 763; (1922) P. 175). There was fault in the *Pioneer* because she showed wrong lights. The *Tinto* was also in fault, and there was, therefore, damage caused by the fault of two vessels. If damage is sustained by one of two vessels in fault, the Maritime Conventions Act is applicable:

The Cairnbahn, 12 Asp. Mar. Law Cas. 455; 110 L. T. Rep. 230; (1914) P. 25.

The *Pioneer* and the *Tinto* being both in fault, and the *Tinto* being damaged, those responsible for the fault of the *Pioneer* are liable:

The Umona, 12 Asp. Mar. Law Cas. 527; 111 L. T. Rep. 415; (1914) P. 141.

The owners of the *Manorbier Castle*, or those who claim under them, are also liable, because they had not surrendered complete control of the wreck, and there was, therefore, a duty in them to have the wreck properly lighted:

The Bearn, 10 Asp. Mar. Law Cas. 208; 94 L. T. Rep. 265; (1906) P. 48.

The owners had not necessarily abandoned all control because the conservancy were lighting the wreck:

The Snark, 9 Asp. Mar. Law Cas. 50; 82 L. T. Rep. 42; (1900) P. 105.

[*The Utopia*, 7 Asp. Mar. Law Cas. 408; 70 L. T. Rep. 47; (1893) A. C. 293, is distinguishable.] The lighting was a joint operation between the Conservancy and the insurance company. All three vessels were to blame.

Balloch (*Batcson*, K.C. with him, for the conservancy board.—The Maritime Conventions Act 1911 has no application to negligence in the performance of the duty undertaken by the conservancy under sect. 530 of the Merchant Shipping Act 1894. The

only fault was that of showing the lights in a wrong position. Moreover, the *Pioneer* was not the property of the conservancy, but was hired by the insurance company. The negligence found against the conservancy was the negligence of their servants on board the *Pioneer* whose functions were confined to displaying the lights and were unconnected with the management of the ship. The *Pioneer* was not used in navigation because she remained moored and stationary: [See on this point *The Upcerne* (12 Asp. Mar. Law Cas. 281; 107 L. T. Rep. 860; (1912) P. 160).] The Maritime Conventions Act is not intended to have application to negligence of the character found against the conservancy: See the terms of the convention printed in Temperley's Merchant Shipping Acts, at p. 694. [Reference was also made to *The Blowboat*, (1912) P. 217.]

Laing, K.C. and *G. P. Langton* for the insurance company.—The insurance company are in no way to blame. They are entitled to recover against either of the other parties. They parted with the control of the wreck for the purposes of lighting it, and therefore, as regards those purposes they are not liable for the negligent acts of their servants, assuming that those who were negligent be held to have been their servants:

> *Donovan* v. *Lang, Wharton, and Down Construction Company*, 68 L. T. Rep. 512; (1893) 1 Q. B. 629.

The case is governed by *The Utopia* (*sup.*).

Stephens, K.C. replied.

Cur. adv. vult.

Dec. 19, 1922.—HILL, J.—In this case, on the 28th July, I gave judgment finding certain facts, and the case stood over for certain argument. I have now had the advantage of further argument. I found that there was negligence in the marking of the wreck and that there was negligence in the navigation of the *Tinto*.

The first question to be now decided is whether the collision of the *Tinto* with the wreck was caused by both these negligences or only by the negligence in the navigation of the *Tinto*.

The second question argued arises only upon the assumption that the collision was caused by both negligences and is a question whether the case is governed by the Maritime Conventions Act or by the common law rule applicable to negligence and contributory negligence. I have found that the lighting was improper because the lights did not clearly indicate the side on which vessels could safely pass. But I have found that in the circumstances the pilot of the *Tinto* ought not to have attempted to pass to the northward; he should have given the known and ambiguous danger a wide berth, as he could easily have done, or checked the way until he made sure. I am not here dealing with two ships both under way, such as are most of the cases referred to in *The Volute* (15 Asp. Mar. Law Cas. 530; 126 L. T. Rep. 425; (1922) 1 A. C. 129) and *The Volute* itself; I am dealing with a case in which one ship is stationary and the other moving—a case more like the old case of *Davies* v. *Mann* (10 M. & W. 546). If the pilot, when presented with the problem created by the improper lights, ought to have given them a wide berth or checked his way until he made sure, and ought not to have attempted to pass to the northward, then the cause of the collision was his failure to so act and, notwithstanding the impropriety of the lights, there would have been no collision if the pilot had acted with reasonable care. It was contended on the argument that there was a fresh act of negligence of those responsible for the lights because they could have altered the lights or given other warning as the *Tinto* approached. That is not the case made in cross-examination or in the pleadings. The charges in the statement of claim were: (1) Failed to keep a good look-out on board the wreck-marking vessel; (2) caused or permitted the lights of the wreck-marking vessel to be exhibited in such a manner as to invite vessels to pass her on that side on which the wreck was lying and failed to exhibit the same in such a way that the two lights should be on the side of the vessel on which other traffic might safely pass; (3) Gave improper and misleading directions to those on board the *Tinto*; (4) failed to give proper and timely directions to those on board the *Tinto*.

The only allegation proved was the second allegation: "Causing or permitting the lights of the wreck-marking vessel to be exhibited in such a way as to invite vessels to pass her on that side," and so forth. So much for the pleadings.

Then as to the evidence on the question whether there was a fresh and substantive act of negligence on the part of those in charge of the lights. The men on the *Pioneer*—the wreck-marking vessel—saw the *Tinto* at about the distance of a quarter of a mile. The *Tinto* was approaching, according to the evidence, at four to five knots, and she had a tide of a knot to a knot and a half with her, so that she would cover that quarter of a mile in something between two and three minutes. To alter the lights in any effective way they would have had to be hauled down from one yard-arm and hauled up on the other, and the yard-arm would have had to be re-braced the opposite way. Even so, the yard-arm, being incapable of being braced more than thirty degrees, that would not have been a very clear indication, but it might have been of some assistance. But there was no suggestion in cross-examination that there was then time to alter the lights, or that it was possible to give them warning. Hailing there was, but it was ineffective, and I am unable to find that there was time enough to alter the lights. The negligence, and the only negligence, was in having them in the wrong position. That was negligence continuing throughout, but there was no separate act of negligence while the *Tinto* was approaching. I therefore hold that the cause of the collision was the neglect of the pilot of the *Tinto* to pass safely, and therefore the plaintiffs'

claim fails. The only other question is on the counterclaim. On that the insurance company claimed judgment against the plaintiffs. They would also, in my opinion, have been equally entitled to judgment against the plaintiffs if the cause of the collision had been both negligences, because the duty of lighting the wreck did not rest upon them, and the negligence in lighting the wreck was not the negligence of their servants. They had legitimately transferred to the Humber Conservancy Board the control of the wreck in respect of lighting. The facts of the case are within *The Utopia* (7 Asp. Mar. Law Cas. 408; 70 L. T. Rep. 47; (1893) A. C. 492) and not *The Snark* (9 Asp. Mar. Law Cas. 50; 82 L. T. Rep. 42; (1900) P. 105). The only other matter is this. As this case may go further, it is as well that I should state this. The question as to the Maritime Conventions Act does not now, of course, arise. As I expressed last July an off-hand opinion on the matter, it is right that I should say that I was then—not having considered the matter—inclined to think that neither the *Manorbier Castle* nor the *Pioneer* was a vessel within the meaning of the Act. After hearing the argument I should find, if I had to do it, that each was a vessel, and nothing I said in July must be taken as an expression of opinion that the Maritime Conventions Act would not apply if both negligences had caused the collision. But, of course, even if it did apply, that would not affect the right of the insurance company on their counterclaim. All it would affect would be the rights as between the Humber Conservancy Board and the owners of the *Tinto*.

Solicitors for the plaintiffs, *Botterell* and *Roche*, for *Hearfield* and *Lambert*, Hull.

Solicitors for the defendants, the Humber Conservancy Board, *Pritchard* and *Sons*, for *Andrew W. Jackson* and *Co.*, Hull.

Solicitors for the defendants, the Lincolnshire Steam Trawler Mutual Insurance Company Limited, *William A. Crump* and *Son*.

Oct. 26, 27, 30, 31, *Dec.* 20, 1922, *and Jan.* 17, 1923.

(Before HILL, J.)

THE SOCRATES AND THE CHAMPION (*a*)

Collision — Tug and tow — Collision between tug and third vessel—Liability of tug when acting under orders of the tow—Three vessels to blame—Division of loss—Apportionment of half blame to tug and tow jointly and severally and half to the third vessel—Maritime Conventions Act 1911 (1 *&* 2 *Geo.* 5, *c.* 57, *s.* 1).

The plaintiffs' vessel bound up river came into collision in foggy weather with a tug owned by one of the defendants towing a steamship owned by the other defendants out of Tilbury Dock. It was held on the facts that the plaintiffs' vessel was one half to blame for excessive speed and that the tug and tow were one half to blame for leaving dock in the prevailing state of the weather.

Held, (1) *that the tug was not excused from liability because she was obliged to obey the orders of the tow to start towing;* (2) *that all three vessels were to blame;* (3) *that the moiety of blame for which the tug and tow were held liable ought not to be apportioned between them.*

ACTION of damage by collision.

The plaintiffs were the owners of the Norwegian steamship *San José*, and claimed for damage sustained by their vessel in Gravesend Reach on the 27th Jan. 1922. The weather at the time of the collision was alleged to be a fog of varying density, the wind easterly, a light breeze, and the tide the first hour's flood of the force of about two or three knots. The *San José* was bound up river, and in these circumstances she came into collision with the tug *Champion*, belonging to some of the defendants, which was towing the steamship *Socrates*, belonging to other defendants, out of Tilbury Dock, sinking the *Champion* and damaging herself. The *Socrates* was not in collision.

On the 20th Dec. HILL, J. held the *San José* to blame for excessive speed and said:

As regards the *Socrates* and the *Champion* it is proved that the thick fog which they encountered as they were crossing the basin was not a sudden and unsuspected fog. It had been intermittently foggy more or less all night. The *Socrates* and her tug started from the lock in a lighter interval, when, as they said they could see across the river, but when, according to the lock-master, one could see to about mid-river. According to the deposition of the master he proceeded from Tilbury Dock about 8 a.m., the weather being thick. The wind was light, easterly, up river. In such circumstances I am advised that it was improper for a large ship like the *Socrates* and her single tug to leave the lock without taking the utmost precautions. They knew that the tide was flood, and that coming out head first they would be across any traffic until the *Socrates* got turned down stream. I am not, on the evidence, finding that it was in itself an improper way to come out, but it was a matter which called for extra care. They knew that though for the time being the fog was less dense it had been increasing and decreasing in density, and might at any moment increase. They knew that they had only one tug ahead—no tug astern. They knew that once they had left the lock they had no means of holding back in the basin, if, while they were crossing it, the weather became so foggy that it was not safe to be under way. They chose to come out with only a single tug and without taking any steps to inquire what the weather was like down the river to windward. I hold that it was negligence to start in the circumstances. That is the only neglect

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

I find. I do not find it was negligent in the *Champion* not to slip earlier than she did. It was contended that the negligence did not contribute to the collision. I am unable to accept that argument. The negligence was continuing in its effect right up to the collision. It is not as if the *San José* had all the time seen what the *Socrates* and the *Champion* were doing.

Clearly the owners of the *Socrates* are liable for that negligence whether the start was by the direction of the master or the pilot. Are the owners of the *Champion* responsible? It was argued that they were not responsible because the tug was bound to obey the orders received from the *Socrates* and did obey them, and that there was no negligence for which the owners of the *Champion* were responsible. If that be right, the owners of the *Champion* can recover the whole of their damage from the owners of the *San José* leaving the *San José* to recover one half from the owners of the *Socrates.* If it is wrong, the owners of the *Champion* can recover only half against the owners of the *San José* leaving the *San José* to recover one-half from the owners of the *Socrates.* If it is wrong the owners of the *Champion* can recover only half against the owners of the *San José*—I say half because I see no reason to apportion the blame otherwise. The *Champion* was co-operating in an operation which was negligent as regards the *San José* or any other ships in the river. The master was the servant of the owners of the *Champion.* He was, it is true, under a contractual obligation to obey the orders received from the *Socrates.* He may have been under a legal obligation to obey the orders of the pilot of the *Socrates* if, as I suppose, pilotage was compulsory; but in view of sect. 15 of the Pilotage Act 1913, that will not alter the position. If he co-operates in an operation which is negligent as regards the rest of the world, is it any answer to say "I did it because I had voluntarily put myself under the orders of another person"? I think not. *Qua* the *San José*, the *Champion* cannot be regarded as an innocent ship.

The result is that I pronounce the collision to be due to the fault of the *San José* and of the *Socrates* and *Champion,* and I apportion half the blame to the *San José* and half the blame to the *Socrates* and the *Champion.*

The case stood over for argument.

Jan. 17, 1923.—*Batten,* K.C. and *Dumas* for the plaintiffs.—All three vessels are to blame equally. Blame should be apportioned between them each bearing one-third.

Stephens, K.C. and *E. Aylmer Digby* for the owners of the *Socrates.*—The liability of the defendants is not joint and several. As between the *Socrates* and the *Champion* blame should be apportioned under sect. 1 of the Maritime Conventions Act 1911.

Balloch, for the owners of the *Champion,* adopted the same argument.

HILL, J.—I have already apportioned the damages, and I shall not make any further apportionment. The defendants' liability is joint and several, but of course the owners of the *San José* must not recover the moiety of their damage twice over.

The decree will pronounce that the damages arising from the collision ought to be borne equally by the owners of the *San José*, on the one hand, and the owners of the *Socrates* and the *Champion* on the other, and will condemn the owners of the *Socrates* and the owners of the *Champion* jointly and severally in a moiety of the plaintiffs' claim for the damage to the *San José*, and will also condemn the owners of the *San José* in a moiety of the counter-claim of the owners of the *Champion.*

Solicitors: for the plaintiffs, *Thomas Cooper* and *Co.*; for the owners of the *Socrates, Stokes* and *Stokes*, for *Cameron, MacIver,* and *Davie,* Liverpool; for the owners of the *Champion, Botterell* and *Roche.*

Wednesday, Jan. 17, 1923.

(Before HILL, J.)

THE CYCLOPS. (*a*)

Pilotage charges — Berthing — Vessel coming to an anchor between leaving dock and berthing — Charge for transporting from the dock to the anchorage in addition to berthing charge—Liverpool Pilotage Order 1920—*Pilotage Act* 1913 (2 *&* 3 *Geo.* 5, *c.* 31), *and pilotage by-laws made thereunder.*

The plaintiffs, the Mersey Docks and Harbour Board, who are the pilotage authority for the Liverpool pilotage district, claimed to recover certain pilotage charges from the defendants, the owners of the steamship C. *In Nov.* 1921 *the* C. *was due to leave Liverpool, and a week before her sailing date, when she was lying in the Alfred Dock at Liverpool, her owners arranged with the plaintiffs for her to berth at the Princes Landing Stage after leaving the Alfred Dock for the purpose of embarking passengers. It was impossible to arrange for the* C. *to berth at a time when she could come direct from the Alfred Dock to the Princes Stage and the defendants agreed to a time which would necessitate the* C. *coming to anchor in the river between leaving dock and berthing at the Princes Stage. The* C. *in fact left dock at* 10.30 *a.m. on the flood tide, and remained at anchor in the river until she berthed at the Princes Stage at* 2.30 *p.m.*

The plaintiffs were authorised to make pilotage charges by their by-laws made under the Pilotage Act 1913 (2 *&* 3 *Geo.* 5, *c.* 31) *and the Liverpool Pilotage Order* 1920 *at the rates set out in the schedule to the said by-laws. Part* 4 *of the schedule fixes rates for* (a) *berthing a vessel at any stage, wharf, or pier, and for* (b) *conducting a vessel each time a vessel is transported,* i.e., *navigated or moored anywhere within certain*

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister at Law.

limits in the river Mersey provided that the operations of berthing a vessel for which a charge is made under part 4 (a), or for navigating or manœuvring an outward bound vessel to an anchorage to wait for the tide, should not be deemed a transporting for the purpose of making a charge.

The plaintiffs made pilotage charges in respect of the movements of the C. for outward pilotage, berthing at the stage, attendance in excess of the first six hours (which were free under the by-law) including the period when the C. was lying in the river, and transporting from the dock to the place where the C. anchored. The defendants refused to pay the last item on the ground that the service was included under part 4 (a) of the schedule to the by-laws in the operation of berthing, or that the C. was an outward bound vessel navigated or manœuvred to an anchorage to wait for the tide.

Held, the plaintiffs were entitled to make the charge. The defendants' vessel did not come to an anchor to wait for the tide, nor was the operation of moving from dock to the anchorage part of the operation of berthing.

ACTION by the Mersey Docks and Harbour Board, the pilotage authority for the Liverpool pilotage district, to recover pilotage charges amounting to 4*l.* 2*s.* 9*d.* from the defendants, the Ocean Steamship Company for pilotage services rendered to their steamship *Cyclops*.

By sects. 4 and 5 of the Liverpool Pilotage Order 1920 it is provided that :

4 (i.) Pilotage for a vessel outward bound from the Port of Liverpool . . . shall be compulsory as soon as the vessel has been brought to the outer sill of the river entrance of a dock or lock within or leading into the port and shall continue to be compulsory as far as, but not seaward of the following imaginary lines, viz. : . . . and a vessel shall be deemed to be navigating for the purposes of leaving the port until she has passed seaward of one or other of the said imaginary lines as the case may be and no further. (ii.) Where a vessel outward bound from the port of Liverpool calls at any stage in the river Mersey to the northward of the imaginary straight line drawn from Dingle Point on the Lancashire shore of the Mersey to the New Ferry Slip on the Cheshire shore or anchors or moors in the river to the northward of such line for the purpose of taking on board any passengers, crew, animals, cargo, coal, water, or stores, or while waiting for tide or weather, or otherwise for any purpose incidental to the voyage, the obligation of the master to employ a pilot for the outward voyage shall attach from the time when the vessel first proceeds to any such anchorage or mooring, and shall continue while she is lying thereat and the duties of the pilot shall extend to and include the taking her to and from and attending her at every such stage, anchorage or mooring.

5. When a vessel is neither inward nor outward bound to or from the river Mersey the master shall be obliged to employ a pilot (*a*) for her navigation or movement ; (*b*) to attend her while lying at any anchorage or mooring anywhere in the river Mersey to the northward of the imaginary straight line drawn from Dingle Point as aforesaid, and the duties of a pilot shall extend to and include the taking charge of such vessel to navigate or move her and to attend her while lying at any anchorage or mooring as aforesaid. . . .

By-law III. of the by-laws relating to pilotage made by the plaintiffs under the provisions of the Pilotage Act 1913 (2 & 3 Geo. 5, c. 31), and of the Liverpool Pilotage Order 1920 provides :

The pilotage rates chargeable in respect of pilotage services of a licensed pilot shall be those set out in the schedule hereto. . . .

By the schedule it is provided as follows :

RATES OF PILOTAGE, &C.

This schedule contains both the pilotage dues, and also the boat rate fixed by the authority as provided by the Liverpool Pilotage Order 1920, and gives the total amount payable for each pilotage service.

. . . .

Inward and outward pilotage.—1. Compulsory.

	Amount payable per foot draught of water.		
	Pilot Dues. s. d.	Boat Rate. s. d.	Total s. d.
1. *Inward.*			
. . . .			
2. *Outward:* To the Bar Light ship . . . or to the Horse Channel Fairway Buoy.	7 6	2 9	10 3
. . . .			

4. *River Rates for the Lower Mersey and Channel Rates.*

(*a*) For berthing a vessel at any stage, wharf or pier, or alongside another vessel to the northward of an imaginary straight line drawn across the river Mersey from Dingle Point to New Ferry Slip :—

	Amount payable as per tonnage following for each berthing.		
	Pilotage Dues.	Boat Rate.	Total.
. . . .			
Vessels over 5000 tons gross tonnage	£3 0 9	£1 2 9	£4 2 9

(*b*) For conducting a vessel from river or dock to the powder or dynamite grounds for the purposes of loading or discharging, and for each time a vessel is transported (*i.e.*, navigated or moved, including manœuvring for the purpose of adjusting compasses or attending a launch of a vessel) anywhere in the river Mersey north of the said line :

	Amount payable as per tonnage following.		
	Pilotage Dues.	Boat Rate.	Total
. . . .			
Vessels over 5000 tons gross tonnage.	£3 0 0	£1 2 9	£4 2 9

Provided that the following operations shall not be deemed a transporting for the purpose of these charges :

(1.) Berthing a vessel for which a charge is made under part 4 (*a*) of this part of this schedule, and

(2.) (i.) Navigating or moving an inward bound vessel : (*a*) To her first anchorage ; (*b*) from an anchorage or mooring to dock ; (*c*) To or from an anchorage on account of weather conditions, dragging anchors or a foul berth. (ii.) Navigating or moving an outward bound vessel : (*a*) To an anchorage to wait for tide ; (*b*) To or from an anchorage on account of weather conditions, dragging anchors or a foul berth.

(*c*) For attending a vessel while lying at any anchorage or mooring anywhere in the river

Mersey : For the first six hours, nil—for each hour or part of an hour thereafter ; vessels over 2000 tons gross tonnage 3*s.* per hour.

These charges include 6*d.* per hour boat rate.

The following statement of facts upon which the action was tried was agreed upon by the parties :

About a week before the 19th Nov. 1921, the defendants telephoned to the master of the Princes Landing Stage to say that a berth at the stage on the 19th Nov. 1921 was requested for their steamship *Cyclops,* which was then lying in dock at their appropriated berth in the East Float, and was intending to sail for China on the 19th Nov. 1921, and they asked at what time approximately they could have the berth.

The defendants wished to arrange that their steamship should berth at the stage at a time which would permit of her proceeding from dock to stage without anchoring, and endeavoured to book a berth at the stage at a time which would enable this to be done. Owing, however, to the use of the stage by the regular coastal and western ocean traffic the stage master was unable to allot the *Cyclops* a berth at the stage earlier than 2.30 p.m. This the defendants accepted, and, accordingly, the *Cyclops* was booked for the north end of the stage for the 19th Nov. 1921, at 2.30 p.m or as soon after as the coastal traffic was finished.

On the 19th Nov. 1921 the *Cyclops* left her berth in the East Float at 10.23 a.m., proceeding into the Alfred Dock between 11.10 a.m. and 11.25 a.m., and passed over the outer sill of the river entrance of that dock into the river Mersey at 12.30 in charge of William Williams, a first-class pilot duly licensed by the plaintiffs. High water that day was at 1.29 p.m. ; there was a spring tide of 28ft. 9in. ; the weather was hazy with a light S.S.E. wind.

When the *Cyclops* came out into the river the flood tide was making, with a force of three and a half to four knots, it being one hour before high water. At the time she was due to berth at the stage (2.30 p.m.) the ebb tide would have been making for about an hour. Inasmuch as this necessitated that the *Cyclops* should approach the stage with her head to the ebb tide, *i.e.*, south, the pilot, after bringing the vessel across the river to the position shown in her deck log, a distance of not more than six cables, anchored her in the river at 12.40 p.m, and let the vessel swing to the ebb. She remained at anchor until 2.7 p.m. when the pilot hove the anchor up, the vessel then heading south, and berthed the vessel at the north berth of the stage at about 2.55 p.m., the Isle of Man boat having been late in leaving.

Having regard to the time of high water on the day in question, and to the fact that she had to wait her turn to undock, it would not have been reasonably possible for the *Cyclops* to reach her berth at the stage at 2.30 p.m. or thereafter without anchoring in the course of that operation. Had she not desired to berth at the stage she could have proceeded to sea forthwith on leaving dock at 12.30 p.m.

The *Cyclops* embarked passengers, naval ratings, and baggage at the stage, remaining there until about 3.40 p.m., when she proceeded in charge of the pilot to an anchorage in the river. She anchored at 4.5 p.m. and remained at anchor waiting for tide until 10 p.m., when the anchor was hove up and she proceeded to sea.

The following charges were made by the plaintiffs for the above operations :

(*a*) Outward pilotage : Under part I. 2 of the schedule.

(*b*) Transporting from dock to anchorage : Under part I. 4 (*b*) of the schedule.

(*c*) Berthing at stage : Under Part I. 4 (*a*) of the schedule.

(*d*) Attendance : Under part I. 4 (*c*) of the schedule.

The defendants paid the sums charged by the plaintiffs under heads (*a*), (*c*), (*d*), the payment under head (*d*) being made under protest, but the defendants refused to pay the sum of 4*l.* 2*s.* 9d. for transporting charged under head (*b*), and the plaintiffs now claim the said sum of 4*l.* 2*s.* 9*d.* in this action. The charge for attendance under head (*d*) was in respect of the time that the *Cyclops* was at anchor before going alongside the stage and after leaving the stage before proceeding to sea.

Bateson, K.C. and *Stewart Brown* for the plaintiffs.—The plaintiffs are entitled under the terms of their by-laws to recover the amounts claimed. Reference was made to :

The Servia ; The Carinthia, 8 Asp. Mar. Law Cas. 353 ; 78 L. T. Rep. 54 ; (1898) P. 36.

G. P. Langton for the defendants.—The only question is whether anchoring is part of the operation of berthing. In a previous case of *The Tyresias* the plaintiffs did not press for a payment of a charge similar to that which they are now claiming. They could not on that occasion have excused payment as an act of grace, for they are in the position of trustees, and are bound to collect all charges properly due. There is no question of the position of the pilots for they are paid by time. In *The Servia ; The Corinthia* (*sup.*) it was held that a berthing charge was recoverable : here the plaintiffs are claiming something more than a berthing charge ; they are claiming for a transporting, and according to them the letting go of an anchor amounts to a transporting. This operation was part of the berthing and is not chargeable by reason of the proviso (i.) to sect. 4 of the schedule. Moreover the charge is not maintainable by reason of proviso 2 (ii.) (*a*) to the same section, for the *Cyclops* was waiting for the tide within the meaning of the proviso, because the time of high tide forced her to leave dock at a time when she would have to wait before coming to her berth. "Waiting for tide" means waiting on account of tide.

Reference was made to :

The City of Cambridge, 2 Asp. Mar. Law Cas. 739 ; 30 L. T. Rep. 439 ; L. Rep. 5 P. C. 451 ;

The Cachapool, 4 Asp. Mar. Law Cas. 502; 46 L. T. Rep. 171; 7 Prob. Div. 217.

Bateson, K.C. replied.

HILL, J.—In this case, the Mersey Docks and Harbour Board sue the Ocean Steamship Company Limited, the owners of the steamship *Cyclops*, in respect of a sum of 4*l.* 2*s.* 9*d.*, representing the payment of a particular item in the pilotage account rendered by the board, as the pilotage authority, to the owners of the steamship. That item the defendants dispute. The matter has been tried upon agreed facts, and they are these: The *Cyclops* was in the Alfred Dock. She was going to proceed to sea, and she had to berth herself at the Princes Stage in order to take on board passengers. She was going to leave on the 19th Nov. 1921, and she would have liked to have been able to berth at the Princes Stage earlier on that day than was possible for her owing to the berth being engaged for other vessels, and she was informed that she could not berth earlier than 2.30 in the afternoon. It was high water at about half-past one. She left the dock (she could not wait in the dock) and then proceeded into the river at half-past twelve in charge of a pilot. The tide was then flood and would be shortly becoming ebb. She, having to berth at the stage on the ebb, would have to be heading up river, and in that position she dropped her anchor and came to anchor. She dropped her anchor at 12.40 and remained at anchor. When the time fixed for her berthing at the stage approached, she lifted her anchor at 2.7, and she actually berthed at 2.55.

Reading the facts, it is set out that "It would not have been reasonably possible for the *Cyclops* to reach her berth at the stage at 2.30 p.m. or thereafter without anchoring in the course of that operation." That means coming out as she did at half-past twelve, she could not hang about in the river—it would not have been reasonably possible for her to hang about without anchoring until 2.30, and, as I have already said, she would have to get heading up river, and the proper way to do that would be to swing to her anchor. After she had taken her passengers on board she proceeded out. For those services she was charged "outward pilotage"; that is not disputed. She was also charged for "berthing at the stage"; that is not disputed. The free time having been exceeded she was charged an item which is the one in dispute, namely, "For transporting from the dock to the anchorage." That is for taking her from the Alfred Dock to the anchorage at which she anchored at 12.40, the anchorage at which she lay waiting until the time arrived when she could go to her berth at the Princes Stage. This is a matter which, in my view, must be determined solely and wholly upon the interpretation of the by-laws made under the Liverpool Pilotage Board. In the case of a ship of the same owners named the *Tyresias*, in circumstances not identical, the pilotage authority did not press the charge for transporting from dock to anchorage. But, in my view, that case does not assist me. I have got to interpret the Act, and whether they made a concession or whether they were acting on what they thought to be an interpretation of that section does not matter. As I have said, I have got to interpret the section. Under the by-laws there is a schedule of rates of pilotage, &c. No. 2 deals with the outward—that is the charge for taking a ship out into the river and out to the limits of the pilotage. I need not trouble about that. No. 4 is headed "River rates for the Lower Mersey and channel rates." As regards the rates for the Lower Mersey, we are concerned here with the Lower Mersey. By (*a*) there is a charge for berthing a vessel at any stage, and by (*b*) there is a charge for "conducting a vessel from river or dock to the powder or dynamite grounds for the purpose of loading or discharging, and for each time a vessel is transported (*i.e.*, navigated or moved including manœuvring for the purpose of adjusting compasses or attending a launch of a vessel) anywhere in the river Mersey north of the said line." To that there is a proviso to the effect that the following operations would not be deemed a transporting for the purpose of these charges. The first is with regard to berthing a vessel for which a charge is made under part 4 as part of this schedule, and 2 (ii.) (*a*) is for "navigating or moving an outward bound vessel to an anchorage to wait for the tide." The words "for each time a vessel is transported, navigated, or moved" must mean I think for each separate occasion on which a vessel is transported, navigated, or moved, and "transported" involved, in my view, moving from one fixed place to another fixed place. So that, to begin with, there is a charge made leviable for each separate occasion on which a vessel is transported from one fixed place to another fixed place in the Lower Mersey. Now, this ship was transported from the Alfred Dock to the anchorage at which she was brought at 12.40. In my view, she was transported from one fixed place, and it seems to me that the ship came within the rule, considered apart from the exception. Now, the exception, first of all, is berthing, and, secondly, navigating an outward bound vessel to an anchorage to await the tide or to and from an anchorage on account of weather conditions, dragging anchors or a foul berth. I will deal with that section first of all. In my view, it is quite clear that this ship was not moved from the Alfred Dock to her anchorage to wait for tide. She was moved to wait for a vacant berth at the Princes Stage. Nor was she moved to that anchorage on account of weather conditions, dragging anchors, or a foul berth. There is therefore nothing to bring this ship within the proviso 2 (ii.). Mr. Langton suggested that moving to an anchorage to wait for tide might include not only moving to an anchorage in order to wait until the time of tide arrived (which to my mind is clearly the meaning of "wait for"), but also included moving to an anchorage to wait because the time of high

tide had forced her to leave the Alfred Dock earlier than she would otherwise have had to do for the mere purpose of getting to the landing stage. That is a fallacious argument based upon reading the words "wait for" in totally different senses in two branches of the argument. That leaves the question whether what happened in this case—the transportation of the *Cyclops* from the Alfred Dock to the anchorage to which she had come at 12.40—is not to be deemed a transporting because it was the operation which is described by proviso 1: the berthing of a vessel for which a charge is made under part 4 (*a*) in this part of the schedule. The berthing described is berthing a vessel at the stage, and it seems to me impossible to say that the transportation from the Alfred Dock to the anchorage was within the exception unless Mr. Langton is right in his contention that the whole transportation must be regarded as a part of the operation of berthing. I do not think it can be so regarded, the operation of berthing referred to in 4 (*a*) is berthing at a stage. Here the operation of moving the ship from the Alfred Dock to the anchorage was a preparation for the operation of berthing at the stage, but it seems to me to be a wholly distinct operation—namely, removing a ship from dock to anchorage in order that she may so lie as to wait until the operation of berthing at the stage could be accomplished. I therefore think that the plaintiffs are right in this matter, and there must be judgment for the 4*l.* 2*s.* 9*d.*

It is agreed that as this matter involves a question of principle there should be costs on the High Court scale.

Solicitors for the plaintiffs, *Rawle, Johnstone, and Co.*, agents for *W. C. Thorne*, Liverpool.

Solicitors for the defendants, *Stokes and Stokes*, agents for *Cameron, MacIver, and Davie*, Liverpool.

March 5, 1923.

(Before HILL, J.)

THE SVEIN JARL. (*a*)

Collision—Practice—Costs—Two defendants—Two actions—Counterclaim.

A plaintiff who, being in reasonable doubt as to which of two parties has been negligent, sues both parties and fails against one, is entitled to add the costs which he has to pay to the successful defendant to his costs against the unsuccessful defendant, notwithstanding that the unsuccessful defendant has not put the blame upon the other. But if he brings separate actions, unless he acts reasonably in so doing, he will not be allowed the costs of two actions.

Similarly, if one of the defendants sets up a counterclaim against the plaintiff together with the other defendant and fails against the plaintiff, he is entitled to recover from the defendant against whom he succeeds the costs which he has to pay the plaintiff.

ACTION of damage by collision.

The plaintiffs were the owners of the steamship *Hampshire*, and the defendants were respectively the owners of the steamships *Svein Jarl* and *Maronian.*

Two collisions took place on the 30th July 1921 in the River Thames when the *Hampshire* was bound up river. The *Maronian* overtook the *Hampshire* and attempted to pass so close along the port side of the *Hampshire* that she struck the *Hampshire's* port bow a violent blow, throwing her off her course. Shortly afterwards the *Svein Jarl* overtaking the *Hampshire* struck her a violent blow on the starboard bow with the port side.

On the 21st Sept. 1921 the *Hampshire* commenced an action against the *Svein Jarl* the statement of claim in which action was delivered on the 11th Feb. 1922. By their defence delivered on the 27th Feb. 1922 the owners of the *Svein Jarl* alleged that the collision was solely caused by the negligent navigation of the *Hampshire* and (or) the *Maronian* by the defendants or their servants, or some or one of them, and delivered particulars of negligence of the *Hampshire* and particulars of the negligence of the *Maronian.* They further counterclaimed against the *Hamsphire* and joined the owners of the *Maronian* as defendants by counterclaim. The owners of the *Maronian*, by their defence delivered on the 20th Jan. 1923, denied that the collision between the *Hampshire* and the *Svein Jarl* was caused or contributed to by the negligent navigation of the *Maronian*, and they further alleged that the collision was caused by the negligent navigation of the *Svein Jarl* and (or) of the *Hampshire.*

On the 7th Nov. 1921 the plaintiffs commenced proceedings against the owners of *Maronian.* By their statement of claim in those proceedings, delivered on the 16th Feb. 1922, the plaintiffs alleged that the collision between the *Hampshire* and the *Maronian* was solely caused by the negligent and improper navigation of the *Maronian.* The owners of the *Maronian*, by their defence delivered on the 3rd March 1922, denied that the collision was caused by the negligence of the *Maronian*, and made charges of negligence against the *Hampshire.* No charge of negligence was made against the *Svein Jarl.*

Dunlop. K.C. and *Noad* for the plaintiffs.—The plaintiffs acted reasonably in bringing actions against both vessels. The question of liability could only be properly determined with the three vessels before the court, The *Maronian* denied liability and blamed the *Svein Jarl* for the second collision. It would have been unreasonable for the plaintiffs not to proceed against the *Maronian* and the *Svein Jarl.* The rule is that if the plaintiff acts reasonably he is entitled to recover his costs, irrespective of whether the defendant he first sues charges the other defendant with negligence. The test is whether he acts reasonably—see Sir J. Hannen's judgment in *The River Lagen* (6 Asp. Mar. Law Cas. 281 ; 58 L. T. Rep. 773),

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(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

and *Bullock* v. *London General Omnibus Company* (95 L. T. Rep. 905; (1907) 1 K. B. 264), where the Master of the Rolls says that the question of the position taken up by the defendant is to be considered. It is not sufficient that a defendant merely denies liability in order to avoid liability for costs; he must make it clear that he does not throw liability upon the other defendant: see Bankes, J. in *Mulhern* v. *National Motor Cab* (29 Times L. Rep. 677; see also *Whimster and Co.* v. *Rose Richards Limited*, and the *Barry Railway* (5 Ll. L. L. Rep. 350; *The Theoderos; The Blidensol* (1923) P. 26)

G. P. Langton for the *Svein Jarl*.—The only question which concerns the *Svein Jarl* is that of the costs in the counterclaim against the *Hampshire*, in which the *Svein Jarl* failed. If the plaintiffs acted reasonably in proceeding against the *Svein Jarl*, then whoever pays the plaintiffs' costs should pay the costs of the *Svein Jarl*.

Bucknill for the *Maronian*.—These defendants object to paying any of the costs of the plaintiffs' abortive action against the *Svein Jarl*. The plaintiffs saw, when the *Svein Jarl* delivered her defence, that they were charging the *Maronian*. They should have then joined the *Maronian* in the *Svein Jarl* action. Reference was made to *The Mystery* (9 Asp. Mar. Law Cas. 281; 86 L. T. Rep. 359; (1902) P. 115).

Dunlop, K.C. replied.

HILL, J.—This application has reference to a rather troublesome question of costs; but I think the matter must be determined by considering whether the action that was taken on the part of these several parties was a reasonable action. The *Maronian* has certainly got to pay a good deal, and the question is how much? In my view, the owners of the *Hampshire* acted reasonably in making claims against both the *Maronian* and the *Svein Jarl*, and, it having been ascertained that the sole delinquent was the *Maronian*, the plaintiffs—the owners of the *Hampshire*—are entitled to recover against the *Maronian* not only the actual costs of suing the *Maronian*, but the costs to which they were exposed by reason of their making a claim against the *Svein Jarl*. Speaking generally, I think that is so, because Mr. Dunlop has satisfied me that the power to give such costs in Admiralty does not arise exclusively when one of two persons said to be negligent has put the blame on to the other, but it applies in cases where the injured party is in real doubt, and in reasonable doubt, as to which of two other parties have by their negligence caused him the damage he complains of. Therefore, on that principle, I think in this case the *Hampshire*, having been in real doubt, was justified in suing the *Maronian* and the *Svein Jarl*, and that, having succeeded against the *Maronian*, the *Hampshire* is entitled to costs against the *Maronian*; but that having failed against the *Svein Jarl* is liable to the *Svein Jarl* for costs, but is entitled to include those costs as part of the costs payable by the *Maronian*. But, in my view, while in principle they are entitled to those costs because they acted reasonably in making both the other ships defendants, they did not act reasonably in suing, and in continuing to sue, them in separate actions. Supposing they were in doubt as to which was really liable—if that were the position—then if they wanted to act reasonably and minimise the cost they would include both those parties in the same writ. If they had wanted to arrest one of the ships—the *Svein Jarl* being a foreign ship—sooner than *Maronian*, which was a British owned ship, bail would have been given on an undertaking, and the owners of the *Hampshire* could have put both those vessels into the same writ. That would have meant one action from the start, and there would have been some saving of expense. Therefore I think that although the owners of the *Hampshire* are entitled to the costs which I have mentioned, yet, in taxing those costs, the registrar ought to tax them as if the *Hampshire* had acted reasonably and had included both the *Maronian* and the *Svein Jarl* in one action which would have saved some expense in printing, and would have saved the costs of setting down as well as, it may be, expense in respect of other items.

I have not yet dealt with the *Svein Jarl's* costs. The *Svein Jarl* put up a counter-claim. First of all, having been sued by the *Hampshire*, she is entitled (as I have already said, the *Hampshire* having failed as against her) to her costs on the principle that I have laid down. But then the *Svein Jarl* set up a counterclaim against both the *Hampshire* and the *Maronian*, and as against the *Maronian* she succeeded. She is therefore entitled to those costs against the *Maronian*, but in respect of the *Hampshire* she failed. I think the general principle must be applied to those costs. The *Svein Jarl* succeeds in her counterclaim against the *Maronian*; the *Svein Jarl* therefore gets the costs of the counterclaim against the *Maronian*. The *Svein Jarl* failed in her counterclaim against the *Hampshire*; she therefore has to pay the *Hampshire* the costs of that counterclaim. But, having reasonably sued both the *Maronian* and the *Hampshire*, the *Svein Jarl* will add the costs which she has to pay to the *Hampshire* to the costs which she recovers from the *Maronian*.

Solicitors for the plaintiffs, *Thomas Cooper and Co.*, agents for *Gilbert, Robinson, and Co.*, Cardiff.

Solicitors for the defendants in the first action, the owners of the *Maronian*, *William A. Crump and Son*.

Solicitors for the defendants in the second action, the owners of the *Svein Jarl*, *Botterell and Roche*.

House of Lords.

Dec. 7 and 8, 1922, and March 16, 1923.

(Before Lords Birkenhead, Finlay, Atkinson, Sumner, and Phillimore.)

Mersey Docks and Harbour Board v. Hay and others; The Countess. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Docks—Negligence—Collision with gates—Dock-owner's rights of detention—Statutory powers of the Mersey Docks and Harbour Board—Limitation of liability—Priorities—Mersey Dock Acts Consolidation Act 1858 (21 *&* 22 *Vict. c. xcii.*), *s.* 94—*Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 503, 504—*Merchant Shipping* (*Liability of Shipowners and Others*) *Act* 1900 (63 *&* 64 *Vict. c.* 32), *ss.* 1, 3—*Mersey Docks and Harbour Act* 1912 (2 *&* 3 *Geo* 5, *c. xii.*), *s.* 7.

The plaintiffs' steamship C., *lying in a dock belonging to the defendants, the Mersey Docks and Harbour Board, negligently crashed through the dock gates into the river, carrying with her a number of other craft. The C. herself had to be beached by tugs, and the defendants' assistant marine surveyor certified that she was "an obstruction, impediment, or danger," or likely so to become, to the safe and convenient navigation of the port. The defendants then patched, docked, and repaired the C. at a cost of 1048l. The damage negligently done to the defendants' docks and works amounted to 10,014l. The plaintiffs instituted the proceedings for limitation of liability. The defendants claimed the right to detain the C., under the Mersey Dock Acts Consolidation Act 1858 and the Mersey Docks and Harbour Act 1912, until the plaintiffs had paid the sum of 4468l., the statutory amount of the plaintiffs' liability calculated in accordance with the Merchant Shipping Acts, and in addition the sum of 1048l. The plaintiffs issued a writ in detinue, alleging that the detention of the C. was wrongful. The C. was released on payment of 5000l. into court by the plaintiffs. By sect. 94 of the above-named Act of 1858 a vessel negligently doing damage to any works belonging to the Dock Board may be detained until the amount of the damage or a deposit for the estimated amount has been paid. By sect. 1 of the Merchant Shipping Act 1900 a shipowner's right of limitation of liability under the Merchant Shipping Act 1894 is extended to all cases where, without his actual fault or privity, any loss or damage is caused to property of any kind, whether on land or water, by reason of the improper navigation of the ship; and by sect. 3 the limitation under the Act applies "whether the liability arises at common law or under any general or private Act of Parliament and notwithstanding anything contained in such Act." The Court of Appeal (Atkin and Younger, L.JJ.; Lord Sterndale, M.R. dissenting) held, affirming with a variation the judgment of Duke, P., that after the limitation of liability decree, the defendants were entitled to hold the deposit only until they were paid their rateable proportion of the amount of the plaintiffs' limited liability, and that under the Merchant Shipping Acts the defendants had a lien only until they actually received such payment. The Mersey Docks and Harbour Board appealed.*

Held (*Lords Sumner and Phillimore dissenting*), *that the board had a possessory lien on the ship; that the Act of* 1900 *had not affected the lien beyond limiting the amount for which the lien could be exercised; that the court, on distributing the statutory amount of the shipowner's liability rateably among the clamiants, ought to have regard to the priorities as well as to the amounts of the claims, and that consequently the board had, under their Act, a right to receive the whole sum of* 4468*l., in addition to the cost of the repairs, and not only to share rateably with the owners of the barges which had been damaged.*

Leycester v. Logan (1857, 3 *K. & J.* 446); *and* The Emilie Millon (10 *Asp. Mar. Law Cas.* 162; 93 *L. T. Rep.* 692; (1905) 2 *K. B.* 817) *considered.*

Judgment of the Court of Appeal (127 *L. T. Rep.* 313; (1922) *P.* 41) *reversed.*

Appeal from a judgment of the Court of Appeal (Atkin and Younger, L.JJ.; Lord Sterndale, M.R. dissenting) varying a judgment of Duke, P.

The facts are fully stated in the report of the case in the Court of Appeal (127 L. T. Rep. 313) and in the judgment of Lord Birkenhead.

The Mersey Docks Consolidation Act 1858, s. 94 provides:

In every case in which any damage shall be done to any . . . work belonging to the board, through the misconduct, negligence, or default of the master of any vessel, or any other person on board of any vessel . . . such vessel may be detained until such damage shall have been paid or a deposit shall have been made by the master or owner of such vessel equal in amount to the claim or demand made by the board for the estimated amount of damage so done by such vessel; which deposit the board are authorised to receive and retain until the entire amount of such damage shall have been ascertained by the Board and paid to them by the master or owner of such vessel, when the said deposit shall be returned to him; . . .

The Mersey Docks and Harbour Board Act 1912, s. 7, sub-s. 1 provides:

The Board may . . . remove the wreck of any vessel or any vessel . . . sunk or stranded . . . within the Port of Liverpool . . . which shall be . . . an obstruction impediment or danger or is likely . . . to become an obstruction impediment or danger to the safe and convenient navigation or use thereof . . . . and may . . sell . . . the said vessel or wreck . . . and out of the proceeds of such sale . . . may retain the expenses of . . . removing such vessel or wreck.

(a) Reported by W. C. Sandford, Esq., Barrister-at-Law.

Talbot, K.C., *Greaves-Lord*, K.C. and *Stewart Brown* for the appellants.

W. N. Raeburn, K.C. and *R. H. Balloch* for the barge owners, the respondents.

R. A. Wright, K.C., *A. T. Miller*, K.C., and *Lewis Noad*, for the owners of the *Countess*, respondents.

Their Lordships took time to consider their judgments.

March 16. — Lord BIRKENHEAD. — These appeals are from the two orders of the Court of Appeal in England, affirming with variations, decrees made by the President of the Probate, Divorce, and Admiralty Division, in two actions brought by the respondent shipowners against the appellants.

The respondent shipowners are the owners of the steamship *Countess* which, on the 5th June 1920, was being navigated in the Alfred Dock at Birkenhead, one of the docks owned by the appellants. Owing to the negligence of those on board the vessel, she collided with the dock gates leading to the river Mersey and carried away part of the gates. The water in the dock being above the level of the river at the time, the vessel, together with a number of barges and like craft, was carried into the river, where a series of collisions took place; some eighteen or twenty barges were sunk or damaged and the steamship *Countess* was holed.

She was towed to and beached at Tranmere to save her from sinking. On that day the appellants' assistant marine surveyor formed the opinion that the vessel was, or was likely to become, an obstruction, impediment or danger to the convenient navigation or use of the Port of Liverpool, and signed a certificate to that effect. The appellants took possession of the vessel, effected temporary repairs, and then towed her to a place of safety. The owners of the vessel admitted negligence, which obviously was without their actual fault or privity. The damage done to the locks, gates, &c. of the appellants was estimated at 10,000*l.* The loss or damage caused to the barges and other craft —which included a barge belonging to the appellants—and their cargoes was about 55,000*l.* There was no loss of life. The tonnage of the *Countess*, according to the Merchant Shipping Acts, was 558.83 tons, and the statutory amount of her liability at 8*l.* per ton was therefore 4468*l.* 4*s.* 9*d.* Her value at the date of these events was about 34,000*l.* The amount claimed for raising, removing, and detaining the vessel is about 1000*l.*; but no question arises upon that matter in these appeals.

The Mersey Docks Acts Consolidation Act 1858 (21 & 22 Vict. c. xcii.), s. 94, provides that, where damage is done to any lock gate, or other work of the appellants through the negligence of the master, or any other person on board a vessel, the amount of the damage may be recovered from the master or owner summarily before a justice of the peace, or, at the appellants' option, the vessel may be detained until such damage is paid or a deposit is made of the amount claimed by the appellants. A deposit is to be deemed to have been paid in satisfaction, unless notice of dispute is given within seven days. The appellants, by letter of the 7th June 1920, informed the respondent shipowners that they held the latter responsible for the damage, and that the vessel was detained under the above-mentioned section.

Numerous actions against the respondent shipowners having been commenced by the barge-owners, these shipowners, on the 14th June 1920, commenced a limitation action in which they claimed a right to limit their liability to the amount ascertained under the Merchant Shipping Acts and to have the amount ascertained and distributed rateably among the claimants. The barge-owners' actions were thereafter stayed. In this limitation action the respondent shipowners applied by summons for an order releasing the vessel upon payment into court of the statutory amount of their liability. No order was made, and an appeal was dismissed by Hill, J., on the 12th July 1920. On the same day the respondent shipowners issued a writ against the appellants, claiming the delivery up of the vessel and damages for detention. In this detinue action they issued a summons for delivery up upon such terms as to payment into court as might appear to the court to be just, and eventually the Court of Appeal made an order under which, on the 27th July 1920, the respondent shipowners paid into court the sum of 5500*l.*, and the vessel was delivered up to them. In this detinue action the appellants justified the detention under sect. 94 of the Mersey Docks Act 1858 already mentioned, and also under sect. 7 of the Mersey Docks and Harbour Board Act 1912 (2 & 3 Geo. 5, c. xii.), which authorises them to raise and remove wrecks, &c., and counterclaimed for declarations as to their rights, and to be paid out of the money lodged in court the amount ascertained in the limitation action to be the liability of the vessel, or if no decree, the actual amount of the damage, and also the expenses of raising and removing the vessel.

The two actions were tried together, and the president held that the respondent shipowners were entitled to a decree in the limitation action; that until decree the detention was justified; but that after decree the appellants had no priority over other claimants in the limitation fund which was to be distributed *pari passu* without regard to priorities. He held that the appellants were entitled to be repaid in full the cost of raising and removing the vessel. The balance of the money in court after such repayment he ordered to be paid to the credit of the limitation action for distribution in the manner decreed by him. The appellants appealed in both actions. The respondent shipowners appealed in the detinue action. These appeals were heard together, and the decrees were affirmed with variations, the majority of the court agreeing with the judgments of the president, except that the appellants were held entitled to detain the ship until the rateable

sum payable to them had been ascertained and paid.

From these orders the appeals have been brought to your Lordships' House where the barge-owners, who were not parties, have appeared to support the orders appealed against.

The Mersey Docks Acts Consolidation Act 1858, s. 94, which was preceded by similar sections in two previous statutes relating to the appellants' undertaking, or some parts thereof, viz., 51 Geo. 3, c. cxliii., s. 87, and the Liverpool Dock Act 1855, (18 & 19 Vict. c. clxxiv.), s. 29, is in the following terms:

In every case in which any damage shall be done to any lock, gate, bridge, pier, landing stage, jetty, platform, quay, wharf, warehouse, shed, graving dock, graving block, building, or other work belonging to the board, through the misconduct, negligence or default of the master of any vessel, or any other person on board of any vessel, the amount of such damage may be recovered from such master or the owner of such vessel before any justice in a summary way, and in the same manner as any penalty is hereby made recoverable; or at the option of the board, such vessel may be detained until such damage shall have been paid for or a deposit shall have been made by the master or owner of such vessel equal in amount to the claim or demand made by the board for the estimated amount of damage so done by such vessel; which deposit the board are authorised to receive and to retain until the entire amount of such damage shall have been ascertained by the board and paid to them by the master or owner of such vessel, when the said deposit shall be returned to him; every such deposit shall be considered to have been in payment and satisfaction of the claim or demand for damage in respect of which such deposit shall have been made, unless notice that the claim is disputed be given to the board within seven days after such deposit shall have been made; and after the expiration of seven days next after such deposit shall have been made (unless in the meantime notice be given to the board that the claim is disputed), the board may, unless the amount of damage done by such vessel shall have been sooner paid, apply such deposit or a sufficient part thereof in making good such damage, and shall return the residue of such deposit, if any, to the said master or owner.

There is a similar provision in sect. 74 of the Harbour Docks and Piers Clauses Act 1847 (10 & 11 Vict. c. 27).

The limitation of liability of shipowners was introduced into statute law many years ago as part of a deliberate policy, and appears in the now repealed Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), ss. 504, 506, and 514, whereby the liability of a shipowner in certain cases, when occurring without his actual fault or privity, is limited to the value of the ship and freight due or growing due in respect of the voyage in question, and provision is made for the owner to institute proceedings for the purpose of determining the amount of such liability among the claimants who duly prove their claims. The Amendment Act of 1862 (25 & 26 Vict. c. 63), s. 54, limited such liability in cases to which such limitation applies to a tonnage rate of 8*l.* per ton where no loss of life was occasioned. The Act of 1894 (57 & 58 Vict. c. 60), consolidating and amending the previous Merchant Shipping Acts, provides by sect. 503, sub-sect. 1:

The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say) (*d*) Where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship, be liable to damages beyond the following amounts: . . . (*ii*) In respect of loss of, or damage to, vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate not exceeding eight pounds for each ton of their ship's tonnage. Sub-sect. 3: The owner of every sea-going ship or share therein shall be liable in respect of every such . . . loss of or damage to vessels, goods, merchandise, or things as aforesaid arising on distinct occasions to the same extent as if no other loss, injury, or damage had arisen.

By sect. 504:

Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of . . . loss of or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then, the owner may apply . . . to the High Court . . . and that court may determine the amount of the owner's liability, and may distribute that amount rateably among the several claimants, and may stay any proceedings pending in any other court in relation to the same matter, and may proceed in such manner and subject to such regulations as to making persons interested parties to the proceedings and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of any costs, as the court thinks just.

Under the 1894 Act, which, as I have said, incorporates the previous statutes, there is nothing which would affect the claim of the appellants, who complain of damage to the dock gates, &c. By the Merchant Shipping (Liability of Shipowners and Others) Act 1900 (63 & 64 Vict. c. 32), s. 1, the limitation of liability of shipowners set by sect. 503 of the 1894 Act was extended and applied "to all cases where (without their actual fault or privity) any loss or damage is caused to property or rights of any kind, whether on land or on water, or whether fixed or moveable, by reason of the improper navigation or management of the ship." The Act also declared by sect. 2, sub-sect. 3, that sect. 504 of the Act of 1894 should be applied to that section of this Act—which relates to the limitation of liability of a dock or harbour authority—as if the words "owner of a British or foreign ship" included a harbour authority and a conservancy authority, and the owner of a canal or of a dock. Sect. 3 of the 1900 Act declared that the limitation of liability under this Act "shall relate to the whole of any losses and damages which may arise upon any one distinct occasion, although such losses and damages may be sustained by more than one person, and shall apply whether the liability arises at common law or under any general or

private Act of Parliament, and notwithstanding anything contained in such Act." Sect. 5 enacts that the 1900 Act shall be construed as one with the Merchant Shipping Act 1894 and other named Acts amending the 1894 Act. It will be necessary to consider the extent to which this Act of 1900 has amended the appellants' Consolidation Act.

In the first place, there can be no doubt that the appellants are entitled under their Consolidation Act to detain the ship until the damage is paid, or a deposit made. This detention could be put an end to by appropriate procedure on the part of the shipowners. The appellants would, perhaps, also take proceedings to recover the sum due, but the section imposes no such liability upon them, and, indeed, does not state how, in the case of a dispute leading to a deposit, the issue is to be determined. The value of the ship is immaterial. The damage might be smaller or larger than the value of the vessel. The exercise of this statutory power to detain confers a possessory lien, and is not part of any procedure to ascertain the sum due. This lien, in my opinion, could be relied upon as justifying detention until actual payment. The Act itself prescribes the method whereby the shipowner may obtain release of the vessel—namely, by paying the sum demanded, or by paying as a deposit a sum to cover the disputed amount. This right remained unaffected until 1900, for the 1894 Act and the earlier statutes made no provision for the limitation of liability in the case of damage such as that sustained by the appellants. In any case arising since 1900, the lien cannot be exercised for the purpose of enabling the appellants to claim a greater sum than the maximum allowed by sect. 1 of the 1900 Act, where the shipowner takes advantage of that section; but the really important point is whether the Act has affected the exercise of the lien, and, if so, to what extent. The 1900 Act contains no words which expressly affect the right to detain, nor, in my judgment, can it be inferred that the right has been affected.

It was argued that the implication necessarily follows from sect. 504 of the 1894 Act. It did not, of course, have that effect when enacted in 1894, for, as I have said, at that date there was no provision for limiting liability in such a claim as the appellants'. Sect. 504, moreover, is a re-enactment of a section in the 1854 Act, which is earlier in date than the appellants' 1858 Act creating the right to seize and detain. It is, therefore, necessary to hold that sect. 504 was enlarged in its scope by reason of sect. 1 of the 1900 Act, and then that the section so extended has affected the right. The lien is a right created by express words, and cannot be taken away by a mere implication. To destroy it, the implication must be clearly necessary. Now, sect. 504 was passed to deal with a situation which had been contemplated by the earlier Acts. The limitation of liability conferred by sect. 503, although a complete defence where one claimant alone appears, is not easily applied where a number of separate actions are brought by different claimants. Without further provision, great and unnecessary confusion and expense would be caused. The shipowner is therefore enabled, but not bound, to bring an action in order to have the amount of his liability determined, and in such action the court may order the sum so ascertained and paid by the shipowner to be distributed among the persons who have proved their title in due time. In the ordinary case the parties all stand on the same footing, and distribution is effected by their sharing *pari passu.* I do not accept the view that in a limitation action the court is bound to make an order for distribution of the fund. I accept the view of the Master of the Rolls (127 L. T. Rep., at p. 321; (1922) P., at p. 55) that the word "may" is to be read "may, if the circumstances admit" and not "may, whatever the circumstances may be." The court must, in my judgment, have regard to the rights of the parties. If these rights are equal then a rateable distribution will involve payment *pari passu*, but the word "rateably" does not necessarily involve a distribution according to the amounts which would be due to the respective claimants if there were no limitation decree. The word can be construed, and ought to be construed, with regard to the priorities as well as to the amounts of the claims which have to be taken into account. The distributor must consider the respective rights qualitatively as well as quantitatively. The appellants, therefore, held the vessel by virtue of the exercise of their statutory powers. The Act of 1900 has cut down the amount for which they can exercise this lien, but has not otherwise affected it. The vessel has indeed been released by reason of the payment into court under the order, but the sum in court represents the vessel for this purpose. What we are asked to hold is that the lien is only effective up to the share in the fund to which the appellants would be entitled if they had no special right; in other words, that the lien is merely now an adjunct to the right to participate in any fund distributable in a limitation action. That conclusion is one which seems to me to be impossible. Assume for the moment that the appellants retained the vessel and declined to prove their claim in the limitation action, would the respondents be entitled to claim delivery up of the vessel without any payment as prescribed by the 1858 Act? Clearly not, for the appellants are entitled by the statute to retain until payment. The amount claimable by them may now, of course, be subjected to a maximum as a result of the 1900 Act, but, as I have pointed out, the lien is otherwise unaffected. The shipowners are undoubtedly entitled to a decree limiting their liability to that maximum, but the court is not bound to make an order for distribution otherwise than in accordance with the rights of the parties. If, therefore, the rights of one party are such as to exhaust the fund, no order should be made which would have a different effect, and, if so made, it would be wrong. The court may not, in the exercise of its jurisdiction, destroy rights

in order to give effect to some idea of equality of treatment.

I have reached this conclusion independently of authority, and, indeed, there are no decisions upon the matter which are binding upon your Lordships' House. Nevertheless, what authority there is, in my opinion, confirms the views that I have formed.

Leycester v. *Logan* (1857, 3 K. & J. 446) was a case where the defendant had obtained judgment in the Court of Admiralty before the limitation proceedings. The vessel had been arrested by Admiralty process, and was held liable to be sold. It was held that the sections of the 1854 Act gave the court power to stay the actions notwithstanding that Logan had obtained judgment, but he was permitted to sell the ship and retain his costs out of the proceeds. As to the amount awarded as damages, it was held that the judgment did not entitle Logan to more than his rateable share. The decision, therefore, merely amounts to this; that diligence in obtaining a judgment in other proceedings does not confer priority over other claimants. In *Rankine* v. *Raschen* (1877, 4 Rettie, 725) shipowners paid out to the owners of an injured vessel the amount of their claims, and subsequently obtained a decree limiting their liability to 8*l.* per ton. It was held that, on the redistribution of the fund in the limitation action, regard must be had to the sum paid out in the former action. This is obviously a case where parties were on the same footing, and consequently no priority should be given to one of them. It does not apply to the present case. *The Victoria* (6 Asp. Mar. Law Cas. 335; 59 L. T. Rep. 728; 13 Prob. Div. 125) was a case where the amount paid in respect of loss of life and personal injury—7*l.* per ton under sect. 54 of the 1862 Act—proved to be insufficient, and the question was whether the balance remaining unpaid was to rank with the claims for loss of goods in the distribution of the sum calculated at 8*l.* per ton—which was the limit in respect of loss of goods. Butt, J. upheld the registrar's report that such balance was to rank, and said: "The Act interferes with the claimants' rights only by putting a limitation on the amount which they can recover from the shipowner, and there is nothing in the Act to show that persons who have suffered loss have their rights otherwise altered." *Jenkins* v. *Great Central Railway*, which appears to have been reported only in the *Shipping Gazette* (Jan. 13, 1912) and is cited in vol. 26 of Lord Halsbury's Laws of England, at p. 614, is merely an example of the rule that a claimant who, by diligence, obtains judgment, does not thereby gain priority over fellow claimants. It is for this reason probably that the decision has not been reported.

The Emilie Millon (10 Asp. Mar. Law Cas. 162; 93 L. T. Rep. 692; (1905) 2 K. B. 817) turned upon sects. 248 and 253 of the Mersey Docks Consolidation Act 1858, which give the appellants a power to detain any vessel until the dock, tonnage, and harbour rates have been paid. This power resembles the power confered by sect. 94 of the same Act now in question. When the vessel entered the dock, the master and crew had a maritime lien for wages due. While the vessel lay in the harbour, the master and crew brought an action *in rem* in the Court of Passage to enforce their lien, and recovered judgment. The ship was arrested, and, after an abortive attempt to sell by auction, she was sold privately. The court then made an order that the ship be delivered to the purchaser, free from all claims and demands, upon payment into court of the purchase-money less the auctioneer's charges. The court preserved the rights of the appellants as against the fund in court. The appellants appealed on the ground that the statute enabled them to detain the vessel until the rates, &c., were paid and that no other person, either purchaser or holder of a maritime lien, had any greater right than the owners. It was held that the contention was well founded. Collins, M.R. said: "The only protection which sect. 253 gives is the right to detain the vessel until the dock dues are paid, and nobody can, against the will of the board, undo or annul that statutory provision." So far as this case is material, it is an authority entirely in favour of the appellants.

The earlier decisions, therefore—to which, for this purpose, I am unable to assign much importance—either do not touch the point before your Lordships or confirm the opinion which I have formed independently of authority.

For these reasons, I am of opinion that the appellants are entitled to succeed and that the sum in court standing, as it does, in the place of the ship, is subject to the board's lien under sect. 94 of their Act. The sum, therefore, should be paid out to the appellants.

I move, therefore, that the appeals should be allowed with costs both here and in the Court of Appeal.

Lord Finlay.—This case raises an important question as to the construction of sect. 504 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60). The facts are few and simple. [His Lordship stated them.]

The full claim of the board for damage to the dock was for 10,000*l.*, but it was agreed that the statutory limitation of liability to 8*l.* per ton made it impossible for the Dock Board to recover more than 4468*l.* The Dock Board asserted that their seizure of the *Countess* under their statutory powers had conferred upon them a possessory lien on the vessel, and on the fund in court representing the vessel, which entitled them to payment in full, leaving nothing for the other claims, which were chiefly by the owners of the barges which had been damaged. On the other hand, it was contended for the barge-owners that the effect of the decree in the limitation action was to put the Dock Board on the same footing as all the other claimants, and that they must share rateably according to the amount of their claims.

The claim of the Dock Board is based on the fact that they had a possessory lien on the

Countess in respect of the damage done by her to the dock property. Sect. 94 of the Mersey Docks Acts Consolidation Act 1858 (21 & 22 Vict. c. xcii.), enacts that in every case in which damage is done by any vessel to any works belonging to the board, the amount may be recovered in a summary way, " or, at the option of the board such vessel may be detained until such damage shall have been paid for or a deposit shall have been made by the master or owner of such vessel equal in amount to the claim or demand made by the board for the estimated amount of damage so done by such vessel," and the board are further authorised to retain the deposit until the whole amount of damage shall have been ascertained and paid, and provision is made for the application of the deposit in satisfaction of the claim. It may be mentioned that there are similar provisions in the Harbour Docks and Piers Clauses Act 1847 (10 & 11 Vict. c. 27), s. 74.

The enactments in force in 1858 as to limitation of liability of a shipowner for damage done by his ship without his fault or privity were contained in sects. 504, 506, and 514 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104). The limit of liability was to be the value of the ship and freight, with a provision for a minimum value per ton in case of liability for loss of life or personal injury. In case of several claims power was given to the Court of Chancery to entertain proceedings by the shipowner for the determination of the amount of liability and its distribution among the several claimants. The limit of liability was altered by the Merchant Shipping Amendment Act 1862 (25 & 26 Vict. c. 63), s. 54. But these earlier enactments were superseded in 1894 by the Merchant Shipping Act of that year (57 & 58 Vict. c. 60), ss. 503 and 504. It is upon the construction of this Act that the decision in the present case must turn. Sect. 503 limits the liability to 8*l.* per ton in respect of damage caused to other vessels. Sect. 504 provides that in the case of several claims the owner of the ship which has caused the damage may apply to the High Court, " and that court may determine the amount of the owner's liability, and may distribute that amount rateably among the several claimants," and gives power to stay proceedings in other courts. It is obvious that this last section is one providing the machinery for working out the rights of the parties, where there are more claimants than one. The question raised in the present case, however, is whether the provisions for a rateable distribution have the effect of putting all claimants on the same basis according to the amounts of their claims.

These enactments, while they applied to the case of collision between ships, did not apply to collision between a ship and any works or buildings on shore, but in 1900 their scope was enlarged so as to include such cases. This was effected by the Merchant Shipping (Liability of Shipowners and Others) Act 1900 (63 & 64 Vict. c. 32), ss. 1, 2, 3, and 5. Sect. 1 provides that the limitation of the liability of the owners of any ship shall apply to all cases where, without their own actual fault or privity, any loss or damage is caused to property of any kind, whether on land or water, by the improper navigation or management of the ship. Sect. 2, sub-sect. 3, provides that sect. 504 of the Merchant Shipping Act 1894 shall apply to that section as if the words " owner of a British or foreign ship " included harbour and conservancy authorities and the owner of a canal or dock. Sect. 3 provides that the limitation of liability shall relate to the whole of any loss or damage which may arise upon any one distinct occasion, although such loss or damage may be sustained by more than one person, and applies whether the liability arises at common law or under any general or private Act of Parliament, and notwithstanding anything contained in such Act.

The contest in the present case is substantially one between the Mersey Board claiming in respect of the damage to their works, on the one hand, and the owners of the barges claiming for the damage done to their barges, on the other. The barge-owners contend that the effect of the provisions of sect. 504 of the Merchant Shipping Act of 1894 as to rateable distribution is to destroy any claim by the board to priority based on their possessory lien.

The first contention put forward by the board is that this sect. 504 is not, by the Act of 1900, made applicable to collisions between ships and the works of a dock. The argument is that sect. 1 of the 1900 Act incorporates only sect. 503. In my opinion this contention fails. The words of the 1900 Act are that " the limitation of the liability of the owners of any ship set by sect. 503 of the Merchant Shipping Act 1894 " in respect of damage to vessels shall apply to damage to property on shore caused by improper navigation of the ship. It would, in my opinion, be too narrow a reading of this enactment to hold that the incorporation does not include sect. 504. That section is, in my view, a provision for working out in practice the rights given by sect. 503, and when the Act of 1900 applies the limitations set by sect. 503, it must include the machinery without which the enactment would be unworkable. At the same time, it must be observed that other considerations might arise if sect. 504 were to be read as dealing not merely with machinery, but as altering the substantive rights of the parties by nullifying a possessory lien which one of them had by statute. On the view which I take to the effect of sect. 504, I think that it is incorporated by the language of the 1900 Act. I do not read the provision of sect. 504, that the court may distribute the amount of the owner's liability rateably among the several claimants, as meaning that the court is to have regard in the distribution solely to the amounts of the claims. If the fund in court represents a ship on which a claimant has a possessory lien, and if the fund in court would otherwise be subject to a prior claim in virtue of that possessory

lien, it is to me quite inconceivable that the person having that lien should be deprived of it by such a provision as the present.

The word "rateably" is not strong enough to support the burthen which the argument for the barge-owners would throw upon it. I do not think that this word necessarily excludes the consideration of charges in favour of one claimant upon the fund in court, and, further, I do not think that an enactment that the court may distribute rateably should be read as applicable to a case in which such a distribution would be inconsistent with the rights of the parties. It would require the clearest terms to justify us in construing this section as authorising, nay, as requiring, the confiscation of the right of one claimant for the benefit of the others. I agree entirely with the view which the Master of the Rolls takes of the effect of this enactment. Atkin and Younger, L.JJ. who differed from the Master of the Rolls, both laid great stress upon the provision in the third section in the Act of 1900, that "the limitation of liability under this Act . . . shall apply whether the liability arises at common law or under any general or private Act of Parliament, and notwithstanding anything contained in such Act." All that is meant by this provision is that the total liability of the owner is limited to the aggregate amount yielded by the number of tons in the ship at the prescribed amount per ton. The question here is another and a very different one—namely, how this amount is to be divided among the claimants, and this question is not touched by sect. 3 of the 1900 Act, but depends solely upon the construction of sect. 504 of the 1894 Act. No possible reason can be suggested for the proposed confiscation of the right conferred by a possessory lien which attaches to a fund in court. I do not think that the words bear the construction put upon them by the defendants, but even if there were any ambiguity about the language, an enactment dealing with machinery should not be construed so as to alter the rights of the parties. The whole question is very fully discussed in the judgment of the Master of the Rolls, and I shall not repeat the various considerations to which he calls attention so pointedly.

A few words must now be said with reference to the proceedings. The accident happened on the 5th June 1920, and notice was sent by the board to the owners of the *Countess* that she was detained in respect of the damage done. On the 12th June the owners stated that they did not admit the right to detain. On the 14th June the owners issued a writ for limitation of liability in respect of the collision, and on the 5th July the statement of claim in that action was delivered, claiming a declaration of liability limited to 8*l.* per ton and claiming a right to pay 4468*l.* into court, and to have proceedings stayed. On the same day the owners took out a summons in the limitation action for the release of the vessel on payment into court of 4468*l.* This summons on the 12th July was dismissed.

On this same 12th July the owners of the *Countess* commenced an action of detinue, in respect of the detention by the board of the *Countess*, and a summons was taken out in this action for an order for the delivery up of the ship upon such terms as to payment into court as might appear to be just. This summons was dismissed, but on appeal the following order was made on the 26th July: "It is ordered that on the plaintiffs' paying into court to the credit of this action the sum of 5500*l.*, the vessel be released by the defendants, and if it is decided that the defendants' claim of lien is justified, the defendants' rights over the sum in court to be the same as they would have had if the sum in question had been paid to them, as deposit under sect. 94 of the Mersey Docks Acts Consolidation Act 1858, and sect. 7 of the Mersey Docks and Harbour Board Act 1912." It follows from this last order that the rights of the Mersey Board over the sum in court are, if their claim of lien is justified, to be the same as they would have had if the sum had been deposited under sect. 94 of the Act of 1858. I have already referred to the provisions of that section, and it appears to me from them that the money in court would have been available as security or for the satisfaction of the liability for damages.

The two cases, the action for limitation and the action of detinue, were heard together, and on the 23rd March 1921, judgment was given for the limitation of liabiity to 4468*l.* and the president further ordered that, on the transfer to the credit of the action for the limitation of liability from the credit of the action in detinue of the sum of 4451*l.*, and on payment of a further sum making the amount up to 4468*l.*, all further proceedings in the other actions should be stayed. On the same day, the 23rd March, in the action of detinue, the president gave judgment for the defendants in favour of their right to detain the *Countess* until the damage was paid for or a deposit made, and further ordered that the money in court be transferred to the credit of the limitation action.

It follows that, on the view which I take of the construction of the statute, the Mersey Board are entitled to have the money paid out to them in respect of their claim for damage. There is nothing to deprive them of the possessory lien which they had on the ship, now transformed into a right in respect of the money in court under the orders to which I have called attention.

In my opinion these appeals should be allowed.

Lord Atkinson.—The facts of this case have been fully stated. Putting aside for the moment some conflicting and rather inconsistent orders which have been made in the case, the substantial question for decision on this appeal emerges clearly enough. It is admitted that, by the negligence and default of those in charge of the ship *Countess* on behalf of her owners, the respondents, she collided with the gates of one of the docks of the Mersey

Docks and Harbour Board, hereinafter, for shortness, called the board, causing damage to the property of the board to the amount of over 10,000*l.* By the damage to the dock gates certain barges, which had, at the time of the collision, been floating in the dock, were seriously injured, and their owners claimed damages from the owners of the *Countess* in respect of these injuries. It was not alleged or proved that the injury done by the *Countess* to the dock gates and barges was inflicted with the actual fault or privity of her owners. By sect. 94 of the Mersey Docks Acts Consolidation Act 1858 (21 & 22 Vict. c. xcii.), it is provided that where any damage shall be done to any of the things therein named, or any other work belonging to the board, through the negligent misconduct or default of the master of any vessel, or of any other person on board of her, the amount of the damage may be recovered from the master or owner of the vessel in a summary way before any justice in the same way as any penalty is thereby made recoverable. The amount of the damage means, of course, the full amount of it, not a fraction of it. At the option of the board, the vessel may be detained until either of two things shall happen : (1) the damage shall have been paid ; or (2) a deposit shall have been made by the master or owner for the vessel equal in amount to the estimated amount of the damage done by the said vessel, which deposit the board are authorised to receive and retain until the entire amount of the damages shall have been ascertained by the board and paid to them by the master or owner of the vessel. Provision is made that, in certain events, the deposit, or so much thereof as may be necessary, may be applied by the board for the making good the damage done.

It is not disputed that under this section the board, as the summary remedy was not resorted to, would acquire, at its option in cases to which the section applied, a possessory lien upon the vessel in default until the entire amount of the estimated damage was paid. Since it is, in my view, too clear for argument that if the deposit authorised by this Act was in fact made, it was substituted for the ship, the board got a right to detain it just as they had a right to detain what it represented, the ship. One would naturally suppose that if it was designed by the Legislature to deprive a public body like this board of a power so indispensable as this for the discharge of their widely extended and onerous duties, they would have done so by a clear and explicit enactment. It is not pretended that they have done so. But it has been decided that the lien thus expressly given, although not destroyed, is rendered worthless by the reflex action, as it might be styled, of a statute merely intended to protect from heavy loss owners of ships which caused damage through their negligent and improper navigation or management. This statute is the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), and its sections which are important on this point are the 503rd and 504th. These sections are, to a great extent, merely re-enactments of earlier legislation—namely, sects. 504, 506, and 514 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), and sect. 54 of the Merchant Shipping Amendment Act 1862 (25 & 26 Vict. c. 63). By the first of those sections of the Act of 1894, sub-s. (*d*) (i.) and (ii.), it is provided that the owners of British or foreign ships shall not be liable, where, without their actual fault or privity, injury is done by their ship, to damages in respect of loss of life or personal injury either alone or together with loss or damage to vessels, goods or merchandise to an aggregate amount exceeding 15*l.* per ton of the ship's tonnage. And in respect of loss or damage to vessels, goods, merchandise and other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount not exceeding 8*l.* per ton of the ship's tonnage. By sect. 1 of the Merchant Shipping (Liability of Shipowners and Others) Act 1900 (63 & 64 Vict. c. 32), the limitation of liability in this sect. 503, is made applicable to all cases where without actual fault or privity of the owners loss or damage is caused to property of any kind through the improper or negligent navigation of a ship. The dock gate of the appellants came within this section, even if not within sect. 94 of the Act of 1858.

Sect. 504, upon the proper construction of which the question for decision on this case mainly turns, has been already read. On the 14th July 1920, proceedings were instituted by the respondents to limit their liability under this section, which measured by the tonnage of the *Countess* amounted to the sum of 4468*l.* 4*s.* 9½*d.*, the damage to the appellant's property being stated to be 10,014*l.* Much litigation followed. Meanwhile an action of detinue was instituted by the present respondents against the board. Both actions came on together, and ultimately the order which has been already mentioned was made by the Court of Appeal. On the 27th July 1920, the respondents paid into court 5500*l.*, and the steamship was delivered up to them.

It is not disputed that the day before the amount of the owners' liability was determined under sect. 504, they could only have obtained possession of their ship from the board by paying, under sect. 94 of the Act of 1858, the amount of the damage done to its property, presumably about 10,000*l.*, or depositing that sum with the board ; but, according to the decision of the Court of Appeal, the owners became entitled, by virtue of the decision limiting their liability, to obtain possession of their ship, not by paying to or depositing with the board the sum to which their liability is limited—namely, 4468*l.* 4*s.* 9*d.*, but upon the receipt by the board, as one of the several claimants for damages, of such a dividend upon the amount of its claim as this limited sum would enable the court to pay on its distribution *pari passu* amongst all the claimants. Such is said to be the force and potency of the words "and may distribute that amount rateably amongst the several claimants," used in the section.

The possessory lien of the board is not destroyed. On the contrary, Atkin, L.J. states that it continues to exist, that the board is entitled to exercise it until it has been paid this dividend. Younger, L.J. says that he cannot conceive the retention of it for a larger amount. But this in the result renders the board's lien practically worthless. It secures to the board nothing which it would not receive if it had no lien—namely, a dividend on the amount of its claim, just as the other claimants who have no liens would get a divdend on the amount of their respective claims. It is the court that is to distribute the amount of the owners' limited liability. Lien or no lien, the board will get its dividend from the court. The lien in no way makes the receipt of the dividend more secure to the board. Younger, L.J., relies much on the provision of sect. 3 of the above-mentioned Act of 1900. It runs as follows: "3. The limitation of liability under this Act shall relate to the whole of any losses and damages which may arise upon any one distinct occasion, although such losses and damages may be sustained by more than one person, and shall apply whether the liability arises at common law or under any general or private Act of Parliament, and notwithstanding anything contained in such Act."

Sect. 1 of the Act of 1900 purports only to limit the amount which a dock authority can recover under sect. 503 of the Merchant Shipping Act of 1894, but whether it extends to sect. 504 of that statute or not, it does not refer in any way to the lien given by sect. 94 of the Mersey Docks Acts Consolidation Act of 1858 for damages. For the reasons given by Lord Sterndale in his judgment, I think that it may have been a quite business-like arrangement to have provided by this sect. 504 and sect. 514 of the Act of 1854 that the owners should be empowered to pay 8*l*. per ton of the tonnage into court to be distributed *pari passu* amongst claimants of the same class, standing on the same footing. But the question for decision in this case is, Can this be done so as to destroy the value of a security, a possessory lien conferred by statute? The provisions of sect. 504 are not compulsory. The shipowner need not apply under it; the court is not compelled to act under it. The words are "may determine," and "may distribute." As I shall presently endeavour to show, those words are not to be treated as obligatory where so to treat them would involve injustice. These words, as Lord Sterndale states, seem to carry with them the meaning "may if circumstances permit," and not "may whatever the circumstances may be," or whatever the the rights of the parties may otherwise be. Neither by sect. 1 of the Act of 1900 nor by sects. 503 or 504 of the Act of 1894 is the board expressly deprived of its valuable security, but, if the decision appealed from now be right, the shipowner may, at his option, procure that this security shall be rendered valueless, and all this, although the amount covered by the lien in respect of the damage done to its property is admittedly far in excess of the statutory limit of 8*l*. per ton of the ship's tonnage. No inquiry was necessary on that point. Again, it does not appear to me to be just or reasonable to construe the word "rateably" occurring in this sect. 504 in such a way as to level secured and unsecured claimants, and to distribute the amount of the owners' liability amongst them proportionately to the amounts of their respective debts. That is, as I have pointed out, in effect to destroy or render worthless the board's security. No express and positive provision of any of the statutes referred to requires that this must be done. Younger, L.J. seems to rest his decision somewhat on the principle that equality is equity. That may be so, but with the most unfeigned respect for the learned Lord Justice, that does not mean that secured and unsecured creditors are to be treated alike. For instance, equality of distribution of a bankrupt's assets amongst his creditors is the fundamental all-pervading principle of the Bankruptcy Code. But the fact that some of those creditors hold securities for their debts is not ignored; on the contrary, a secured creditor must either realise his security or surrender it and prove against the bankrupt's estate for the entire amount of his debt, or value it and prove for the balance of his debt. A secured creditor is, by sect. 168 of the Bankruptcy Act 1883 (46 & 47 Vict. c. 52), defined to be a person holding a mortgage, charge or lien on the property of the debtor as a security for the debt due to him by the debtor. If the respondents became bankrupt the board would, I think, independently of sect. 504, be treated as secured creditors, and their claim would not be levelled or treated on the same basis as the debts of claimants who had no security. If sect. 504 expressly enacted that the claim of the board should be so levelled, of course there would be an end to the question. But if the words of that section are reasonably susceptible of a construction which will not work that injustice, they should receive that construction. I concur with the Master of the Rolls in thinking that the words of the section are susceptible of a construction which leaves the security of the board unimpaired, save to this extent that the board must deliver up the ship on getting, instead of the amount of the damage done to them, the amount to which the liability of the owner has been limited. That sum is the substitute for the ship, as was the deposit under sect. 94 of the Act of 1858, and the board are entitled to hold it. The dividend which they would obtain on a rateable distribution of this sum amongst all claimants is not a substitute for the ship and does not represent it.

I turn to the authorities cited in argument. In support of the permissive character of the provisions of sect. 504, I refer to *Julius* v. *Oxford* (*Bishop*) which has long been regarded as the leading authority on the question as to the meaning to be given to the word "may," or to the words "it shall be lawful," when occurring in statutes. Lord Cairns, in giving judgment

in that case, said (42 L. T. Rep., at p. 548); 5 App. Cas., at p.222): "The words 'it shall be lawful' are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power. . . ." He then proceeds to show that this power to do a certain thing may be so coupled with a duty that the person empowered to do the particular thing is under an obligation to do it; and then proceeds "And the words 'it shall be lawful' being according to their natural meaning permissive and enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power to shew in the circumstances of the case something which, according to the principles I have mentioned, creates this obligation." He refers to the case of *Rex* v. *Barlow* (1693, 2 Salk. 609) amongst others, as a good example of the application of this principle. Lord Selborne said (42 L. T. Rep., at p. 552; 5 App. Cas., at p. 235): "I agree with my noble and learned friends who have preceded me, that the meaning of such words is the same, whether there is or is not a duty or obligation to use the power which they confer. They are potential, and never (in themselves) significant of any obligation. The question whether a judge, or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved *aliunde*, and, in general it is to be solved from the content, from the particular provisions, or from the general scope and object, of the enactment conferring the power." Lord Blackburn deals at length with the authorities, and shows that the words "it shall be lawful" are equivalent to the words "may," and that there the same principles of construction apply to statutes in which they are respectively used. I fail to see what duty lies upon the court before which the application mentioned in sect. 504 comes to distribute the amount of the owner's limited liability in such a way as to render worthless the board's lien. A contention was put forward, however, on the hearing of the appeal on behalf of the barge-owners, and apparently accepted by the Court of Appeal, that the construction of sect. 504 which I, following the Master of the Rolls, have suggested cannot be reconciled with the principles laid down in the authorities, and especially by the Court of Appeal in *The Emilie Millon*. (93 L. T. Rep. 692; (1905) 2 K. B. 817). I cannot accept that view, and an examination of the details of that case will show, I think, that the view is unsound. That decision is, of course, not binding on this House.

By sects. 248 and 253 of the Mersey Docks Consolidation Act 1858, an absolute power is given to the Mersey Docks and Harbour Board to detain any vessel until the dock tonnage and harbour rates due by her have been paid. This closely resembles the power of detention given by sect. 94 of this same statute in respect of damage caused to the porperty of the board. In *The Emilie Millon* case (*sup.*) the master and crew of the vessel had a maritime lien for wages due to them before she entered the dock. While she lay there, the master and crew brought an action *in rem* in the Court of Passage of Liverpool, in its Admiralty jurisdiction, to enforce this maritime lien. They recovered judgment. The ship was arrested under the warrant of the court, and an order was made for her sale by auction by the marshal of the court. The attempt to sell the ship by auction having failed, she was sold by private treaty for 250*l*. Ultimately an order was made by the court that the sale of the ship be confirmed, and that the vessel should be delivered to the purchaser free from all claims and demands against her on payment of the purchase-money into court less the auctioneer's charges. That the marshal's account be taxed and paid out of this money. That any right of the Mersey Docks and Harbour Board to payment of their charges in priority to other claimants under the Act of Parliament should be preserved against the fund in court. The board appealed against this order. It was contended on behalf of the board that sect. 253 of the Act of 1858 gave to it an absolute right as against all the world to detain the vessel until the rates were paid; that the Act did not give to the board any charge upon or right against the purchase-money of the vessel, if sold; it simply gave it a right to detain the vessel until the rates were paid. That the board have nothing to say to any question between the vendor and purchaser, that they had no concern with the rights of third parties, whether by maritime lien or otherwise, as against the vessel or the owners. That these persons could not stand in a better position with regard to the Dock Board than the owners. For the respondents and the master and crew it was contended that the vessel went into dock with the maritime lien attaching; that the master and crew, having this lien, were in a better position than the owners, and that the right of the Dock Board to detain the ship was subject to the maritime lien which had already attached. The court decided against this contention. They held that sect. 253 gave to the board a paramount right to detain a vessel until the dock tonnage rates were paid, notwithstanding that the master and crew of the vessel had a maritime lien for wages due to them. Collins, M.R., in delivering judgment, said: "The order made by the learned judge of the Court of Passage seems to ignore that right (*i.e.*, the right to detain the vessel) so clearly given by the Act, because it orders the vessel to be delivered to the purchaser free from all claims and demands against her, and it purports to preserve to the board as against the fund in court any right which their Acts may give them to payment of their charges in priority to other claimants. The board have no such prior right or charge. The only protection which sect. 253 gives them is the right to detain the vessel until the dock dues are paid, and nobody can, against the will of the board, undo or annul that statutory provision." Romer, L.J.

delivered judgment to the same effect. So far from this being a strong authority in favour of the respondent or of the barge-owners, it seems to me to be a strong authority in favour of the appellants. It shows that the statutory right of the board to detain the ship until the dock dues are paid, similar to that of the board in the present case, is paramount to all maritime liens. By parity of reasoning the statutory right of the Board to detain a vessel until the amount of the damage done by her is paid or deposited would take precedence of all other liens or charges upon the vessel: and, to use the words of the then Master of the Rolls, " nobody can annul or undo that statutory provision without the consent of the board." To level the claim of the board with the claims of all the other claimants is practically to annul and undo it, without the consent of the board. What the board is claiming is not a charge upon the ship or her value; it is the right to detain the ship herself until the damage done to the property of the board is paid for. If the 4468*l.* represents, and is, the substitute for the ship, as I think it is, the board is entitled, in my view, to hold it.

In *Rankine* v. *Raschen* (4 Rettie 725) the owners of the ship in default paid out of court to the owner of an injured ship the amount of the latter's claim. Subsequently the owner of the former ship by suit limited his liability to 8*l.* per ton. In the distribution, under sect. 540 of the Merchant Shipping Act 1862, and sect. 514 of the Merchant Shipping Act, 1854, of the fund thus created, it was decided that the sum paid out of court should be taken into consideration. To do otherwise would be to give, to a person who claimed to be entitled to a right of a certain kind and character, priority over a person entitled to the same right. Although relied upon in argument on behalf of the barge-owners, the case does not touch the present case. *The Victoria* (*sup.*) was the next of the cases relied upon. The decision turned upon sect. 54 of the Merchant Shipping Act 1862, by which it was enacted that where, by the improper navigation of a ship, persons on another ship are killed or injured, or any goods, &c., on such other ships are lost or damaged, the owner of the ship in default is only liable in damages for the loss of life or personal injury, either alone or together with loss or damage to goods to an aggregate amount not exceeding 15*l.* per ton of the ship in default, nor in respect of the loss, &c., or damage to ship's goods, merchandise, &c., whether there be loss of life or personal injury or not; owner only liable to an aggregate amount not exceeding 8*l.* per ton. In a suit by the owner of the *Victoria*, the ship in default, to limit the liability he paid into court a sum of 7862*l.* 18*s.* 10*d.*, being 15*l.* per ton of her tonnage, of which sum 8*l.* per ton was the limit in respect of loss of goods. 7*l.* per ton was held by the registrar to be insufficient to satisfy the claims in respect of loss of life and personal injury, and it was also held by him that the balance of these claims was entitled to rank *pari passu* with the claims for the loss of goods against the further sum equal to 8*l.* per ton; whereas the owner of the goods contended that these latter claims should have priority. The learned judge, Butt, J., held that the report of the registrar was just and equitable, and on delivering judgment used this significant language (59 L. T. Rep., at p. 728; 13 Prob. Div., at p. 127): " The Act interferes with the claimants' right only by putting a limitation on the amount which they can recover from the shipowner, and there is nothing in the Act to show that the persons who have suffered loss have their rights otherwise altered."

In *Leycester* v. *Logan* (3 K. & J. 446) the point decided was, according to the passage dealing with it on the page of Halsbury's Laws of England, to which Younger, L.J., refers—namely, vol. 26, p. 614, this: " The court sees that a shipowner is not made liable to pay any sum in excess of these amounts out of any moneys over which the court has control." The facts of the case were as follows: A ship named the *Falcon* collided with and sank a ship named the *Imogene*. Her cargo and some passengers' luggage which was on board her were lost. The plaintiffs, the owners of the *Falcon*, admitted that they were, in respect of these losses, responsible in damage to the extent of the value of their ship and the freight due, or to become due, in respect of her then voyage, and admitted, further, that the value of the ship and freight was insufficient to answer all the claims which were in fact made, or might be made, in respect of the *Imogene*. Several actions were commenced against the plaintiffs, in the Admiralty Court of London, by the owners of the *Imogene*, by the owners of part of her cargo, and by certain passengers. In one of these actions, commenced by one Logan, judgment was obtained condemning the plaintiffs in damages for the losses sustained by the collision, with costs. The ship *Falcon* was arrested by the process of the Admiralty Court, and was held liable to be sold, and continued so to be held up to the hearing of the case. The plaintiffs filed a bill in the Court of Chancery, apparently to have their liability limited under sect. 504 of the Merchant Shipping Act of 1854, and under sect. 514, for an injunction to restrain Logan from proceeding to have the ship sold under the judgment which he had already obtained, and the other defendants restrained from prosecuting their actions. It was held that the provisions of those two sections applied, and gave the Court of Chancery jurisdiction to stop the actions, notwithstanding the circumstance that one of the adverse claimants, Logan, had obtained a judgment condemning the ship, and that the utmost to which Logan was entitled under this judgment was to share rateably with the other claimants in the value of the ship and freight. Logan, however, was permitted to proceed to sell the ship, and out of the proceeds to retain such costs as the Court of Admiralty might by its order entitle him to. The decision in this case merely amounts to this, that a claimant gains nothing over his fellow claimants by his

diligence in obtaining judgment in the Admiralty Court in respect of his own claim.

In the case of *Jenkins* v. *Great Central Railway* (*Shipping Gazette*, Jan. 13, 1912) a cargo-owner had succeeded, in respect of loss of cargo consequent on collision, against the owner of the ship in default in the court of first instance, and the amount of the judgment was paid into court as a condition of a stay of proceedings pending appeal. Notice of appeal was given, but subsequently the shipowner, having after judgment obtained a limitation decree, paid into court the limited amount, asked leave to withdraw his appeal and to have the money paid into court returned to him. This he obtained. This is only another example of the rule that under sect. 504 a claimant gains no advantage over his fellow claimants by diligence in obtaining judgment for the amount of his claim. I do not think that any of these cases establish that the construction of sect. 504 which I have suggested is unsound.

I think it never could have been intended that, by the provision of sect. 504, the rights of the board should have been practically swept away, or that this section on its proper construction levelled all debts, whether secured or unsecured, and provided that all claims for damages, irrespective of their nature, character or class, whether secured by a lien or otherwise, should be treated as on the same level as unsecured claims. In my opinion this sum of 4648*l.* odd stands, *quoad* the board's lien, in the place of the ship, and the board are entitled to hold it. I think, therefore, that the appeal succeeds; that in the detinue action the sum of 4468*l.* 4*s.* 9*d.* should be paid out of court to the appellants, and that the respondent should pay to the appellants the costs here and in the Court of Appeal.

Lord Sumner.—Sect. 1 of the Merchant Shipping (Liability of Shipowners and Others) Act 1900 (63 & 64 Vict. c. 32), does not in terms apply sect. 504 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), although sect. 2 does. Nevertheless it seems to me to be plain that sect. 1, truly construed, does apply sect. 504 as well as sect. 503 of the Act of 1894 to the case of damage to dock property by negligent navigation of a ship. Sect. 1 confines the shipowner's liability to an "aggregate" amount and enacts that by the phrase "the limitation of the liability of the owners of any ship set by sect. 503 . . . shall extend and apply." This is not a simple amendment of sect. 503 by inserting a sub-head thus—"(E) Where any loss or damage is caused to property whether on land or on water, or whether fixed or moveable." It is, in my opinion, the extension to damage to fixed property of an existing system of judicially limiting liability in respect of life, ships and cargo, so as to fix an aggregate amount which will discharge all liability incurred by the shipowners in the aggregate to all the persons who may be entitled to hold them liable. Limitation is the process by which a limit is made effective. Since limitation of liability was first enacted in favour of shipowners in 1734 (7 Geo. 2, c. 15), it has always been accompanied by the enactment of procedure by which a single court has been empowered to deal with all claims on the shipowners, and to satisfy them in one proceeding out of the agregate amount of their liability. The language used has varied, but, as Lord Blackburn pointed out in the case of *The Khedive* (4 Asp. Mar. Law Cas. 361; 47 L. T. Rep., at p. 204; 7 App. Cas., at pp. 815, 816), the substance has remained and still remains the same. Indeed, without the importation of some such judicial system as was familiar to the Legislature in 1900, shipowners could not be fully protected, and claimants would be remitted to a competitive scramble for the aggregate sum, in which the hindmost would come off as the hindmost proverbially do. Each claimant would necessarily bring his own action; each would proceed separately to trial; and no tribunal would have power to stay any of the actions, or to order that only one action should proceed. Suppose then that one court should hold that the negligent navigation was not "without the actual fault or privity of the owner," although the occasion and the evidence was practically one, and the other courts took the contrary view, the shipowners would then be liable to pay twice, once the limited and once again the full amount. Suppose that the shipowners pleaded the statutory limit in each action, and that absence of actual fault or privity was established, but that the judgment first pronounced was for the full limited amount, that judgment being satisfied in full subsequent judgment creditors would get nothing. Suppose, again, that all the actions were simultaneously begun, and that all the judgments were pronounced on the same day. The question, who would get the money, would depend on the agility of the judgment creditors in putting the sheriff in motion. I do not see what power any court would have even if the actions had been consolidated, to order a rateable distribution, unless sect. 504 applied. The whole conception of a limitation of liability "set" by the Act of 1894 is the conception of a discharge of the shipowners, on the one hand, and a distribution of the aggregate sum to which they elect to limit their liability, on the other. This can only be done by a court which can bring all the parties before itself. Of that system and of that judicial procedure the Legislature in 1900 was fully aware; it found them clearly set out in the Act of 1894, and it is prescribed that the Act of 1900 should be construed as one with the Act of 1894. This is, in my opinion, amply sufficient to apply sect. 405 to the present case.

I do not place any reliance for this purpose on the second and subsequent sections of the Act of 1900. That Act has two objects—the first, to limit the liability of shipowners to dock authorities in the same way in which their liability to other shipowners and to cargo-owners was already limited. This object is effected by sect. 1, which extends the old limitation of liability "set" by sect. 503 of the Act of

1894. The second object is to limit certain liabilities of dock-owners; this is a new limitation of liability under this Act—namely, the Act of 1900, and it is with this that sect. 2 and the subsequent sections deal, laying down for it lines necessarily very different from those of the older limitation. Accordingly, I think the fact that sect. 2 of the Act of 1900 mentions sect. 504 of the Act of 1894, while sect. 1 does not, of no real importance. Similarly, to my mind, nothing turns on sect. 3 for the purposes of this case. The difference between the objects of sect. 1 and those of the rest of the Act, and the different methods of attaining those objects respectively, are enough to explain the mention of sect. 504 in one part and the silence of the other part about it, and prevents the maxim *expressio unius exclusio alterius* from having any application to it in this connection. The Legislature was free to employ one structure in one part, and another in the other part of the Act. It does not follow, because it amended sect. 504 in one case, or, more truly, added expressly to its provisions, that it should not have equally added to its provisions in the other case, although it only used the words "the limitation of liability, set by sect. 503, . . . shall extend and apply." The words "extend and apply" suffice, in my view, to give the unaltered language of sect. 504 a new and extended meaning in such application, although from 1894 to 1900 it had no application to dock structures at all.

If I may say so without disrespect, the appellants have throughout based their argument on a fundamental fallacy—namely, that it is really the ship which is liable, and not the shipowners; that the Acts enable the shipowners to substitute 8*l*. a ton for their ship; that procedure is of subordinate importance, and that, if the shipowners deposit 8*l*. a ton somewhere, they can go away with the ship *legibus soluti*. Everything else goes on as before. The board, so far as may be necessary, has a possessory lien for its claim on the money deposited and that lien must be discharged, since it cannot be cut down. In spite of the action for limitation of liability, the barge owners are left in the lurch. No case was cited in which such a claim to priority in a limitation action has been sustained. All the comparable cases, although none is directly in point, are adverse to such an interference with equality and suggest the principle that a reateable distribution places on the same footing all claims which, as in this case, are the same in their quality. If the shipowners have already paid a claimant in whole or in part, that claimant must in effect bring the money into account—*Rankine* v. *Raschen* (4 Rettie 725) if his diligence has obtained a judgment *in rem* against the ship, he can only avail himself of it—apart from costs—as a security for his rateable share in the limited fund, for which alone the shipowners are liable— *Leycester* v. *Logan* (3 K. & J. 446), if some claimants have already obtained payment by proceedings *in rem* still the shipowners can, in their subsequent proceedings for limitation of their liability, receive out of the 8*l*. a ton, which they are liable to bring into court, a return of the sum so obtained, leaving these claimants to receive out of it only their rateable share, after giving credit for the sum: *The Crathie* (8 Asp. Mar. Law Cas. 256; 76 L. T. Rep 534; (1897) P. 178). As parties entitled to a maritime lien, the barge-owners by the law maritime, and the Mersey Dock Board under the Admiralty Jurisdiction Act 1861 (24 & 25 Vict. c. 10), s. 7—*The Veritas* (9 Asp. Mar. Law Cas. 237; 85 L. T. Rep. 136; (1901) P. 304), all are on an equal footing, and although that lien gives a security arising at the commencement of proceedings *in rem*, the barge-owners gain no advantage over the Dock Board by being first in the field with their writs. "The true view is that the court holds the property not only for the first plaintiff, but also for at least all creditors of the same class, who assert their claim before any unconditional decree is pronounced: (per Jeune, P., *The Africano* 70 L. T. Rep., at p. 252; (1894) P., at p. 149). The board's right of detention is a remedy only; it does not promote the cause of action for the damage to a higher degree than that of the barge-owners for the same damage. It is not like the Crown's claims for stores lost in collision, which, although the right is generally waived—*The Zoe* (5 Asp. Mar. Law Cas. 583; 54 L. T. Rep. 879; 11 Prob. Div. 72), *The Winkfield* (9 Asp. Mar. Law Cas. 249; 85 L. T. Rep. 668; (1902) P. 42) —is a truly prior right, and can be asserted in the limitation proceedings as such, although it can also at the choice of the Crown be asserted outside them. If, as Lord Inglis, P. says in *Burrell* v. *Simpson* (4 Rettie, at p. 183), limitation of liability is "a case of statutory insolvency," which, if not an exact, is a very telling, description of it, what the appellants must show is either a higher claim for the damage done, and not a mere additional remedy for a claim of the same degree as the barge-owners' claims, or else a charge on or a property in the distributable fund itself.

The appellants rely for this on their private Act (21 & 22 Vict. c. xcii.). What then is sect. 94 of the Act of 1858? Its meaning will be best ascertained by considering it as at the time when it was passed, for nothing has been enacted since to extend it. The right to recover "the amount of such damage" is, of course, a right not given by the section, but arising independently of it. It was a right to recover the full amount, although, since 1900, if the shipowners claim and get limitation of their liability, it is admittedly a right only to recover a part of it, if the whole exceeds the statutory limit. The case for which it provides—that of damage to dock property by the negligent handling of a ship—was one for which the common law already provided an ample cause of action, but the procedure to be followed was that of an ordinary trial with a jury. To give a permissive remedy by summary proceedings before a justice was, no doubt, a boon to the Dock Board. That procedure, however,

involved personal service on the party proceeded against, and an alternative right to detain the ship no doubt gave a further advantage, but no word so far is to be found in the section to enlarge or qualify the cause of action; so far nothing is provided but the means of enforcing the pre-existing right, whatever it might be. First of all, detention is a bare right to detain. There is no pledge, no charge, no right *ad rem*, no power to sell, no power to any court to order a sale. It has been said that the section gives a possessory lien. It may well be questioned whether the section gives such possession as would enable the board to bring trover, or would justify an indictment laying in the board the title to articles stolen from the ship's equipment. The obligation of the board to go to expense in protecting the ship, while detained, would raise another question. I wish to keep the point open, since it is not now necessary to decide it, whether what is called in the section detention authorises what the law knows as possession. Nothing at any rate is said about dispossessing the owners' servants, and the detention, provided in sect. 253 of the same Act, seems clearly not to involve any such right. The point is of some importance, for sect. 688 of the Merchant Shipping Act 1894 enables property owners, when their property has been damaged by a foreign ship in circumstances like those of the present case, to obtain a judge's order, directed to sheriffs and others, to "detain" the ship, when found in a British port, until satisfaction is made or security given in respect of the injury, and, although I recognise the distinction between a power given to the injured property-owner himself and a power given to a public officer, it is open to question whether the same word "detain" can have a different meaning on this ground alone, as it is equally a mode of enforcing a cause of action, whether it is a power to detain given to a public official for the protection of a private claimant or is a power given to the claimant himself.

The case of *The Emilie Millon* (10 Asp. Mar. Law Cas. 162; 93 L. T. Rep. 692; (1905) 2 K. B. 817) decided upon sect. 253 of this private Act, and cited, as I understood, as an authority in favour of the appellants, appears to me, on the contrary, to show how limited the operation of this right to "detain" really is. In that case the Court of Appeal held, in terms, that under the word "detain" "the board had only the right to refuse to grant the vessel a clearance, and, consequently, to detain her—to keep her in the docks—let her ownership, legal or equitable, and the liens upon her be what they might." The judgments expressly say that the section conferred no claim on any fund, even though that fund, being the proceeds of the sale of the ship under an order of the court in an action *in rem*, "represented" the ship in the highest sense in which that term can be used, and they say also that the board derived no priority under the section over the claims of those who had a maritime lien against the ship for wages. In brief, the section gave an absolute right, outside of the power of any court to enforce it, to be exercised by the board at its own hand, and without interference by anybody, to immobilise the ship indefinitely unless and until the dues should be paid. Apply that reasoning to sect. 94. It draws a broad line between a remedy under the section and a claim in the limitation suit to have priority upon a fund, which had not been paid in to obtain the release of the ship from a lien, but had been paid in to obtain release of the shipowners from personal liability. If the board has released the ship without getting a deposit placed in its own hands, in terms of the section, that is its affair. If it has asked for or has acquiesced in payment of the amount into court instead of to the credit of the detinue action, it does not gain thereby any right against strangers, which the section itself is powerless to give. As it happens, the claim for damage to the dock gates exceeds 8*l.* a ton of the ship, but, if it has been otherwise, the sum paid into court in the detinue action would have differed from the sum deemed to be in court in the limitation action, and the distinction between the two funds would have been apparent on the face of them. The fund to be deposited under the section is the ransom of the ship, and only since 1900 could it possibly have been identified with the fund, which is the aggregate amount of the shipowners' liability under the Merchant Shipping Act 1894. The fund to be paid into court in the limitation action is a distributable fund, over which in no event could the board exercise the only right of sharing in it which sect. 94 gives—namely, the right to spend it in repairs. I cannot see how these two different funds can be identified by saying that they "represent" the ship.

The Mersey Dock Board took over older docks at Liverpool and Birkenhead under the Acts of 1857 and 1858, but, after examining those Acts, I cannot find that the Harbours Clauses Act 1847 (10 & 11 Vict. c. 27), was made applicable to the undertaking. It may, however, be worth noting that sects. 74 and 75 of the general Act are just as far from supporting the appellants' claim as sect. 94 of the Mersey Dock Act of 1858 is. They provide for detention of a ship, which has done damage to dock property, until security for the damage is given, and for summary proceedings before justices, who are empowered to distrain the ship until the amount of the damage awarded by them is paid. Such was the general policy of the Legislature in these matters in the middle of the last century. The object of detaining or distraining a ship was to secure or to discharge the liability for the damage done, but the amount and the nature of the liability remained to be fixed otherwise, and, if the right to be paid was one which itself enjoyed no priority over the similar right of others similarly circumstanced in one and the same transaction, none of these ancillary or remedial provisions can supply a priority over the other and so interfere with equality of distribution among all.

What can the board do if they detain the ship? Nothing at all, unless the owners, for their part, first take action. Except as a means—often highly effectual—of bringing pressure to bear on the shipowners, detention of the ship results in nothing. When the money is deposited, it does not "represent" the ship, against which, when the section was passed, the Dock Board had no remedy *in rem;* it represents the amount claimed as being contingently due from the shipowners, a representation in quite another sense. If the vessel is badly damaged, the owners may not think it worth while to release her. They may pay the damage claimed, and then the right to detain ceases, whatever the damage may ultimately turn out to be, or they may deposit the amount claimed with the board, and then either pay the damage and get back the deposit, which seems a roundabout thing to do, or give a notice disputing the claim, in which case the dispute will have to be tried. Only if the damages are not paid, and no notice is given, can the board do anything with the money deposited except retain it, and even then, if the board applies it in making good the injury done to its property, it must return any residue which may be left over when that has been done. It is only at this point that the idea of a security, properly so-called, emerges, as distinguised from a mere means of constraining the shipowners to facilitate a settlement of the claim. It appears to me that the whole section is pure procedure, and adds nothing to the cause of action, which it is to help to enforce. The liability remains as it always was, that is a personal liability in tort for unliquidated damages, and nothing is provided which assimilates it to a specialty debt taking priority over other similar claims, or gives the board any security over any fund within the jurisdiction of any court, which it can charge or bind or release. This right to detain is not equivalent to an arrest, and is not a proceeding *in rem.* The money in the board's hands is not equivalent to money paid into court. If the board continued to detain the vessel after the amount claimed had been deposited or paid, the owner's remedy would be an action of detinue, and would not be anything in the nature of a redemption action.

Consider, on the other hand, what a limitation of liability action is. If the shipowners do not choose to bring it, no one can compel them to do so. If they choose to admit and pay the barge-owners' claims, the board cannot prevent it, and, since 1900, if they choose to bring an action for limitation of liability and to make the board a defendant as they did, there is nothing, as far as I can see, to prevent it either. Of course the board may go on detaining the ship, but, if the shipowners brought the 8*l.* a ton into court in the limitation action and declined to take any step to release the ship, they would be entitled to their decree for limitation. The board could only claim unliquidated damages in the limitation action, and, on getting a decree for its rateable share of the fund in court, could, as it seems to me, have no further right under sect. 94 to detain the ship, for, in terms of that section, the right is only to detain until such damage shall have been paid for, and paid the board would have been to the extent now allowed by law.

In *The Veritas* (9 Asp. Mar. Law Cas. 237; 85 L. T. Rep. 136; (1901) P. 304) Barnes, J. makes some observations which seem to me to support the view of sect. 94 taken above. The *Veritas* (like the *Countess*) had done damage to the dock company's landing stage, and herself became a wreck. Under sect. 94 the board could detain, and under sect. 11 of its Act of 1874 (37 & 38 Vict. c. xxx.), as amended by sect. 29 of its Act of 1889 (52 & 53 Vict. cxl.), could remove and sell her, and did so, receiving the proceeds. Other parties also claimed. "It is to be observed" says the learned judge (85 L. T. Rep., at p. 138; (1901) P., at p. 308): "that in selling under its statutory powers the board do not extinguish the claimants' claims altogether against the proceeds, but hold the same, subject to such rights as could be enforced against the *res* . . . and, although they had an option to detain the wreck until their damage was paid or a deposit made for the same, that appears to be only an additional right, . . ." The learned judge then dealt with the question of priorities, and, although he pointed out that the board had a maritime lien for the damage, it is noticeable that he nowhere suggests that, in respect of the right to detain under sect. 94, it any possessory lien at all, or that, if it had, such a lien could have availed it in any question of priorities beyond what might be recoverable by action, if no priority were involved.

It was argued, without defining the term, that the money in court is "substituted for" or "represents" the ship, but in what sense? A sum brought into court in a limitation of liability action does not "represent" the vessel; it may, and in this case would, represent a great deal less than the vessel. It represents, and is, the aggregate liability of the shipowners to all the parties whom they have injured. In the present case, what was brought into court under the order of the Court of Appeal in the detinue action was not brought in under the terms of sect. 94, which only provide for deposit in the dock board's hands. The order was, in part at least, a consent order, and, if there was jurisdiction to make it, at any rate it does not bind strangers to that action, nor can an order to credit it to the limitation action be made, so as to limit the rights of persons who claim in the limitation action only. In truth, this point does not help the appellants, unless the money brought into court in the detinue action, to which the barge-owners were not parties, is, as the appellants aver, to be deemed at the same time to be in court in the limitation action, to which they are parties, and also to be the deposit provided for by sect. 94, which has to be paid to the board and not into any court. Even so, it does not avail, unless, further, sect. 94 enlarges the board's cause of action, either by

chargnig the money and making it the board's own money by way of security, or by giving the board a right to have it applied to satisfy its cause of action, as limited by the Act of 1900, s. 1. The section occurs in a private Act, and is not to be extended in favour of the promoters of the Act by any implication beyond what it says. It was enacted at a time when a harbour authority as a claimant for damage done to dock structures, had no connection with suits for limitation of liability, and naturally its terms give a harbour authority no right in or charge on the money paid into court in such suits. Neither does the Act of 1900. That sum is in principle a sum to be distributed among all parties injured. A party, who claims a right to have it handed over to himself instead, must find clear words in some statute to that effect, for the whole matter originated in and is regulated by statute; but, so far from the money deposited with the board under the section being available for the purpose of enabling it to pocket more than it could obtain if the shipowners chose to sue for the limitation of their liability, I think that, under the section, there are cases in which the board might have to refund part at least of the deposit, even though it received no satisfaction of its claim at all.

Let me put two such cases: Suppose, first, that the ship is being navigated under a demise charter, so that the negligent captain is not the servant of the shipowners at all. Did the section mean that a justice of the peace could make an order for the payment of damages against persons who did not employ the captain and to whom the maxim *respondeat superior* did not apply? Surely not. A charterer by demise was not an owner within sect. 503—*Hopper No.* 66 (10 Asp. Mar. Law Cas. 492; 97 L. T. Rep. 360; (1906) P. 34)—until the Merchant Shipping Act 1906 (6 Edw. 7, c. 48), expressly made him so (sect. 71) but nothing has extended sect. 94 of the Mersey Docks Act 1858 in this respect. The alternative remedy against the ship can carry the board no further than a common law action, or an appeal to summary jurisdiction, would take it against a defendant, and, if the owners deposited the money and disputed the claim, the board would in the end be compelled to return the deposit. Again, if the owners of 31/64ths, dissenting from the views of the managing owner, took the necessary steps to dissociate themselves from all his acts, including the appointment of the captain, here again, although part owners, they would not be liable *in personam* for the captain's negligence; and if, to obtain the liberation of the ship which in part belonged to them, they were forced to make a deposit, I apprehend that they could obtain a return of what they had deposited under duress, whether the co-owners, who had employed the captain were solvent or not, and the board would have to be content with executing any judgment against the 33/64ths. If so, the only result of detaining the ship under the section, which has to be a detaining of the whole ship, since it is indivisible, beyond of course the barren satisfaction of keeping her in dock indefinitely, is to compel someone to deposit money which can only be made available to the extent to which a right of recovery can be established in an action.

I think that the net result is this. Down to 1900, so far as such a case as this is concerned, the law stood as it did in 1858, and the Merchant Shipping Acts had nothing to do with it. The Act of 1900 extended to this case both the limit of the shipowners' liability and the machinery of the limitation of liability action. That Act has been called a parliamentary bargain, but we are not concerned with that; we are construing a public general statute, not a contract *inter partes*, and this at least is clear, that we cannot assume an unexpressed intention of the Legislature to compensate the dock company for losing its right to full damages against the shipowner who is vicariously to blame, by allowing it to take away altogether any relief to the other shipowners, who are not to blame at all. When a statute means to rob Peter to pay Paul it must say so.

The board continues to enjoy its special remedies under sect. 94, but what do they now amount to? It seems plain that nothing more can be got through summary proceedings before a justice than the dock board is entitled to get in actual contemporaneous limitation proceedings, and the police court proceedings must therefore be stayed. What more is to be got in the alternative event? By continuing to detain the ship, the board may have some security for the satisfaction of the amount adjudged to it in the limitation action, but the matter is purely academic, for the money itself is *ex hypothesi* under the hand of the court. If, but only if, the shipowner forgets to give notice of dispute, there may seem to be some chance of the board's being better off than the barge-owners are, for then, under sect. 94, it might wait seven days and thereafter proceed to spend the deposit in repairing the damage in full. How matters would then stand it is not necessary to decide beyond saying this, that I cannot see how in that event the barge-owners, who are strangers to the whole matter, could suddenly be worse off in the limitation action than they were before. I should have thought that, having placed themselves in that position, the shipowners must either find some way of recovering the appropriate part of their deposit from the board as money paid under a mistake of fact, or otherwise, or else lose it, for the Merchant Shipping Act 1900 does not limit their liability for their own defaults in procedure; but, be that as it may, the event, improbable in itself, is quite outside of the limitation of liability suit, in which the shipowners have to make available for the court's order 8*l*. a ton, whatever may have become of the ship, if they are to get a chance of limitation at all.

On sect. 504 of the Act of 1894, I think that *Julius* v. *Oxford* (*Bishop*) (42 L. T. Rep. 546; 5 App. Cas. 214) is rather beside the point. The section doubtless empowers the court and the

judge "may" exercise that power, but he must do so when duly invoked, and he must do so according to law. If the board has a legal right to be satisfied in priority to the barge-owners, the court may not satisfy the barge-owners in derogation of that right; if the board has not that legal right, "rateably" can only mean *pari passu*. The whole question is whether the board has that right. The court "may" distribute among all; the board has to show some right in itself to say that the court "may" not do anything except pay the whole fund to the board itself without any distribution. Sect. 94 is the sole alleged foundation for it. It is not enough to say that the right to detain remains, for the question is "to detain what for?" and I think that the answer is "to detain as an additional remedy towards enforcing some legal right existing independently of sect. 94" and that right is, in in the events which have happened, only a right to a rateable share. If so, the appeal in the limitation action fails.

As to the detinue action, I think that the shipowners have done much to confuse this litigation by bringing it at all, so far as the collision is concerned, since the issue could equally well have been raised by appealing from the order of Hill, J. in the limitation action. As, however, the Merchant Shipping Act 1894 clearly means that the shipowners are liable for an amount of 8*l*. a ton only, the question in the detinue action can only be one of costs, and I need say no more. I think that this appeal fails also.

Lord PHILLIMORE.—This is a difficult case; but upon reflection I conclude that it may be determined by the statement of three propositions.

(1) The right of the Mersey Docks and Harbour Board was to hold the ship as security for the amount of their lawful claim in respect of damage done to their dock. What that amount might be would, in ordinary cases of dispute, be determined in an action between the parties. The shipowner might tender what he deemed a sufficient sum, and, if it were refused, bring an action of detinue, or the board might sue the shipowner upon his liability at common law, in which case the amount recovered would have no relation to the value of the ship detained; it would neither be diminished nor enhanced by any such consideration. To repeat, the board took the ship not as a step in proceedings for determining their lawful claim, but as security for their claim when lawfully determined. And security in itself is not priority.

(2) The case before the House is not the ordinary case. The right to limit liability given by the Act of 1900 (63 & 64 Vict. c. 32) comes in, and it is agreed that the extent of the liability of the shipowner to all persons, including the board, who were injured by the negligent act of his servant, is, inasmuch as there was no personal fault or privity, limited to a sum to equal to 8*l*. per ton of the ship's registered tonnage without deduction on account of engine room—that is, to 4468*l*. odd. That is the measure of the liability of the shipowner to everyone, and into this question again the value of the ship detained does not enter either by way of diminution or enhancement.

Now, the shipowner, having this concession of a reduction of liability made to him by statute, is not given it in name only. The law gives, and must give him, the means of availing himself of it. If there is only one claimant, it will suffice for the shipowner to pay into court the statutory sum with a plea asserting that here was no actual fault or privity on his part. But if there are more claimants than one, how is he to proceed? He cannot pay the first man in full, and plead that payment in bar to the next comer. Such an idea has never even been suggested since limitation was enacted by 53 Geo. 3, c. 159. He could not safely pay the first what he esteemed to be his *pro rata* share, for he might not know at the time how many claimants were to follow, nor might he know later claimants might not successfully contend that the first claimant had exaggerated the sum due to him, or, indeed, had nothing due to him. He would be bound to institute some form of procedure in the nature of interpleader by which all claimants to a fund which he placed *in medio* would establish their claims and the amounts severally due. If sect. 504 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), and the corresponding section in earlier Acts, had not existed, the courts would have been obliged to invent some form of procedure for the same purpose. I do not, therefore, think that it much matters whether the Act of 1900 incorporates sect. 504 of the Act of 1894, or not. If it does not, there must still be, by the reason of the thing, an analogous procedure. The inconvenience which would otherwise arise would amount to a denial of justice. Take the present case, and merely modify it by assuming that the amount of damage done to the dock was in dispute, and that the barge-owners contended that it was much less than 4468*l*. The shipowner could not safely pay the board the sum claimed, and as the board could not be expected to release the ship unless their claim, so far as it could be lawfully enforced, was paid, the shipowner would have to get the claim assessed in the presence of the barge-owners, that is, in some form of litigation to which the barge-owners as well as the board were parties, and where the barge-owners could bring forward their objections, they being the only parties interested in having the claim of the board lawfully determined.

The shipowner must, for his legitimate protection, bring proceedings for limitation, and he is therefore entitled to bring them. Proceedings of this nature are the only proceedings by which he and the barge-owners can get justice. I should hold this independently of the language of the statute of 1900, but I think it would be safe to say that the word "limitation" in sect. 1 of that Act means, or includes, the process of limiting, that is, the process of ascertaining and working out the shipowner's defence

of limited liability. If this be so, the second proposition is established. The shipowner has a right, which he will exercise, of instituting proceedings to limit his liability, and to these proceedings he may, and for his own sake must, make parties all claimants, including the board. As counsel for the respondent shipowners put it in his short and able argument, the amount for which the security taken by the board is to stand must be determined in the limitation action, and in that action the board must put forward its claim and have its value determined.

(3) The third stage in the argument is not difficult. Amongst the various claimants the amount is to be distributed "rateably." This is language not used for the first time. It appears in the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104)—if not earlier—and has uniformly received the same construction, and the Legislature, in passing the Acts of 1854 and 1900, must be taken to have had knowledge of *Leycester* v. *Logan* (3 K. & J. 446), of *The Crathie* (8 Asp. Mar. Law Cas. 256; 76 L. T. Rep. 534; (1897) P. 178, and of the other cases cited in argument, which show that neither priority of suit and judgment—although this priority in the ordinary case of several actions *in rem*, where the *res* is deficient should, by the Admiralty rule, give preference to the prior *petens*—nor maritime lien, nor payment under compulsion of a foreign court of justice, nor mistaken over-payment, is allowed to interfere in any way with the mathematically rateable division of the fund; and if it be said that sect. 504 is technically inapplicable, still the analogous procedure must be governed by the ordinary rules of equity practice established for bankruptcy and for the administration of the insolvent estates of dead people, the well-established principle to which Younger, L.J., refers in his judgment—Equality is equity.

Then it is said, What advantage does the board gain from its statutory right to seize and hold? If by this be meant, What advantage does it gain over other claimants? the answer is None. Why should it? The security is not given to it in order to assure priority. It is given to prevent the ship sailing away without paying what is due from the shipowner. There is no indication in the board's Act of competing claims or competition coming under consideration at all. The advantage which the board has gained is that the payment by the shipowner of all that he can be made to pay is assured. The benefit in the particular case is limited to a quota; but without the security, there might have been no quota.

In my judgment these appeals fail.

Appeals allowed.

Solicitors for the appellants, *Rawle, Johnstone*, and *Co.*, for *W. C. Thorne*, Liverpool.

Solicitors for the respondent barge-owners, *Thomas Cooper* and *Co.*, for *Hill, Dickinson*, and *Co.*

Solicitors for the respondent, owners of the *Countess*, *Charles Lightbound* and Co.

Feb. 26 *and March* 22, 1923.

(Before Lords Cave, L.C., Shaw, Sumner, Parmoor, and Wrenbury.)

Adelaide Steamship Company v. The King.(a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Insurance—Charter-party—Requisitioned ship—War risk or marine risk—" Consequences of hostilities or warlike operations"—Use of ship as ambulance transport—Collision—Negligence.

In 1916 *the steamship* W. *was taken over by the Admiralty for use as a hospital ship upon the terms of charter-party T.* 99, *the Admiralty accepting liability for all war risks, including " all consequences of hostilities or warlike operations," while the owners undertook the maritime risks. The* W. *was used as an ambulance transport, and was armed with a gun, and had on board a few Royal Navy men to work it. Her master was instructed that if he were attacked by a submarine and saw an opportunity of ramming it, he should do so. While carrying wounded men with doctors and nurses from Havre to Southampton, and being navigated without lights on a dark and hazy night, and proceeding at full speed by the orders of the Admiralty, the* W. *collided with another ship and was damaged. The* W. *was found to be alone to blame for the collision, which was due to the negligence of those in charge of her.*

Held, that the W. *was engaged in a warlike operation at the time of the collision.*

Peninsular and Oriental Branch Service *v.* Commonwealth Shipping Representative (16 *Asp. Mar. Law Cas.* 33; 128 *L. T. Rep.* 546; (1923) *A. C.* 191) *followed.*

And, further, that the dominant and effective cause of the loss was the operation in which the W. *was engaged and, whether it was skilfully or unskilfully conducted, the liability therefor attached to the Crown under the terms of the charter-party.*

Decision of the Court of Appeal (reported 16 *Asp. Mar. Law Cas.* 57; 128 *L. T. Rep.* 258; (1923) 1 *K. B.* 59) *affirmed.*

Appeal from the decision of the Court of Appeal (reported 16 Asp. Mar. Law Cas. 57; 128 L. T. Rep. 258; (1923) 1 K. B. 59) on a petition of right. The suppliants were an Australian steamship company of Melbourne. In Aug. 1915 the *Warilda*, belonging to the suppliants, was requisitioned by the Australian Government for use as a transport for bringing Australian troops to England. In July 1916 she was taken over by the British Admiralty for use as a military hospital ship upon the terms of the charter-party T. 99, which provided that the Admiralty should accept liability for all war risks, including " all consequences of hostilities or warlike operations " while the suppliants continued to be liable for the marine risks. She was described as an " ambulance transport to be

(a) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

treated as a troop transport." She was armed with one 12-pounder gun placed aft and had instructions to ram any submarine sighted. On the 24th March 1918 the *Warilda* was carrying wounded men from Havre to Southampton when, about 4 a.m., she came into collision with another vessel, the *Petingaudet*, and both vessels suffered considerable damage. The night was dark and hazy and the sea smooth. By order of the Admiralty the *Warilda* was being navigated at full speed without any lights showing, and the *Petingaudet* was being navigated without masthead lights. The owners of the *Petingaudet* brought an Admiralty action against the suppliants, and in that action it was held that the *Warilda* was guilty of negligence and that she alone was to blame for the collision, and the suppliants were made liable for the damages to the *Petingaudet*. The suppliants claimed a large sum for the damage sustained by the *Warilda* on the ground that their vessel was injured in consequence of warlike operations, and that the Admiralty had undertaken this risk; the Crown in their plea asserted that the collision was due to the negligent navigation of the *Warilda* and was the result of a maritime risk.

The Court of Appeal held, reversing the decision of McCardie, J. (1) that the *Warilda* was engaged in a warlike operation at the time of the collision; and (2) that in the circumstances the negligence of those in charge of the *Warilda* was immaterial, and the Admiralty were liable.

The Crown appealed.

Raeburn, K.C. and *Balloch* (Sir *Ernest Pollock*, K.C. with them) for the appellant.

MacKinnon, K.C., *Dunlop*, K.C., and *Dumas* for the respondents.

The following cases were referred to:

Peninsular and Oriental Branch Service v. *Commonwealth Shipping Representative*, 16 Asp. Mar. Law Cas. 33; 128 L. T. Rep. 546; (1923) A. C. 191;

Attorney-General v. *Ard Coasters Limited; Liverpool and London War Risks Association Limited* v. *Marine Underwriters of Steamship Richard de Larrinaga*, 15 Asp. Mar. Law Cas. 353; 125 L. T. Rep. 548; (1921) 2 A. C. 141;

Britain Steamship Company v. *The King; Green* v. *British India Steam Navigation Company Limited; British India Steam Navigation Company Limited* v. *Liverpool and London War Risks Insurance Association Limited; The Matiana*, 15 Asp. Mar. Law Cas. 58; 121 L. T. Rep. 553; (1919) 2 K. B. 670; affirmed 15 Asp. Mar. Law Cas. 58; 123 L. T. Rep. 721; (1921) A. C. 99;

British and Foreign Steamship Company v. *The King; The St. Oswald*, 14 Asp. Mar. Law Cas. 270; 118 L. T. Rep. 640; (1918) 2 K. B. 879;

Charente Steamship Company Limited v. *Director of Transports* 38 Times L. Rep. 434;

Ionides v. *The Universal Marine Insurance Company*, 8 L. T. Rep. 705; 14 C. B. N. S. 259;

Thompson v. *Hopper*, El. Bl. & El. 1038;

Trinder Anderson and Co. v. *Thames and Mersey Marine Insurance Company; Same* v. *North Queensland Insurance Company; Same* v. *Weston, Crocker, and Co.*, 8 Asp. Mar. Law Cas. 378; 78 L. T. Rep. 485; (1898) 2 Q. B. 114;

Inui Gomei Kaisha v. *Bernardo Attolico*, Lloyd's List Rep., Feb. 10, 1919;

Owners of Steamship Larchgrove v. *The King*, 36 Times L. Rep. 108;

Busk v. *Royal Exchange Assurance Company*, 2 B. & Ald. 73.

Their Lordships took time to consider their judgment.

Lord Cave, L.C.—In the month of March 1918 the steamship *Warilda* was under requisition by the Admiralty on the terms of the well-known form of charter-party called "T. 99." She was being used as an ambulance transport for the conveyance of wounded combatants from France to this country. She was painted grey and armed for defence against enemy submarines; and she had instructions to sail at night and without lights and at the maximum speed compatible with safe navigation. On the night of the 23rd–24th March, the *Warilda* was carrying about 600 wounded men, with the usual medical and nursing staff, from Havre to Southampton; and at about four o'clock in the morning of the 24th, when she was proceeding at about fifteen knots and without lights, she came into collision off St. Katherine's Head with the steamship *Petingaudet*, which was carrying a cargo of coke from Shields to Rochefort, with the result that serious damage was caused to both vessels. The owners of the *Petingaudet* having brought an action for damage caused to her by the collision, it was held that the collision was due to the negligence of the master of the *Warilda* in not giving way or slackening speed, and judgment was given for the owners of the *Petingaudet*; and this decision was affirmed by the Court of Appeal and by this House.

The question of insurance liability then arose. The charter-party T. 99 contained the well-known clauses 18 and 19, clause 18 providing that the Admiralty should not be liable for injury by collision or other cause arising as a sea risk, and clause 19 providing (in effect) that the Admiralty should be liable for the risks of war including "all consequences of hostile or warlike operations"; and the owners of the *Warilda* presented a petition of right, alleging that the collision was a consequence of hostilities or warlike operations and claiming to be indemnified against their loss. The trial judge, McCardie, J., decided in favour of the Crown; but his decision was reversed by the Court of Appeal (consisting of Bankes, Warrington, and Atkin, L.JJ.), who declared the Crown liable for such sum as should be found due to the

suppliants by the Commercial Court. Thereupon the present appeal was brought.

Two questions were argued in the courts below, namely, first, whether at the time of the collision the *Warilda* was engaged in a warlike operation, and, secondly, whether, if so, the collision was a consequence of that warlike operation; and the case for the appellant raised both questions. But before the appeal came on for argument before your Lordships, this House had decided the case of *The Geelong* (*Peninsular and Oriental Branch Service* v. *Commonwealth Shipping Representative*, affirmed 16 Asp. Mar. Law Cas. 33; 128 L. T. Rep. 546; (1923) A. C. 19); and counsel for the appellant very properly admitted that in view of that decision and of the reasoning upon which it was founded, he could no longer contend that the *Warilda* was not engaged in a warlike operation. The first point therefore was not argued in this House.

The second point was put on behalf of the appellant in this way. It was said that the warlike operation of the *Warilda* was not the proximate cause of the collision, that the negligence of her master was a new factor intervening between the warlike operation and the collision, and that the collision was a consequence of that negligence and not of the warlike operation. The Court of Appeal unanimously rejected this argument, and held the Crown responsible. I agree with the view taken by the Court of Appeal. By the terms of the charter-party, the Crown is liable for "all consequences" of hostilities or warlike operations, nothing being said about their being skilfully or unskilfully conducted. The navigation of the *Warilda* in those waters at full speed without lights was clearly a warlike operation, which in itself involved peril to other ships. The operation may have been negligently conducted so far as the safety of other vessels was concerned, but the same may be said of many other warlike operations. The negligence of the master may have contributed to the loss; but its dominant and effective cause was the operation in which the vessel was engaged, and the liability therefore attaches. Cases such as *Busk* v. *Royal Exchange Assurance Company* (*sup.*) and *Trinder Anderson and Co.* v. *Thames and Mersey Marine Insurance Company* (*sup.*) may not be directly in point; but the reasoning in those cases affords some analogy to the present, and it is not favourable to the appellant.

In my opinion this appeal fails and should be dismissed with costs, and I move your Lordships accordingly.

Lord SHAW.—The steamship *Warilda* was in the year 1915 requisitioned by the Australian Government as a transport for bringing Australian troops to England. In July 1916 she was taken over by the British Government for use as a military hospital ship, and she was in fact so used for some time. She was painted white, carried lights and bore a white flag with a red cross, all as provided by the Geneva Convention of 1896 and by the Hague Conference of 1907. As a result, however, of the conduct of the German Naval Authorities in disregarding the sanctity of hospital ships, steps were rendered necessary in particular for the protection of vessels in the Hospital Service across the English Channel. The *Warilda* was accordingly taken off the list of hospital ships and was thereafter known as an ambulance transport and treated in the same manner as a troop transport. This was in accordance with the written order of the Ministry of Shipping. The vessel was "painted grey with dazzle markings, the Red Cross flag ceased to fly and she steamed without lights. A 12-lb. gun was placed aft and two or three Royal Naval men were taken on board for the purpose of erecting the gun if the need arose."

It appears accordingly to be beyond question that the ambulance transport *Warilda* was part of the naval forces of the country.

On the 24th March 1918 she was proceeding in accordance with naval orders at a full speed of fifteen knots without lights from Havre to Southampton, carrying 600 wounded men, with the usual staff of doctors and nurses. She came into collision with the steamship *Petingaudet*, which was also steaming at high speed with side lights dimmed. It should further be mentioned that by the naval orders the *Warilda* was directed to proceed even in a fog at full speed. It has been judicially affirmed that the *Warilda* was alone to blame for the collision.

The terms of the requisition under the charter-party have been already cited. The risks of war taken thereunder by the Admiralty are those which would be excluded from an ordinary policy "by the following or similar, but not more extensive, clauses." These clauses which are quoted include the words "and also from all consequences of hostilities or warlike operations."

I do not have any doubt that at the time of the collision the *Warilda* was sailing in the course of warlike operations. It was argued that while this might be so, yet the collision was not a consequence of these operations. I do not think that in the state of the Authorities this contention can be sustained. It was admitted that the collision must be attributable to one of two things, either to the warlike operations or to a sea risk, and the enumeration of sea risks even under the requisition of the charter-party no doubt includes "collision" . . . "or any other cause arising as a sea risk." It seems out of the question to infer from this language that all collisions are *ex necessitate* sea risks. And, in short, it appears to me that when a ship requisitioned by the Naval Authorities and actually engaged in what I have explained to be a warlike operation comes into collision with another vessel under, of course, the exceptional conditions of speed, lights doused and such warlike operations, the category of war risk cannot be changed into the category of sea risk by reason of the negligence of those engaged in conducting those operations. The conduct may have been faulty, but it was a warlike operation although faultily conducted. Faulty navigation on the

part of one ship or the other is, of course, the determining factor of responsibility as between the two ships, but, in my opinion, it is not a legitimate factor for the other purpose which is here attempted, namely, of converting a war risk into a sea risk. Once the category of warlike operations attaches to the movements of the vessel, that category must continue to attach, although these movements had an element of negligence in their operations.

The appellants' cause was powerfully presented, but I cannot myself see that the shifting of category to which I have alluded can be said to have been accomplished by reason of the negligence of those in charge of the vessel.

Lord SUMNER.—In this case the contract of insurance (for such this clause, No. 19 of charter T. 99, in effect is) provides that:—"The risks of war, which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive, clause: '. . . warranted free . . . from all consequences of hostilities or warlike operations. . . .'"

The *Warilda* and the *Petingaudet* were damaged in collision, and collision is a risk included in an ordinary English policy of marine insurance. Accordingly, the suppliant must show that, under the circumstances of this case, the damage would be excluded from the protection of such a policy by such words as those above quoted. In effect, there is no substantial inaccuracy in saying that the question is, "Was this loss caused directly and proximately by a warlike operation?" and I think there is no substantial doubt that the answer must be "Yes."

The collision came about by both vessels proceeding during their respective voyages on courses which intersected, and at times and speeds which brought them simultaneously to the point of intersection. In keeping those courses the *Petingaudet* was right and the *Warilda* was wrong, but, as each vessel in proceeding to the point of collision was proceeding on her voyage and neither had abandoned either the destination or the purpose of her voyage, it was part of the operation, in which each vessel was engaged, to proceed to that point. By admission the *Warilda's* operation was a warlike operation throughout, and as was the whole so were the parts. Steaming into the *Petingaudet* was one of those parts, and none the less so, whether it was due to mere misfortune, to error of judgment, or to negligent navigation. Had it been done wilfully the case might be different. There might, for example, have been an abandonment of the ship's warlike operation altogether, but it is unnecessary to do more than save such a case.

Negligence is a quality of the navigation as carried out, when two ships run into one another, but is not a distinct operation in itself. Whether the navigating officer keeps his course, when he should have given way, or gives way when he should have kept his course, what proximately causes the damage is the forcible impact of the two vessels, and it has long been settled that, under an ordinary policy against marine risks, an assured can recover for a loss by collision notwithstanding that the collision was solely brought about by the negligence of his employees, the captain or crew. I cannot see any valid ground for deciding otherwise, where the collision is part of a warlike operation, badly conducted on the part of those in charge of the ship, which is engaged in such an operation. At any rate, whatever possibility of debate might arise where the negligence consisted in the positive commission of a false manœuvre none can arise where, as here, the negligence consisted in failing to give way, or in failing to infer, when the *Petingaudet* became visible, that it was the *Warilda's* duty to give way.

I do not think that this view is inconsistent with any decided authority. *Inui Gomei Kaisha* v. *Bernardo Attolico* (*sup.*), turns out, on examination of the language of Roche, J., to be quite distinguishable. In that case the warlike operation relied upon was the navigation of two merchantmen on their respective commercial voyages without lights in contravention of the international rules for navigation at sea, because they were ordered to do so by the competent naval authority during and by reason of the war. Whether either vessel was performing a warlike operation or not ceased to be a matter for consideration, as soon as it was proved that, lights or no lights, each ship saw the other at a time when appropriate helm action might have been likely to avoid collision but, owing to default, was not taken. From that point the absence of navigating lights was at most a *causa sine qua non*, as it is called, and probably was no more than a picturesque introduction which might not assist the court but could do the parties no harm. In the result the collision was brought about by actual helm action, taken *ad hoc*, but taken wrongly, by persons who would have been no better off at the moment if each ship's lights had been burning. The resulting collision was not directly caused by a warlike operation but was caused by collision in the course of a commercial operation, attended by negligent navigation.

The judgment of Roche, J. is summed up thus in his conclusions: "The onus," he says, "is on the plaintiffs here and involves that they should satisfy me that the collision must have happened, in the sense that the vessels were seen at such a distance that they must have collided, and that either there was no wrong action, or that the wrong action made no difference. . . . I am satisfied at all events that the collision and the loss were neither of them inevitable when the vessels sighted one another, and in these circumstances the plaintiffs have not established that navigation without lights is a proximate cause either of this collision or this loss." Read with this judgment I think that any difficulties which might otherwise arise, on the judgment of

Bankes, L.J. in affirming Roche, J. are removed. He says "there was an intervening cause of the collision, because, without this negligence, which has been found against the persons in charge of these vessels, the accident would not have happened in spite of the fact that they were being navigated without lights." "This negligence" here is the taking of helm action, which the respective navigating officers were free to take or not to take, and, as it so happened, that action was negligent, but it constituted a new independent intervening cause not because it was negligent but because it was independent. This is its material aspect as a peril insured against causing loss. Negligence is the aspect of it, which is further material in a collision action, in which legal responsibility for wrong done has to be ascertained.

Various authorities were cited in which it is noted in the judgments that negligence was not proved or not alleged as one of the circumstances of the case. Many of the references to negligence in the "warlike operations" cases are merely savings of the present question *ex abundanti cautela* and cannot be pressed further, *e.g.*, Bailhache, J., in *The Petersham* (15 Asp. Mar. Law Cas. 58; 120 L. T. Rep. 275; (1919) 1 K. B., pp. 580, 581); Scrutton and Duke, L.JJ., in *The St. Oswald* (*sup.*) (pp. 887 and 889); Atkin, L.J., in *The Matiana* (*sup.*). It appears to me that the dictum of Rowlatt, J., in *The St. Oswald* (14 Asp. Mar. Law Cas. 270; 117 L. T. Rep. 94; (1917) 2 K. B., at p. 773), "if I could say that the *Suffren* was to blame for starboarding I should have held that "the negligence of her commander had intervened and immediately caused the disaster" is difficult to support, but, as the negligence there suggested was an act of negligent commission, it may not be absolutely necessary to negative it in the present case, where the negligence is only a negligent omission. The dicta of Bailhache, J., in *The Matiana* (1919) 1 K. B. 632, 636, 637), *viz.*, that, "if the stranding was due to the master's negligence, probably this would prevent its being proximately caused by the warlike operation, if any, which she was performing," while "negligence on the part of the King's officer" would not matter; "the operation would still be a warlike operation, although badly performed," appear to me to be right in the latter case, and wrong in the first. Roche, J., says in *The Larchgrove* (*sup.*), "where negligence existed, it broke the chain of causes and might prevent a loss from being attributable to a warlike operation, though it did not follow that all negligence would be outside of warlike operations." With this, as a whole, I agree, understanding it to refer to such an illustration as that put by Erle, C.J., in *Ionides* v. *The Universal Marine Insurance Company* (*sup.*); but the initial general words down to "chain of causes" are too wide. So in *The Ardgantock* (35 Times L. Rep. at p. 605), Bailhache, J. is reported as saying, "if negligence on the part of the *Ardgantock* was the effective cause of the loss, the case would be one of marine risk." Literally, this was right, though it is not easy to see what is meant by negligence, as such, being the cause; but no doubt what was meant was that, if the loss of the *Ardgantock* was proved affirmatively to be due to her own fault it would not be caused by the warship and its warlike operations. He proceeds "as to the *Tartar*, if she was on a warlike operation it would not matter whether she was negligent or not"; with this I agree.

In the *Charente Steamship Company Limited* v. *Director of Transports* (*sup.*), Roche, J. lays it down that in a collision between a merchantman and a ship engaged in a warlike operation during the war, both showing no lights, if the merchantman was solely to blame the collision would not be the result of the other ship's warlike operation; while, if it was the other ship that was to blame, still, in most cases, this would not be a new independent cause, but there would only be a negligent warlike operation; for where the negligence consists in carelessly carrying out the operation in progress, the results are a consequence of hostilities and, he adds, "where an essential and necessary part of the direct and immediate cause of a loss was a warlike operation, whether well or ill conducted, the loss is a consequence of hostilities." This was affirmed in the Court of Appeal and seems to me to have been right.

Negligence may be material as going to inevitability, where the inevitability of a series of consequences is part of the proof that a more distant occurrence was truly the proximate cause of the ultimate result. This is the illustration of Erle, C.J., in *Ionides* v. *The Universal Marine Insurance Company* (*sup.*), as I understand it. So, conversely, where a peril is in operation and produces in due course its direct damage, that peril does not become a remote cause because, before the actual collision occurs, attempts are made to avert the result, which fail. This is pointed out by Rowlatt, J. in *The St. Oswald*. When damage is done by two ships coming into collision, one being engaged in a warlike operation and the other on an ordinary commercial voyage, the collision is a risk falling on the marine policy, unless it is taken out of it by being proved to be caused by warlike operations and this proof fails when it is shown to be caused by the action of the officer in charge of the commercial operation, all the more so if his action is negligent and blameworthy; but I think the result would be the same if his action was only an error of judgment, or wrong but excusable in what is called the agony of the moment, so long as it is his action that causes the collision effectively and proximately, for the ship engaged in the warlike operation may play a minor rôle, since it takes two to make a collision. I believe the whole key to these problems is to be found by remembering that negligence is directly material in collision actions, when the question is how to attribute blame to persons, but is only evidentiary in insurance actions, where the question is whether the event has happened which entitles the assured to be indemnified.

Accordingly I think that this appeal fails.

Lord Parmoor.—A charter-party entered into by the respondents with the Admiralty contained two clauses which are relevant in the present appeal. The first of these provided that the Admiralty should not be held liable if the steamer shall be lost, wrecked, driven on shore, injured or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather or any other cause arising as a sea risk. The second contains the following words, "warranted free of capture, seizure, and detention and the consequences thereof or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war."

The appellant contends that the collision by which the *Warilda* was injured was a sea risk, from liability for which the Admiralty are exempted under the terms of the charter-party, and that such collision was not the consequence of warlike operations within the meaning of the charter-party on two grounds, (1) that the *Warilda* at the time of the collision was not engaged on a warlike operation, (2) that, assuming that the *Warilda* was engaged on a warlike operation, the collision from which the damage resulted was not the consequence of that warlike operation.

The first point was abandoned on the hearing of the appeal. On the second point it was argued that the collision and damage were not the consequence of a warlike operation, but resulted from the negligent navigation of the master of the *Warilda*. That the *Warilda* at the time of the collision was negligently navigated is not questioned. This has been determined in a previous decision in this House. The only question therefore which arises is whether the navigation of a warship engaged on a war-duty ceases to be a warlike operation when it is performed in a negligent manner. In my opinion this question can only be answered in the negative. At the material date the *Warilda* had what has appropriately been called the status of a warship, and was engaged on a war duty, namely, the carriage of wounded soldiers. The negligence of the master in navigating the *Warilda* did not affect either the status of the vessel as a warship or the nature of the duty in which she was engaged. On the contrary it occurred while the vessel was in fact carrying out the war duty for which she had been chartered.

It follows that the *Warilda* was engaged at the time of the collision in a warlike operation and that it is not an answer to the claim that at the time of the collision there was negligent navigation on the part of the *Warilda* and that the collision was brought about by such negligence.

In my opinion the appeal fails and should be dismissed with costs.

Lord Wrenbury.—In this case two material facts are not in dispute, viz., first: that the *Warilda* was engaged in a warlike operation; and, secondly: that the master of the *Warilda* was negligent. The operation that was in progress was the navigation of the vessel. It was a warlike operation in that the vessel was an "ambulance transport," carrying some 600 wounded and a staff of doctors and nurses from Havre to Southampton and steaming at night at some fifteen knots without lights.

By art. 18 of the charter-party the Admiralty was not liable for sea risks, but by art. 19 was liable for "consequences of hostilities or warlike operations." The question is whether the collision which took place was a sea risk or a consequence of a warlike operation.

In *Trinder Anderson and Co.* v. *Thames and Mersey Marine Insurance Company* (*sup.*), it was decided that, in the case of a policy of marine insurance, loss by stranding occasioned by the negligent navigation of the master was a loss in respect of which the underwriters were liable. The principle is that the underwriter insures against a loss occasioned by a peril of the sea, and that stranding is none the less a peril of the sea though brought about by negligent navigation. The negligence does not alter the character of the sea peril, which still remains the *causa proxima*. So if I insure my house against fire, or my carriage or car against road risks, the risk that my servant may negligently set the house on fire, or that my driver may drive negligently and cause a collision, is exactly one of the risks against which I seek insurance. I insured against fire or collision. The fire or collision occurred and the insurance office is to bear that risk to my indemnity. The fire or the collision is the *causa proxima* of the loss—the negligence is a cause more remote. As regards sea peril, I may perhaps express it by saying that the underwriter insures against the sea peril however it may happen—including, therefore, negligence of the master. It is otherwise if the loss occurs through the wilful negligence or wilful act of the assured. In that case the loss does not "happen," but is caused by the assured himself, and, consequently, he cannot recover.

Collision is a sea risk and art. 18 of the charter-party holds the Admiralty not liable in the case of collision "or any other cause arising as a sea risk." But art. 19 renders it liable for "all consequences of hostilities or warlike operations." The question, therefore, is as between sea risk and war risk; was this loss a consequence of the warlike operation in which the vessel was engaged? Does the fact that the master was negligent render the loss one which was not a consequence of that warlike operation? In my judgment it does not. The principle of *Trinder Anderson and Co.* v. *Thames and Mersey Marine Insurance Company* (*sup.*), applies. The operation in progress was the navigation of the ship; that operation was a warlike operation, and none the less because the operation was negligently conducted. The loss was occasioned by a warlike operation negligently performed. The Admiralty had insured against the

consequences of warlike operations, however they might happen, including, therefore, negligence. The negligence did not alter the character of the operation. and the loss was a consequence of the warlike operation, which still remained the *causa proxima.*

For these reasons I think that this appeal fails and should be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant: *The Treasury Solicitor.*

Solicitors for the respondents: *Parker, Garrett. and Co.*

Friday, May 4, 1923.

(Before Lords Cave, L.C., Birkenhead, Shaw, Sumner, and Parmoor.)

Universal Steam Navigation Company Limited *v.* James McKelvie and Co. (*a*)

on appeal from the court of appeal in england.

Charter-party — Signature by charterers "as agents"—Effect of signature—Liability of charterers.

A charter-party stated as follows: "It is this day agreed between T. H. S. and Co. Limited, agents for the owners of the steamship A. I., *and J. M. and Co., Newcastle-on-Tyne, charterers." It was signed "By authority of owners, for T. H. S. and Co. Limited, A. D. C., as agents," and "For and on behalf of J. M. and Co., as agents, J. A. M." The plaintiffs as owners sued the defendants as charterers for demurrage, which by the charter-party was to be paid by the charterers. Bailhache, J. held, on the authority of* Lennard v. Robinson (5 *E. & B.* 125), *that the defendants were personally liable. The Court of Appeal held that, upon the true construction of the charter-party, the defendants by their signature had deliberately expressed their intention to exclude any personal liability. The shipowners appealed.*

Held, that the signature "as agents" governed the whole document unless a contrary intention was clearly expressed, and as a contrary intention was not clearly expressed, personal liability did not attach to the defendants. The defendants, by adding to their signature the word "agents," had indicated clearly that they were signing only as agents, and had no intention of being personally bound as principals.

Judgment of the Court of Appeal sub. nom. Ariadne Steamship Company *v.* James McKelvie and Co. (*Bankes and Atkin, L.JJ.; Scrutton, L.J. dissenting*) (15 Asp. Mar. Law Cas. 450; 126 *L. T. Rep.* 434; (1922) 1 *K. B.* 518) *affirmed.*

Gadd *v.* Houghton (1876, 35 *L. T. Rep.* 222; 1 *Ex. Div.* 357) *applied.*

Lennard *v.* Robinson (1855, 5 *E. & B.* 125) *overruled.*

Appeal from the judgment of the Court of Appeal, dated the 9th Dec. 1921, setting aside by a majority the judgment of Bailhache, J. in favour of the plaintiffs in the action.

The question in the appeal was whether the respondents were personally liable under a charter-party, dated the 15th Oct. 1919, for demurrage in discharging the steamship *Ariadne Irene.*

The action was brought by the Ariadne Steamship Company Limited as plaintiffs against the respondents, James McKelvie and Co., as defendants. The writ and subsequent proceedings in the action were amended by substituting the Universal Steam Navigation Company Limited, the present appellants, as plaintiffs in lieu of the Ariadne Steamship Company Limited.

By their points of claim the appellants claimed against the respondents as charterers under the charter-party 2444*l.* 12*s.* 6*d.* for demurrage in respect of delay in discharging the steamship *Ariadne Irene* at Civita Vecchia. By their points of defence the respondents pleaded that the charter-party was entered into by them solely as agents for the firm of Brandt Pagnini, of Rome.

The action was tried by Bailhache, J. on the 24th June 1921. In the course of the hearing the defendants' contentions that there had been no delay in discharging the *Ariadne Irene*, and that demurrage to the amount of 2444*l.* 12*s.* 6*d.* had not been incurred, were dropped, and the only defence insisted upon was that the defendants were not personally liable upon the charter-party.

By the charter-party it was "mutually agreed between Thos. H. Seed and Co. Limited, agents for owners of the good screw steamer called the *Ariadne Irene*, classed of tons net register 6500 tons deadweight, exclusive of bunkers or thereabouts, master, now discharging at Grangemouth, and expected ready to load about 20th inst., and James McKelvie and Co., Newcastle-on-Tyne, charterers. . . ."

The charter-party was signed as follows:

"For and on behalf of James McKelvie and Co. (as agents) (s.) J. A. McKelvie.—By authority of Owners, For Thos. H. Seed and Co., Ltd. (s.) A. D. Cadogan (as agents)."

Following the decision in *Lennard* v. *Robinson* (5 E. & B. 125), Bailhache, J. held that the respondents were personally liable for demurrage under the charter-party. The respondents appealed to the Court of Appeal, who by a majority allowed the appeal.

The appellants appealed on the grounds that: (1) On the true construction of the charter-party the respondents were personally liable thereon as contracting parties; (2) the respondents were expressly stated in the charter-party signed by them to be the parties contracting as charterers; (3) the words "as agents" after the respondents' signature in the charter-party were words of description and were not sufficient to free the respondents from personal liability; (4) these words after the respondents' signature did not contradict or qualify the express statement in the charter-

(*a*) Reported by W. C. Sandford, Esq., Barrister-at-Law.

party that the respondents were parties to the contract as charterers.

Leck, K.C. and *E. Aylmer Digby* for the appellants.

Raeburn, K.C. and *S. L. Porter* for the respondents.

Lord Cave, L.C.—This appeal from the Court of Appeal in England raises the question whether the respondents, Messrs. James McKelvie and Co., are personally liable under a charter-party for demurrage.

By the charter-party, which was dated the 15th Oct. 1919, and was expressed to be made between T. H. Seed and Co. Limited, agents for the owners of the steamship *Ariadne Irene*, and James McKelvie and Co., Newcastle-upon-Tyne, charterers, it was agreed that the steamship should proceed to the River Tyne and there load from the charterers a full and complete cargo of coal, and should proceed to one of certain Italian ports as ordered, and there deliver her cargo. Provision was made for the payment by the charterers of demurrage in the event of the steamer's being detained beyond the stipulated time either at the port of loading or at the port of discharge, and it was provided that "the charterers' liability should cease as soon as the cargo is shipped and the advance of freight, dead freight and demurrage at the ports of loading and (or) discharging (if any) paid, the owner having a lien on the cargo for freight and average." The charter-party was signed: "For and on behalf of James McKelvie and Co. (as agents), J. A. McKelvie." Liability for demurrage at the port of discharge having been incurred, the owners brought this action against the respondents for the amount claimed—viz., 2444*l.* 12*s.* 6*d.*, and the respondents pleaded that they had signed the charter-party as agents of the firm of Brandt, Pagnini, of Rome, and denied liability.

At the trial of the action before Bailhache, J. it was proved that the respondents had sold a cargo of coal to Pagnini and Co. at a price per ton f.o.b. Newcastle, and had chartered the vessel for this cargo as agents for and on behalf of that firm. It was also proved that it was customary when selling f.o.b. to charter on behalf of the receivers, and that the custom was well known to ship agents and shipowners. Under the regulations of the Coal Controller coal could only be exported under licence naming the consignees; and in the licence for this cargo, which was referred to in the charter-party as having been granted, Pagnini and Co. were named as consignees. The bill of lading, which was signed by the agent for the shipowners, showed a shipment to the order of Pagnini. The representative of the shipowners in his evidence maintained that he dealt only with the respondents; but his answers to certain questions, and his refusal to answer others, leave no doubt in my mind that he knew perfectly well that the respondents were acting for other persons. It was not suggested that the respondents ever withheld the name of their principals. The learned judge found as a fact that the owners knew when the charter-party was signed that the cargo was sold on f.o.b. terms; but on the authority of the case of *Lennard* v. *Robinson* (5 E. & B. 125) he held that the respondents were personally liable, and gave judgment for the plaintiffs for the amount claimed. The Court of Appeal by a majority (Bankes and Atkin, L.JJ.; Scrutton, L.J. dissenting) reversed that decision and entered judgment for the respondents with costs; and thereupon the present appeal was brought.

Apart from authority, I should feel no doubt whatever as to the correctness of the judgment of the Court of Appeal. If the respondents had signed the charter-party without qualification, they would of course have been personally liable to the shipowners; but by adding to their signature the words "as agents" they indicated clearly that they were signing only as agents for others and had no intention of being personally bound as principals. I can imagine no other purpose for which these words could have been added; and unless they had that meaning, they appear to me to have no sense or meaning at all.

When the cases are examined, it appears that the weight of authority is in favour of the above view; it is true that in a series of cases, in which the signatories were referred to in the body of the contract as agents for others, but appended no qualification to their signature, they were held to be personally liable. Decisions to that effect were given in *Tanner* v. *Christian* (1855, 4 E. & B., 591), *Cooke* v. *Wilson* (1856, 1 C. B. (N. S.) 153), *Parker* v. *Winlow* (1857, 7 E. & B. 942), and *Paice* v. *Walker* (1870, 22 L. T. Rep. 547; L. Rep. 5 Ex. 173). Whether all or any of those decisions can stand with the later decisions of the Court of Appeal in *Southwell* v. *Bowditch* (1876, 35 L. T. Rep. 196; 1 C. P. Div. 374), and *Gadd* v. *Houghton* (1876, 35 L. T. Rep. 222; 1 Ex. Div. 357) it is not necessary for present purposes to determine; for in none of them was the signature qualified by any words showing that the signatory signed as agent only, and in each of them it was expressly stated in the judgment that if the signature had been so qualified the decision would or might have been the other way. On the other hand, in *Deslandes* v. *Gregory* (1860, 2 L. T. Rep. 634; 2 E. & E. 602), where the defendants were described both in the body of the charter-party and in the signature as agents for a known person, they were held not liable; and in *Gadd* v. *Houghton* (35 L. T. Rep., at p. 223, 1 Ex. Div., at p. 359) James, L.J. said that he could not conceive that the words "as agents" could be properly understood as implying merely a description, adding that "the word 'as' seems to exclude that idea."

To this current of authority the only exception is the case of *Lennard* v. *Robinson* (*sup.*) on which the learned trial judge and Scrutton, L.J. relied. There the defendants were named in the charter-party itself as parties, but signed "by authority of and as

agents for" a person named; and it was held that they contracted personally. There may be minute distinctions between that case and the present; but I think it best to say that in my opinion that case cannot now be treated as law. It is, as Bankes, L.J. said, to the interest of the commercial community that a signature "as agent" should have a generally accepted meaning, and I agree with him that such a qualification of the signature should be taken as a deliberate expression of intention to exclude any personal liability on the part of the signatory.

I think it desirable to add, in order to prevent misapprehension, that in the present case no evidence was given (as in *Pike* v. *Ongley*, 18 Q. B. Div. 708, and the cases there cited) of any custom of the trade or port that agents not disclosing the names of their principals at the time of making the contract were personally liable as principals; nor was it suggested (as in *Miller, Gibb, and Co.* v. *Smith and Tyrer Limited* (116 L. T. Rep. 753; (1917) 2 K. B. 141) that there was any general or special custom that an agent acting on behalf of a foreign principal undertook the liability of a principal. In the absence of such a custom, and where a principal exists, the general rule applies although the principal be not named or be a foreigner.

For these reasons I am of opinion that this appeal fails, and I move your Lordships that it be dismissed with costs.

Lord Cave added that he was desired by Lord Birkenhead to say that he agreed with the judgment of Atkin, L.J., subject to the qualification contained in the opinion to be delivered by his noble and learned friend Lord Sumner.

Lord Shaw.—The question of this appeal is whether the respondents are liable to payment of demurrage in discharging a cargo of coal from the steamship *Ariadne Irene*. The liability is said to arise under the terms of the charter-party founded on. The respondents deny liability; and they plead that the charter-party was entered into by them as agents, and as they submit, solely as agents, for a firm, Brandt Pagnini, of Rome.

The charter-party states that "the licence for the above cargo is granted." The meaning of that is that, under the regulations of the Coal Controller operative during this contract, a licence was required which stated the names of the consignees. The licence for this cargo of coal named Pagnini as the consignees. Further, it is admitted in the cross-examination of Messrs. Seed and Co.'s manager that the bill of lading for this cargo "shows a shipment to the order of 'Brandt Pagnini, Esq., of Rome,' and his assigns."

In my opinion, accordingly, no question of undisclosed principal arises in this case. When, in signing this charter-party, the respondents added to their signature the word "agents," the owners knew that principals existed and who they were.

In the opening words of the charter-party the contract purports to be between Messrs. Seed and Co., agents for the owners of the ship, and "James McKelvie and Co., Newcastle-upon-Tyne, charterers." Throughout the body of the charter-party the term "charterers" is employed. (1) There is no acceptance, in any express words employed, of personal obligation, but the name of Messrs. McKelvie is used *simpliciter*, and the word "charterers" follows that name and is repeated in the course of the contract. (2) There is no assertion of agency in the language employed in the body of the contract. All this until the signatures are reached. The signature of the charterers was as follows: "For and on behalf of James McKelvie and Co. (as agents), J. A. McKelvie."

The first question is in what character Messrs. McKelvie signed this document? I see no ground whatsoever for denying effect to the express word "agents"; it was undoubtedly in that character that the contract was signed; there is as little ground for cutting out the express character in which it was signed as for cutting out the signature itself.

The second question is whether, although thus denominating themselves as "agents," Messrs. McKelvie were yet signing a contract which by its terms made them principals therein. But its terms do not refer to either "principals" or "agents"; the body of the document can be applied to either category. As for the names of the parties, I hold that the names of McKelvie followed by "charterers," with nothing said of agency, is definitely stamped with agency by the express affirmation of the signature.

A third view suggested, namely, that they were *ex concessu* agents, but yet were principals over and above, answers itself. Such a confused and unusual situation would require the clearest words to make it intelligible and effective. As at present advised, I have doubts as to whether this could be done.

I do not regret that the appeal has been taken, for it enables this House to settle the question whether on the numerous authorities the judgment in the case of *Lennard* v. *Robinson* (5 S. & B. 125) is sound law. In my humble opinion it is not; the cases of *Gadd* v. *Houghton* (35 L. T. Rep. 222; 1 Ex. Div. 357) and *Lennard* v. *Robinson* (*sup.*) cannot stand together. *Gadd's* case (35 L. T. Rep. 222; 1 Ex. Div. 357), which was decided by a very powerful court, was, in my view, correctly decided; and it has, from its date, been properly accepted as sound. The authorities are most carefully reviewed in the judgment in this case by Bankes, L.J. (126 L. T. Rep. 434; (1922) 1 K. B. 518), and it is unnecessary to add to that review.

But I desire to say that in my opinion the appending of the word "agents" to the signature of a party to a mercantile contract is, in all cases, the dominating factor in the solution of the problem of principal or agent. A highly improbable and conjectural case (in which this dominating factor might be overcome by other parts of the contract) may by

an effort of the imagination be figured, but, apart from that, the appending of the word "agent" to a signature is a conclusive assertion of agency, and a conclusive rejection of the responsibility of a principal, and is and must be accepted in that twofold sense by the other contracting party.

Lord Sumner.—It is reasonably plain that in this case there was no contract between the parties until the formal charter was signed. The main terms had no doubt been already agreed by word of mouth, but, in the ordinary course of business, they would have to be incorporated into a printed form and that form would then have to be duly signed. The result is that the whole question is one of the construction of the entire charter, as we have it, including the form in which it is signed—viz., in the name of James McKelvie and Co. "(as agents)."

Atkin, L.J. observes that "some confusion has been introduced into the cases by not sufficiently distinguishing between cases of construction of the body of the contract and cases turning on the proof of assent in the signature," and he proceeds: "The words 'as agents' are conclusive, when qualifying the signature, to negative liability as principal. . . . If used in the body of the document, they are very strong to negative liability, but, as you must read the document as a whole, you may possibly find other words and clauses so plainly indicating personal liability that they outweigh the words in question. . . . If the words qualify the signature, they qualify the assent and nothing more matters."

For myself, I can hardly go so far as this. I agree that for many years past it has, I believe, been generally understood in business that to add "as agents" to the signature is all that is necessary to save a party, signing for a principal, from personal liability on the contract, and I agree also that, even as a matter of construction, when a signature so qualified is attached to a general printed form with blanks filled in *ad hoc*, preponderant importance attaches to the qualification in comparison with printed clauses or even with manuscript insertions in the form. It still, however, remains true that the qualifying words "as agents" are a part of the contract and must be construed with the rest of it. They might have been expressed as a separate clause—*e.g.*, "it is further agreed that the party signing this charter as charterer does so as agent for an undisclosed principal," and that clause would obviously have to be construed. They are a form of words and not a mere part of the act of signifying assent and closing a negotiation by duly attaching a name. They purport to limit and explain a liability, and not merely to identify the person signing or to justify the inscription of a name by the hand of a person other than the owner of it. They are more than the addition of "junior" or "(Revd.)" to the signature, which serves to identify the signatory by distinguishing him from others. They are more than a mere "per procuration," which only alleges authority to write another's name. If Mr. J. A. McKelvie had written in his own handwriting "Brandt Pagnini and Co." and no more, then, on proof of due authority, Brandt Pagnini and Co. would have been bound by the charter and (subject to the effect of the words at the beginning of the charter "and James McKelvie and Co., Newcastle-upon-Tyne, charterers") McKelvie and Co. would not. There are, of course, persons and occasions such that no inference of personal engagement can arise, as when a barrister signs a memorandum of the settlement of a case recording that money is to be paid, or when a Treasury clerk signs a letter stating that he is "directed by my Lords of the Treasury to say" so and so. In such a case as the present, however, the act of attaching the signature of J. McKelvie and Co., even without the words above quoted from the body, would *primâ facie* indicate a personal undertaking, and that so strongly that, in the absence of qualifying words, evidence could not be admitted to discharge Messrs. McKelvie but could be admitted only to charge Messrs. Pagnini. I think it follows that the words "as agents," which as a matter of construction may be sufficient to discharge Messrs. McKelvie, have that effect because they form part of the contract, and, if they are conclusive, it is by reason of their meaning as part of the contract and not because they are part of the proof of assent to a contract, which is itself distinct from them.

They are more, too, than words of description of the signatory's business. It has sometimes been said that when "agents" is the word added to the signature it is a mere word of description, and so does not qualify the liability, which the act of signing imports. I question this explanation. One's signature is not the place in which to advertise one's calling, nor is "agent" ordinarily used to describe a trade, as "tailor" or "butcher" would be. I have no doubt that when people add "agent" to a signature to a contract they are trying to escape personal liability, but are unaware that the attempt will fail. The result, however, is the same. When words added to a signature in themselves qualify liability, it is because, as words, they can be so construed in conjunction with the contract as a whole.

In construing the words "as agents," there is a distinction to be taken. Though it may be somewhat subtle, it has been mentioned in the older cases. Do the words "as agents" mean "and as agents," or "only as agents"? The positive affirmation, that I sign "as agent"—that is, for another—is formally consistent with my signing for myself as well. If the act of signing raises a presumption of personal assent and obligation, which has to be sufficiently negatived or qualified by apt words, are the words "as agent," apt or sufficient to exclude personal liability? For myself I think that, standing alone, they are. To say "as agent," meaning thereby "also as agent" for someone undisclosed, is substantially useless. If the agent refuses to disclose, the opposite party is

no better off. If the statement is true, the rights and liabilities of the principal can be established at any time by proof. The statement only acquires a business efficacy, as distinct from a formal content, if it means " I am not liable but someone else is and he only," and this is what I think it does mean.

Unless, then, something is to be found to the contrary in the earlier part of this charter, the qualification " as agents " appears to me to relieve Messrs. McKelvie and Co. from personal liability on the contract. There are two features in the charter sufficiently significant to be worth considering in this connexion—one is that, of the very numerous stipulations in their favour, which the shipowners are entitled to have performed by somebody, those performable by charterers *eo nomine* in this country are more numerous than those performable by charterers *eo nomine* in Italy, since in the latter case many of them are expressed to be performable by " consignees " or by " receivers " ; the other is that the charter begins by saying : " It is this day mutually agreed between Thomas H. Seed and Co., Limited, agents for owners, and James McKelvie and Co., Newcastle-upon-Tyne, charterers."

These features, so common as to be almost common form, are of little weight in aid of the appellants' contention here. If throughout the charter " James McKelvie and Co." is to be read wherever the word " charterers " is found, I think, reading the whole instrument together and giving effect to every part of it, that " James McKelvie and Co., as agents " must be so read in lieu of the word " charterers," and then matters are left as they were on the meaning of the words " as agents." The circumstance that Thos. H. Seed and Co. are described as agents for owners and sign " by authority of owners and agents " carries things no further ; " by authority of owners " would be implied in any case, and the repetition of " as agents " is a repetition only. What can be the meaning of saying " James McKelvie and Co., on behalf of their principal, engage that James McKelvie and Co., as charterers, shall pay steamer demurrage at Civita Vecchia " except that they bind their principal to authorise them to pay for him and to put them in funds to do so ? The construction comes back to the same point, that the addition of the words " as agents " has the effect of reading all references to James McKelvie and Co. in the obligations undertaken by the charterers, as if James McKelvie and Co. had been throughout described as agents for charterers, as Thos. H. Seed and Co. are for owners. I may add that clause 16 seems to corroborate this view. It runs, " The brokerage of 5 per cent. is due to Thos. H. Seed and Co., Limited, one third of which to James McKelvie and Co. on the cargo being loaded." However this is read, it plainly puts McKelvie and Co. and Seed and Co. on exactly the same footing, and Seed and Co. are admittedly agents for others in this matter and nothing more.

As to the authorities, I think that *Gadd* v. *Houghton* (*sup.*) cannot be usefully distinguished from *Lennard* v. *Robinson* (*sup.*), merely because Houghton was a selling agent and Robinson was a chartering agent. The reasoning in the former case seems to me to be correct and it ought to prevail. The strongest argument for *Lennard* v. *Robinson* (*sup.*) is that Mellish, L.J., when counsel for the defendant in *Wake* v. *Harrop* (1862, 7 L. T. Rep. 96 ; 1 H. & C. 202), accepted it as good law against his client manifestly to the disappointment of Bramwell, B., and did not criticise it in *Gadd* v. *Houghton* (*sup.*), although it had been cited. I think the weight of authority has long been against *Lennard* v. *Robinson* (*sup.*), though it has been cited often and sometimes has been expressly followed, and I can see no good purpose to be served by keeping it alive, as an authority to be followed, if an exactly similar case should arise for decision, but not otherwise. I think it was ill decided and that in the present case the judgment appealed against was right.

Lord Parmoor.—The question in this appeal is whether the respondents are personally liable, under the terms of a charter-party, for demurrage in discharging the steamship *Ariadne Irene*. The defence of the respondents is that they signed the charter-party " as agents," and did not incur thereunder any personal liability. The charter-party was signed as follows : " For and on behalf of James McKelvie and Co. (as agents).—J. A. McKelvie." The words " as agents " are, in my opinion, clearly words of qualification and not of description. They denote, in unambiguous language, that the respondents did not sign as principals, and did not intend to incur personal liability. The signature applies to the whole contract, and to every term in the contract. I think it would not be admissible to infer an implied term, or implied terms, in the contract inconsistent with the limitation of liability directly expressed in the qualification of the signature, since the effect of such an implication would be to contradict an express term of the contract. It is not impossible that, by plain words in the body of the document, persons signing " as agents " may expressly undertake some form of personal liability as principals, but I can find no trace of any intention of the respondents to incur any such liability in the charter-party which is in question in the present appeal.

The authorities have not been consistent, but I agree that *Gadd* v. *Houghton* (35 L. T. Rep. 222 ; 1 Ex Div. 357) should be followed. In *Gadd* v. *Houghton* (*sup.*), James, L.J., referring to the case of *Paice* v. *Walker* (*sup.*), says " I cannot conceive that the words ' as agents ' can be properly understood as implying merely a description. The word ' as ' seems to exclude that idea. If that case were now before us, I should hold that the words ' as agents ' in that case had the same effect as the words ' on account of ' in the present case, and that the decision in that case ought not to stand." Mellish, L.J. (*sup.*) expresses the same opinion, and adds : " When the signature comes at the end you apply it to everything which occurs

throughout the contract." Archibald, J. (*sup.*) adds: "The usual way in which an agent contracts, so as not to render himself personally liable, is by signing as agent."

In *Deslandes* v. *Gregory* (2 L. T. Rep. 634; 2 E. & E. 602), the signature was "For Samuel Ferguson, Esq., of Anamaboe, Gregory Brothers, as agents." An action was brought by the shipowners against Gregory Brothers. It was held in the Queen's Bench, and confirmed in the Exchequer Chamber, that the defendants were not liable on the charter-party as principals. Williams, J., delivering the judgment of the Exchequer Chamber: "The form of the charter-party and the mode of signature, taken together, are decisive to show that the defendants did not bind themselves by the contract as principals. They sign 'for Samuel Ferguson, Esq., of Anamaboe, Gregory Brothers, as agents.'" No doubt in this case Gregory Brothers are described as agents in the body of the charter-party, but Williams, J. says: "It would require extremely plain words in the body of the contract to control the effect of that mode of signature, and no such words are to be found there."

When this case was heard in the first instance, before Bailhache, J., the only authority quoted was *Leonard* v. *Robinson* (*sup.*). If this authority had not been overruled, it would have been incumbent on Bailhache, J. to follow it. I think, however, that *Lennard* v. *Robinson* (*sup.*) is not reconcilable with *Gadd* v. *Houghton* (*sup.*), and that, since the decision in that case, it cannot be regarded as an authority. In *Lennard* v. *Robinson* (*sup.*) the contract was signed "by authority of and as agents for," and, as stated in *Gadd* v. *Houghton* (*sup.*), it is not possible to suggest clearer words to show that the person signing the contract is signing for a principal, and does not intend to incur personal liability. The construction applied in *Lennard* v. *Robinson* (*sup.*) was applied in *Weidner* v. *Hoggett* (35 L. T. Rep. 368; 1 C. P. Div. 533), in which the defendant was held personally liable under a contract signed by him, "on account of Bebside Colliery, W. S. Hoggett."

Different considerations arise when a person signs a contract without qualification, and the question is raised whether he is to be deemed as contracting personally or as agent only. In such a case the intention of the parties is to be discovered from the contract itself, and the rule laid down in Smith's Leading Cases has been adopted as a rule to be followed: "That where a person signs a contract in his own name, without qualification, he is *primâ facie* to be deemed to be a person contracting personally, and in order to prevent this liability from attaching it must be apparent from the other portions of the document that he did not intend to bind himself as principal." I agree with Atkin, L.J. that it would tend to confusion to consider these cases in a case in which the signature itself has been expressly qualified.

Atkin, L.J., in giving his decision in the present case, says: "If the words qualify the signature, they qualify the assent, and nothing more matters." I do not understand Atkin, L.J. to exclude the possibility that a person signing "as agent" may nevertheless in the same document expressly undertake some form of personal liability. Such a possibility does not, in my opinion, affect the value of the rule as laid down by Atkin, L.J. or its acceptance as an accurate guide in the construction of contracts not regulated by statute or considerations of a special character. The rule accords with the dictum of Mellish, L.J. in *Gadd* v. *Houghton* (*sup.*): "When the signature comes at the end you apply it to everything which occurs throughout the contract."

In my opinion the appeal should be dismissed, with costs.

Solicitors, *Downing*, *Middleton*, and *Lewis*; *Thomas Cooper* and Co.

Supreme Court of Judicature.

COURT OF APPEAL.

Oct. 27, 30, 31, *Nov.* 1, 2, *and* 24, 1922.

(Before Bankes and Scrutton, L.JJ., and Eve, J.)

La Compania Martiartu *v.* Corporation of the Royal Exchange Assurance. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Insurance (Marine)—Loss of insured vessel—Claim on policy—Vessel scuttled with connivance of owners—Onus of proof.

The plaintiffs had insured their vessel with the defendants against, inter alia, *adventures and perils of the sea and barratry of the master and mariners. The vessel having been totally lost during the currency of the policy and a claim having been made against the defendants under the policy, the defendants refused to pay upon the ground that the vessel had been intentionally cast away by the captain and crew with the connivance of the owners.*

Bailhache, J. having given judgment for the plaintiffs, the defendants appealed.

Held, upon the facts that it was impossible to say that the plaintiffs had established that the loss of the vessel was due to a peril covered by the policy. The presumption might well be, when nothing was known except that the ship had disappeared at sea, that her loss was by perils of the sea. But when, although it was known she had sunk, there was evidence on each side which left the court in doubt whether the effective cause of the admission of sea water was within or without the policy, the plaintiffs, the assured, failed, for they had not proved a loss by perils insured against and the defendants were therefore entitled to judgment.

Decision of Bailhache, J. reversed.

(a) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

Appeal from a judgment of Bailhache, J.

The action was brought by the plaintiffs to recover a sum of 150,000*l.* upon a policy of marine insurance from the 17th May 1920 to the 17th May 1921 against adventures and perils of the sea and barratry of the master and mariners upon the hull and machinery of the plaintiffs' steamship *Arnus.* The policy was subscribed by the defendants to the amount of 10,000*l.*

The defendants denied that the steamer was lost by any of the perils insured against; they alleged that she had been cast away with the connivance of the owners and they refused to pay under the policy.

Bailhache, J. held that the vessel was sunk as the result of a collision with floating wreckage and gave judgment for the plaintiffs.

The defendants appealed.

The facts and arguments appear sufficiently from the judgments.

Dunlop, K.C., *G. P. Langton*, and *J. R. Ellis Cunliffe* for the appellants.

Stuart Bevan, K.C. and Sir *R. Aske* for the respondents.

The following cases were cited in the course of the argument:

Mountain v. *Whittle*, 14 Asp. Mar. Law Cas. 534; 125 L. T. Rep. 193; (1921) 1 A. C. 615;

Munro Brice and Co. v. *War Risks Association Limited and Anchor Marine Mutual Underwriting Association Limited*, 14 Asp. Mar. Law Cas. 312; 118 L. T. Rep. 708; (1918) 2 K. B. 78;

Lindsay and others v. *Klein*, 11 Asp. Mar. Law Cas. 563; 104 L. T. Rep. 261; (1911) A. C. 194;

Pickup v. *The Thames and Mersey Marine Insurance Company Limited*, 4 Asp. Mar. Law Cas. 43; 39 L. T. Rep. 341; L. Rep. 3 Q. B. Div. 594;

Lennard's Carrying Company Limited v. *Asiatic Petroleum Company Limited*, 13 Asp. Mar. Law Cas. 81; 113 L. T. Rep. 195; (1915) A. C. 705;

Ajum, Goolam, Hossen, and Co. and others v. *Union Marine Insurance Company*, 9 Asp. Mar. Law Cas. 167; 84 L. T. Rep. 366; (1901) A. C. 362;

Mentz, Decker, and Co. v. *Maritime Insurance Company Limited*, 11 Asp. Mar. Law Cas. 339; 101 L. T. Rep. 808; (1910) 1 K. B. 132;

Westport Coal Company Limited v. *McPhail*, 8 Asp. Mar. Law Cas. 378; 78 L. T. Rep. 490; (1898) 2 Q. B. 130;

Jones v. *Nicholson*, 10 Ex. 28;

Green v. *Brown*, Stra. 1199;

Sassoon and Co. v. *Western Assurance Company*, 12 Asp. Mar. Law Cas. 206; 106 L. T. Rep. 929; (1912) A. C. 561

Hamilton v. *Pandorf*, 6 Asp. Mar. Law Cas. 212; 57 L. T. Rep. 726; 12 App. Cas. 518;

Hurst v. *Evans*, 116 L. T. Rep. 252; (1917) 1 K. B. 352;

Smitton v. *Orient Steam Navigation Company Limited*, 10 Asp. Mar. Law Cas. 459; 96 L. T. Rep. 848;

Leyland Shipping Company Limited v. *Norwich Union Fire Insurance Society Limited*, 14 Asp. Mar. Law Cas. 258; 118 L. T. Rep. 120; (1918) A. C. 351;

Cur. adv. vult.

Bankes, L.J.—This is an appeal from the decision of a learned judge upon a question of fact of a very serious character and involving serious consequences. Under ordinary circumstances this court naturally attaches very great weight to the opinion of the trial judge upon the question of the credibility of witnesses in any case where the judge has had the opportunity of seeing them and hearing them give their evidence. The learned judge who tried this action speaks of it in his judgment as one which had given him the greatest possible anxiety and one in which it was difficult to ascertain the facts with certainty. He finally took a view of the facts favourable to the respondents. It is made clear by his judgment that this view was based upon the belief that the second officer was telling the truth in reference to his having seen a floating mass close to the vessel shortly before the leak was discovered as the learned judge in terms says that the respondents' case in substance depended upon whether he believed the second officer or not. It was apparently because he believed this story that the learned judge accepted the evidence of the chief engineer as true, in spite of the fact that during his cross-examination he had apparently indicated that he did not regard him as a reliable witness. The learned judge in his judgment says that he formed the favourable opinion of the second officer after seeing him in the witness box and hearing him give his evidence. This was a mistake as this witness was examined on commission in Spain. It is a pity that counsel did not call the learned judge's attention to the error. As the case comes before this court the judgment appealed from is one which rests entirely upon the view that the second officer is a witness of truth, and upon that question it is clear that the learned judge formed his opinion under a misapprehension. Under these circumstances this court must examine the evidence without the assistance, which it is always glad to have, of an opinion of the trial judge as to the credibility of witnesses whom he has heard and seen.

A point was raised at the end of the arguments of the counsel for the respondents upon what was, I think, erroneously referred to as the onus of proof. This I will deal with before referring to any of the facts. It arose in this way. Counsel was asked what the proper result would be, assuming the court, upon the whole of the evidence, was left in doubt as to whether the respondents had made out their case. The answer was that the court must then fall back upon the presumption that, the vessel being a

seaworthy vessel and having been lost by some unascertained peril, the peril must be presumed to be a peril covered by the policy. This contention is, in my opinion, quite untenable. In a case like the present if the assured makes out a *primâ facie* case, as the respondents in the present case did, then, unless the underwriters displace that *primâ facie* case, the assured is no doubt entitled to rely upon the presumption. On the other hand if the *primâ facie* case, which was the foundation upon which the presumption was rested, fails because the underwriters put forward a reasonable explanation of the loss the superstructure falls with it. If both the assured and the underwriters put forward an explanation of the loss, the loss is not unexplained in a sense which would admit of the presumption, merely because the court is unable to say which of the two explanations is the correct one. In my view of the facts of the present case this conclusion disposes of this appeal because, having regard to the case made for the appellants in the court below, I find it impossible to say that the respondents have established to my satisfaction that the loss of the vessel was due to a peril covered by the policy.

I am unwilling, however, to rest my judgment entirely on this point, as the evidence has been exhaustively discussed, and I have formed a clear opinion upon it. The respondents' case rests upon what is alleged to be a fact and upon a series of theories all founded on that fact. The fact is the presence of the black mass as deposed to by the second officer. The theories founded on that fact are (1) that some projecting portion of the floating mass came into collision with the vessel ; (2) that the blow was a slanting blow stripping some portion of the bilge keel ; (3) that water found its way into the vessel through the holes where the rivets holding the bilge keel to the plates of the vessel had been sheered off. The second and third theories are put forward as accounting for the absence of any noise of a violent blow, or of any vibration, and as accounting for the slow inflow of water immediately following the collision and increasing later but never with such inrush as would sink the vessel in less than five and a half hours. If the evidence of the second officer is disbelieved, the respondents' case must fail, because that case rests upon the assumption that a collision took place between some projecting portion of the submerged mass and the vessel. This witness gave evidence on commission. This court has therefore the same opportunity of forming an opinion on that evidence as the learned judge had in the court below. This comment may no doubt be made on this witness' evidence, namely, that if he had desired to tell lies, he might have made up a much better story for the respondents than he in fact did. Apart from the single fact that he speaks to seeing the floating mass, his evidence is entirely favourable to the appellants' case. According to him the mass when first seen is abaft the bridge. It is at such a distance that any contact appears to be at least extremely unlikely. No noise is heard or vibration felt. The witness suspects nothing and undresses and goes to bed. On the other hand, in cross-examination, he persisted in denying that he had ever heard that there were suspicions about the manner in which the ship was lost, and he was not prepared to admit that he had any knowledge of the suggestion that the vessel had been cast away. The witness was examined on the 2nd Feb. 1922. The action had been commenced in the previous October. Having regard to this fact and to the pecuniary interest of the witness and his family in the result of the action, I cannot believe that in this part of his evidence the witness was either telling the truth or desirous of telling the truth, with the result that I cannot regard him as a witness upon whose veracity and reliability the entire case of the respondents may be rested. If the story of the floating mass breaks down the rest of the story goes with it. But assuming, without deciding, that the floating mass was seen as described by the second officer, what then ? Unless some portion of the floating mass touched the vessel the presence of the mass is immaterial. According to the theory of the respondents, as finally developed by their experts, the point of contact was most probably where the bilge keel commences, that is to say, at a point opposite to the foremast of the vessel, and some 80ft. forward of the watertight bulkhead at frame 92. This point of contact is selected in order to account for the alleged stripping back of the bilge keel without noise or vibration, and for the entrance of water into the fore part of the vessel, as well as into the engine and boiler rooms. The fact that a point so far forward has to be selected as the point of contact in order to account for certain ascertained facts renders the theory of a possible contact between some projecting portion of the submerged mass and the vessel not merely very unlikely, which was the view taken by the learned judge, but, in my opinion, quite untenable. No satisfactory explanation was, in my opinion, given by the respondents' witnesses as to how any portion of the alleged floating mass could project sufficiently to come into contact with the vessel 20ft. below the waterline, and even if such a thing was possible the point of contact must have been so far aft as not to account for the water in the fore part of the vessel in sufficient quantity to cause her to sink by the head. Apart from these considerations, there is an entire absence of any evidence of any vibration, and no noise is spoken to except by witnesses who, if the vessel was thrown away, must have been privy to the scuttling. The evidence as to the nature of the noise is suggestive of the idea that the witnesses who spoke to the alleged noise were not aware of what the proper description of the kind of noise would be to fit in with the collision theory. There only remains for consideration the third theory upon which the respondents' case depended, namely, the theory as to how the water entered the vessel in such a way as to account for the appearances spoken to by the chief

engineer and other witnesses and the sinking of the vessel by the head in about five and a half hours. Some theory must be suggested which would account for the very gradual inflow of water into the engine and boiler rooms, and for the fact that the water when first seen was flowing aft from a point between the port boiler and the port bunker in the boiler room. Any idea that any of this water found its way from No. 2 hold into the boiler room can be dismissed summarily. If once the water had risen in No. 2 hold to a height sufficient to enter the boiler room through the doors, or either door, in the watertight bulkhead, it seems unlikely that any water could run aft until it had risen in the boiler room to the height at which it stood in No. 2 hold. Apart from this consideration, the stokers in the boiler room would never have allowed the doors to remain open if water was coming through them. To account for the water, therefore, the theory must be that a stripping of the bilge keel took place just aft of frame 92, and that the sheared rivets gave way one by one just sufficiently quickly to account for the rise of water in the boiler room and engine room. Combined with this theory must be the theory that sufficient rivets were sheared forward of the watertight bulkhead at frame 92 to admit sufficient water into No. 2 hold to cause the vessel to sink by the head, and combined with both theories must be the theory that the rivets which were forced in were forced in at such times and in such manner as to account for the requisite amount of water getting into the vessel to sink her in five and a half hours. These appear to me to be fanciful theories, but the facts were not sufficiently investigated to enable me to form any confident opinion upon them. I can only say that such theories as these must themselves be based either upon sound theories or upon well-ascertained facts before I should feel inclined to accept them. Turning now to the appellants' case, I find a theory which to all appearances fits in with the ascertained facts as to the first appearance of the water and the sinking of the ship. The chief engineer had abundant opportunity of doing what it is suggested he did. The No. 2 ballast port tank manhole cover could easily have been adjusted before the vessel put to sea. There only remained the opening of the proper valve in the valve box in the boiler room to which the chief engineer had access, and to which he admittedly went on two occasions, on either of which he might have opened the valve and the opening of the sea connection in the engine room where the engineers would naturally be. If water was admitted into No. 2 ballast tank while the port manhole cover was either open or loose, the water would, according to the evidence, first appear where it was first noticed, and it would flow aft, as it was stated that it did, and it would have flowed at a rate sufficient to sink the vessel in five and a half hours. If this was done deliberately there is no reason to suppose that the watertight doors were ever sufficiently closed to prevent sufficient water passing through them into the crossbunker and No. 2 hold to account for the vessel going down by the head. What, then, is the position created by the cases made for the appellants and respondents respectively to account for the sinking of the vessel ? On the one hand a story or series of stories which appear to me to be either unreliable or incredible. On the other hand, a story which is consistent with the ascertained facts, but which no doubt rests upon the assumption that several of the officers and crew are both liars and criminals.

It is only natural to shrink from coming to such a conclusion unless forced to do so, especially in a case where the learned judge who tried the action took the opposite view. I have given this case my most careful consideration and I feel compelled to arrive at the conclusion that the vessel was deliberately scuttled with the connivance of the responsible managers of the company owning her. Apart from the considerations to which I have already referred it is necessary to take into account various matters, all of which go to support the conclusion which I have already indicated. To these I will briefly refer, First, motive. It is not necessary to go into the figures to prove an abundant pecuniary motive, not only on the part of the responsible managers of the company but on the part of members of the crew including the chief engineer and the second officer. Secondly, relationship between various members of the crew to each other, and to the managing directors which, to some extent, might supply the want of pecuniary motive, and to some extent might encourage the idea of securing any necessary assistance without the danger of being betrayed and detected. Thirdly, the extremely suspicious circumstances attending the abandonment of the vessel. No Marconi signal. No flares. No summoning of the carpenter, and the apparent acceptance by the captain and responsible officers of the fact that the vessel was doomed and that there was no need and no necessity to do anything, or to attempt to do anything, either to save her, or to summon assistance. Fourthly, the very unsatisfactory way in which the chief engineer apparently gave his evidence and which resulted in the learned judge indicating pretty plainly that he did not accept his answers. Fifthly, the very suspicious account which the chief engineer gave of his movements after he heard the noise and after the first discovery of the water in the engine room. He omitted to summon the carpenter or to sound the bilges, though he did examine the tanks including No. 2 ballast tank. It is difficult to see why he did this unless it was in order to ascertain how the flooding of the tank was progressing. Finally, there is the course taken by the master. This seems to me to be consistent only with a predetermined decision to cast away the vessel. On the question of the owner's responsibility this decision of the master appears to me to be all important. I cannot conceive of such a decision intended to be put into operation so soon after the vessel left her port of loading,

having been arrived at except with the connivance, or by the instruction, of the managing director, whose pecuniary interest in such a decision is very marked. I do not think that it at all necessarily follows that the other directors were personally responsible, and I think that the learned judge was mistaken in his view of the evidence as affecting Don Jesus de la Rica's position in regard to his loan. I have not gone into the facts in full detail, but I have, I think, sufficiently indicated the reasons for my decision. Though in the result I differ from the conclusion arrived at by the learned judge, I cannot help feeling that had he not been influenced by an unfortunate misapprehension in reference to the evidence of the second officer, he would have taken the same view of the facts as this court is now taking. The appeal must be allowed with costs and the judgment entered for the plaintiffs must be set aside and entered for the defendants with costs.

Scrutton, L.J.—A Spanish company sued underwriters for the loss by perils insured against of the steamer *Arnus*. They alleged that she sank through the entry of water by reason of a collision with floating wreckage. The underwriters replied that she sank because she was scuttled by the desire and with the privity of the owners. Bailhache, J., who describes the case as having given him the greatest anxiety and says that he has never tried a case which gave him so much trouble, found that the water entered through a collision. He did so mainly because he believed the second officer who described his seeing floating wreckage and because he thought this evidence made the rest of the story possible, and he speaks of his resultant decision as " practically unappealable." Counsel for the respondents took the same line, describing it to us as a conclusion of fact with which this court would not interfere. The judgment of this court in *Slingsby* v. *The Attorney-General* (*T. W. and A. P. Slingsby cited*) (32 Times L. Rep. 364). shows that this court will reverse even the judgment of a judge who has seen a witness and believed her from her demeanour if the other facts in the case are strong enough. In this case there is this peculiar feature. The learned judge says of second mate, Filipe Ybarra, " he gave his evidence on commission, and repeated it here, and I was impressed with his demeanour and his frankness.'' The learned judge's memory had unfortunately failed him : Felipe Ybarra did not give evidence before the learned judge at all, but was examined on commission. His brother, Jose Ybarra, did, but gave no evidence material to the point the judge considered crucial. I have no desire to encourage counsel to interrupt and correct the judge in the course of his judgment at every statement which they think is not quite accurate, but this was such an obvious and important error that I regret the judge's attention was not at once called to it that he might consider whether the absence of observation of demeanour of the witness influenced his view in a matter in which he had obviously been hesitating. Further, the conclusions of fact are largely inferences from other facts and balances of probability as to which this court can judge as well as the judge below.

The circumstances of the loss were very suspicious, as Bailhache, J. thought. The company, with a capital of, roughly, 100,000*l.* at the height of the shipping boom, had bought the ship for 160,000*l.*, the excess of price over the capital being a loan from one of the owners, Mr. de la Rica. The ship had made some profits, but the slump in shipping had then come, and the value of the ship had fallen from 160,000*l.* to 14,000*l.* The company owed a considerable sum to Mr. de la Rica and over 50,000 pesetas to the managing director, M. Longaray. On the 27th April 1921, when she was lost, her assurance policy had nearly expired, but as she was insured for 150,000*l.* on ship and 24,000*l.* on disbursements, her loss would obviously be very profitable to her owners, though this could be said of a great many ships at that time. She was being navigated by a family party. Her first and second officers, the two Ybarras, were stepsons of the managing owner, Longaray. Her captain was the uncle of the Ybarras. Of the 4820 shares of 500 pesetas each, the managing director held 1240 shares ; his nine stepchildren, the two Ybarras and their seven brothers and sisters. 648 shares, and the engineer, Gomeza, eighty shares. The captain was not a shareholder. There were remarkable incidents on the voyage and loss such as are frequently found in scuttling cases. The voyage was from Vivero with ore to Rotterdam. Vivero is a port near the north-western corner of Spain, a little north of Finisterre, and the course should be laid by the captain to pass clear of Ushant, with its dangerous rocks and fogs, or, at any rate, clear of the lights south of Ushant, at Armen Rock, and Penmarch Point. A course was set which, if prolonged, would take the ship ashore inside Armen Rock, an unusual course and out of the track of ships passing from Finisterre to Ushant. It would have the advantage of bringing the ship nearer the fishing fleet in the bay south of Penmarch, who, in fact, picked up the crew when in their boats. There was an unjustifiably hasty abandonment of the ship about two hours after the suggested collision. She kept afloat for three hours after she was abandoned. No attempt was made to use the Marconi apparatus with which she was fitted, or to use blue lights or rockets, or to secure a tow towards land from salving ships. One has abundant motive for scuttling, and incidents suggestive of scuttling, before one comes to examine the evidence as to the suggested collision and the rival theories of the entry of water. No one in the ship felt the alleged collision, though part of its effects were said to be near the engine room, in which an engineer and donkeyman were working, and just under the engineers' berths in which two engineers were lying. The second officer on the bridge, who is said to have seen the floating wreckage, did not think a collision had occurred.

or report the wreckage to anyone. Neither the deck look-out nor the helmsman was called, and presumably saw no wreckage. The second officer's story was that between 11.15 p.m. and 11.30 p.m., standing on the portside of the bridge, in "good weather, starry and dark," he saw a dark mass, about 2ft. above water, which he estimated to be 25 metres (81ft. long) and 8 metres (26ft.) wide. He thought it was "6 to 7" or "7 to 8" metres from the ship (20ft. to 26ft.). He did not see it till it was a little behind them. The theory of the plaintiffs has always been that the ship was struck very deep in the water. The water was first seen in the engine room bilges; and they gradually developed a theory that the bilge keel was ripped off by a glancing blow. At first they simply said "a leak" then "a glancing blow on her port side in the neighbourhood of the cross-bunker bulkhead." If this were high up, it would mean a fractured plate, which must mean considerable force and a blow that would be felt. So the suggested blow was made to be one which ripped off the bilge keel, which is a plate riveted to a T bar, which again is riveted to the side of the ship. It was suggested that a sliding blow might shear or tear out the rivets, and so leave holes in the side of the ship. The importance of this is that the bilge keel is on the turn of the bilge and some 20ft. below the water line. What sort of wreckage is it that, visible above the sea, 20ft. at least from the side of the ship, strikes the ship 20ft. below water? The simplest mathematics show that it is something over 30ft. long, projecting at an angle of 45 degrees from the nearest side of the wreckage. The ships' experts thought it might be a submerged and derelict hulk with its cargo shifted so as to have a list. They were not quite clear whether it was right side up or wrong side up. But what sort of a hulk is it that is, say, 100ft. long and 30ft. deep, that has a width of between 26ft. and 50ft. and floats at an angle of 45 degrees? Boats that float derelict awash are usually wooden ships laden with timber, where materials and cargo both float; but then there is no room for cargo shifting so as to produce a list. Cargo that shifts is heavy cargo such as ore or wheat, where room is left in the hold, but such boats do not float awash with only 2ft. out of 32ft. depth above the water. I am sure that no one ever heard of such a boat of the dimensions suggested. The experts would not say that such contact was impossible, but it appears to me so highly improbable as to require the strongest proof to persuade me that it happened. The other thing that happened is that the chief engineer and donkeyman in the engine room say that they heard, about 11.20 p.m., a noise variously described as "dull," "dry," and "sharp" which they thought was in the port bunker, and the noise of a fall of coal or a plate. No one else heard it. The next thing is to set out the rival theories and see how the alleged facts as to the rise of water fit in. The scuttling theory was that, by opening the sea inlet in the engine room and the valve in the valve box forward of the boiler room leading to No. 2 tank, water was allowed to run into No. 2 tank. When that filled there was a manhole on its top at its after end which, left loose, would let the water run on to the top of the tank in the boiler room, whence it would first fill the bilges on each side, and then rise over the top of the tank till it reached the floor of the boiler room and engine room. The engineer admitted he had been to the valve box about 11 p.m., as alleged by the firemen, but said it was to turn the pumps on to the bilges. The collision theory was that the water came through into the engine room in the way of the port bilge, and gradually rose in the engine room and boiler room till it first showed over the boiler-room floor and continued rising till it put out the fires and lights. The first objection to the collision theory was this. The experts said the surplus buoyancy of the ship was 2000 tons. I should have thought, considering the displacement scale, which, to judge by some of their answers, some of the experts had not looked at it was 1800 tons (4ft. 10½in. freeboard × 31 tons to the inch). But taking it at 2000 tons, the ship sank in five hours, which would mean a loss of buoyancy of 400 tons an hour. As the inrush of water would be greater at first owing to the greater head of water outside, the quantity would be some 420 to 480 tons in the first hour, or 7 to 8 tons a minute. But the port bilge of the engine room only holds 7 tons of water, so that the incoming water should have filled the bilge in a minute, and the bilge on the port side aft of the engine room is open to view. Now the chief engineer gives a detailed account of his movements which I do not quote in full, but which repays the most careful study. On hearing the noise about 11.20 (1) he went up on deck to get into the port bunker to ascertain the cause of the noise, going down to the 'tween deck floor. (2) He went back to the engine room and examined under the engine and boilers, though he did not go into the boiler room. This must have been done by taking up a plate in the engine room floor, and, I suppose, going down under the boiler room. He found no water. (3) Then, after the boilerman had oiled the engines, and after 11.30, he reported some water in the bilges. (4) He then examined the bilge pumps to see they were working properly. Their capacity is about 15 tons an hour or ¼ ton a minute. (5) He then went on deck to sound the tanks. This would be routine, but though a blow in the port bunker would not put water into the tanks he did not sound the bilges: why, he did not state, though a blow in the bunker or the side of the ship would put water in the bilges. He found no water in the tanks. This, if true, negatived any idea of scuttling by No. 2 tank, which would be full before water came from it to the engine room. Was it true? (6) He went back to the engine room and found more water than before, so he put the donkey pump on, which had a capacity of 85 tons an hour, say 1½ tons a minute. Up to this time only ¼ ton a minute

was being taken up by the pumps. (7) He went down under the engine room by removing a plate, and found a lot of water, so much that he could not go far in. This water would be on the top of the tank. (8) Up to this time the circulating pump had been passing water from the sea through the condenser to the sea, with a capacity of 300 tons an hour. So he put on the "false injection," which made this pump draw from the bilges and discharge into the sea. If all these pumps were then working on the bilges they were putting out 400 tons an hour, or 6½ tons a minute, and yet the water was found to be rising substantially, so that much more than 6½ tons must have been coming in. (9) He then says he went to call the third engineer, and puts the time at 11.40. He says that he did not get any report about water in the bilges till more or less ten minutes after he came back to the engine room from the bunker, and that when the water covered the tanks he did not recognise there was a serious leakage. Then follow a remarkable series of answers, at the end of which it was obvious that the judge did not, at that time, believe him, for up to the time when the false injection was put on, water must have been coming in at 7 or 8 tons a minute, in view of the fact that when all the pumps were said to be on, with a capacity of 6½ tons a minute, the water was still rising substantially, probably more than 8 tons a minute, or, in ten minutes, some 80 tons—enough to fill both bilges and put a considerable quantity of water over the top of the tanks. Yet it was more than ten minutes after the blow before the water was noticed to be rising in the bilges, and nothing was found on the top of the tanks. And if there was very little water in the engine room at first, until the false injection pump was put on, and then the pumps worked at a capacity of 6½ tons a minute to take water out, it was difficult to see how water ever rose so far and fast as to put out the fires and stop the pumps. This obvious and great difficulty evidently impressed the learned judge very much. The plaintiffs' experts tried to explain it in two ways. First, they said there must have been a good deal of injury forward of the cross bunker bulkhead so that the water coming in did not at first get into the engine-room bilges. To admit this water they suggested that the ship had been struck well forward and the bilge keel ripped off for some distance in the way of No. 2 bilge. This water, through rivet holes, would come into No. 2 hold bilges, and, rising, would not come aft till it had risen 2ft. above the tank top so as to get into the cross-bunker and through the open door into the boiler room. But the more water supposed to come into the hold this way, the more the ship would go down by the head and the water run to the forward, not the after, end of the hold. Further, I think all the expert witnesses agreed that the effect of the bow wave of the steamer would be to throw off a floating mass which had missed hitting the bow. It was suggested that suction might bring it in amidships, after being thrown off forward. The learned judge takes the view that it is extremely unlikely that such a mass would hit the ship at all, "certainly not amidships." However, he "is not prepared to say, improbable as it is, that it is not a physical or scientific possibility that the mass would strike the ship where it did," that is, I suppose, where it is suggested to have struck. This possibility seems to be destroyed by the evidence of Sir Fortescue Flannery. "If the object was big enough . . . if the submerged object was, for example, a waterlogged ship, it would be a big enough mass not to be affected, in my opinion, materially, by the suction." I do not think, after this, that the suction theory can be relied on to bring a mass which has missed the bow of the ship into collision amidships, or glancing along the side of the ship from fore to aft and ripping the bilge keel. Secondly, it was said that this glancing blow only sheared the rivets, leaving part tight in the rivet holes, and only very gradually did rivet by rivet fall in, admitting water through the rivet holes. This seems extremely improbable, and, in addition, it is difficult to believe that a long glancing blow tearing out a number of rivets was not felt or heard by anyone on board the ship, as such a continuous blow. Weighing the probabilities of the stories, and bearing in mind the extreme improbabilities of parts of the collision theory, I have come to the conclusion, after a careful consideration of all the evidence, that water was intentionally admitted into the ship. I am specially impressed by the extreme improbability, I think impossibility, of a blow on the bilge keel amidships from a floating mass in the position described and by the difficulty of reconciling the slow rise of the water after the alleged hearing of a noise with the rapid entrance of water which must have followed a blow amidships from which the ship sank in the time proved. I also find these extreme difficulties in the way of the collision theory, coupled with a strong motive for scuttling, and incidents as to course and premature abandonment frequently found in scuttling cases. The combined effect drives me to the conclusion I have stated.

Next, was the water admitted with the privity of the owner? When the owner is a company the privity must be that of the management, directors, or managing owner. This follows from the decision as to limitation of liability (*Smitton* v. *Orient Steam Navigation Company Limited*, 10 Asp. Mar. Law Cas. 459; 96 L. T. Rep. 848), and non-liability for fire (*Lennard's Carrying Company Limited* v. *Asiatic Petroleum Company Limited*, 13 Asp. Mar. Law Cas. 81; 113 L. T. Rep. 195; (1915) A. C. 705). I find the managing owner, M. Longaray, with a large interest as a shareholder in the capital of the company, and a considerable creditor, and the ship navigated by a captain, first and second officers, who are relations of M. Longaray and each other, and a chief engineer, who is a shareholder. If, then, I come to the conclusion that one or all of these persons on board the ship were concerned in the intentional admission

of water into the ship, I have no hesitation in finding that the admission of water was with the privity of the managing owner, and, therefore, of the company who owned the ship. This view renders it unnecessary finally to discuss the burden of proof, but, in my present view, if there are circumstances suggesting that another cause than a peril insured against was the dominant or effective cause (*Leyland Shipping Company Limited* v. *Norwich Union Fire Insurance Society Limited*, 14 Asp. Mar. Law Cas. 258; 118 L. T. Rep. 120; (1918) A. C. 351) of the entry of sea watei into the ship, and an examination of all the evidence and probabilities leaves the court doubtful what is the real cause of the loss, the assured has failed to prove his case. It may well be when nothing is known except that the ship has disappeared at sea, you may presume that her loss was by perils of the sea (*Green* v. *Brown*, 2 Strange 1199). But when, though it is known she has sunk, there is evidence on each side as to the cause of the admission of sea water, which leaves the court in doubt whether the effective cause is within or without the policy, the plaintiff, the assured, fails, for he has not proved a loss by perils insured against. Not every loss by sea water is a peril of the sea, as is shown by the definition of that peril in the Marine Insurance Act. When there is evidence on each side suggesting the real cause the court must determine on a balance of probabilities, as in every case of circumstantial evidence, and not be deterred from finding in favour of the stronger probabilities by the fact that some remote possibility exists the other way. In this case I find scuttling, but I do not think it is possible to put the case for the assured higher than by saying the matter is left in doubt, and if that be the true view, in my opinion, the assured fails. The appeal must be allowed with costs here and below.

EVE, J.—At 9.30 p.m. on the 26th April 1921 the steamship *Arnus* left Vivero, on the north-west coast of Spain, bound for Rotterdam with a cargo of 4640 tons of iron ore. She was owned by the plaintiff company, a Spanish corporation, and had been purchased in May 1920 for 160,000*l.* In April 1921 her value had fallen to 13,500*l.* or thereabouts, and she was insured for a total sum of 174,000*l.* under policies expiring on the seventeenth of the following month. The plaintiff company was accurately described by the managing director and secretary, Juan de Longaray, as a family company. He, his two brothers and his ten step-children, with a Mr. de la Rica and his brother and sister, held the bulk of the 4820 shares of 500 pesetas each, issued by the company. The difference between the company's capital and the amount required to meet (1) the cost of the ship and (2) the expenses of the purchase and of the formation of the company had been provided by a bank on the guarantee of the three de la Rica shareholders, and in April 1921, when the company's only assets were the ship and a few odds and ends, valued at 375*l.*, all the capital had been expended and there were outstanding liabilities in respect of loans amounting to 936,986 pesetas apart altogether from debts due to ordinary creditors. There can be no doubt that the company was at that time insolvent, and that there was no prospect of paying the creditors, let alone of making any return to the shareholders if the vessel survived the then current insurances. A profit and loss account for the first seven months of the company's trading and a balance sheet made up as on the 31st Dec. 1920 was presented to a general meeting of the company, held on the 31st March 1921. When the vessel left Vivero she was commanded by Thomas Enciardo, who had under him as first and second mates, Jose Ybarra, and Filipe Ybarra, his nephews, and stepsons of Longaray, and as chief engineer Victorinea Gomeza, a cousin of one Jaurequi, who held eighty shares in the company's capital, The captain had joined the ship in Dec. 1920, and the chief engineer on the 18th or 19th April 1921. Each mate held seventy-two, and the chief engineer eighty shares in the company; the captain held no shares. On the night of the 27th and 28th April in fine weather, a smooth sea, and with little or no wind blowing, the ship sank in deep water at a spot within easy reach of a large fishing fleet, but several miles nearer to the coast than she would have been had she been pursuing the normal course from Vivero to Rotterdam. There was no loss of life—some five hours elapsed from the time when the crew took to the boats until the ship foundered—no attempt was made to attract attention or to secure assistance by wireless or other signals—all the ship's logs and papers except the master's chart were said to have been lost in an abortive attempt to launch the first boat; and no one who was on board has given evidence of any casualty to which the sinking of the ship can be attributed beyond the influx of sea water. On being landed from the fishing-boats by which they had been respectively rescued soon after the sinking of the ship, the officers in charge of the two boats in which the crew got away—that is to say, the second mate and the captain—telegraphed to the owners that the ship had been wrecked owing to a leak. By way of defence to this action brought to enforce payment of the defendants' subscription to the policies, it is pleaded that the ship was not lost by perils insured against, but was wilfully cast away by those on board of her with the knowledge and consent of the plaintiffs.

The learned judge in the court below rejected the defence and gave judgment against the defendants for the full amount claimed. It is impossible to read his judgment without appreciating two things; the one that he arrived at the conclusion he did with some considerable hesitancy, and the other that in his ultimate decision he was materially influenced by the weight he attached to the evidence of the second mate. He refers to this evidence where he says: "In my judgment, this case in substance depends upon whether I believe the

second mate or whether I do not. If I do not believe the second mate it is quite clear that the vessel was scuttled"; and later again, where he adds: "The main reason why I decide in favour of the owners is that I accept the evidence of the second mate." Had the learned judge seen and heard this witness as, in momentary forgetfulness, when delivering judgment, he believed he had done, it would have been difficult for this court to reconsider the truthfulness or otherwise of his testimony, but as the learned judge did not in fact hear his evidence, and as we have exactly the same materials for testing his veracity as were available in the court below, it is clearly open to us to review his evidence and to form our own opinion as to its reliability. The importance of this is not restricted to the question of the second mate's credibility. In accepting the truth of his story, the learned judge treated it as in some way establishing the credibility of the chief engineer. With all respect, I cannot follow this reasoning: if the second mate is speaking the truth when he says that the floating wreckage which he alleges he saw at a distance of some 7 or 8 metres from the ship did not touch the ship, how does this avail to support the chief engineer's story of a blow on the port side consistent only with an unmistakeable collision? So far from being of a confirmatory nature, the two statements are, I venture to suggest, mutually destructive of one another. But it may no doubt be said, and said with some considerable force, that if the evidence of the second mate be true it proves the presence in the vicinity of something capable of inflicting a mortal injury to the vessel, and when it is not disputed that what subsequently happened is consistent with the infliction of such an injury, it is argued that it is more logical and more reasonable to link up cause and effect than to cast around for other possible contingencies capable of bringing about the same result. Why, it is urged, should theoretical suggestions of felonious acts on the part of the crew be preferred to the obvious risk present in the shape of this floating mass of wreckage? From this point of view a careful examination of the second mate's deposition appears to me useful. As I have already observed, he is a nephew of the master, a stepson of the manager and secretary, and a shareholder in the company to the extent of some 1400*l.* It is impossible to say that he is independent of the plaintiffs and that he has not, for a young man in his position, a considerable pecuniary interest in the result of the litigation. It is important to bear this in mind, as also that this is only one of several similar actions against the other underwriters in considering some of his answers under cross-examination. His material evidence is that about 11.15 or 11.20 on the night in question, when standing at the port end of the bridge, he sighted at a distance of some 7 or 8 metres a black mass in the water some 85 metres long and 8 metres wide, standing about 2ft. out of the water and looking like a hull or a large raft. The mass was abaft the bridge and seemed to him to pass clear of the vessel. He felt no shock, heard no noise, and kept his course. There is no corroboration of this story. The mass was not seen by the sailor on deck, by the man at the wheel, or by anyone keeping the same watch—so far as is known, its presence has never been reported by any ship navigating or any boat fishing in the locality, and there is expert evidence that the description does not assist in identifying its character. The witness drew no one's attention to the object, made no report of the incident to his brother, the first officer, who relieved him at midnight, and asserts that, although he reported it to the captain when the third boat, the port one, was being launched, he never mentioned it to anyone else. I think it is very difficult to give complete credence to this story. It is scarcely possible to believe that the cause of the catastrophe to the ship was not discussed by the crew when escaping and after their rescue by the fishing boat, and, if so, can one believe if this young officer (he is only twenty-three) had really seen this extraordinary object in the immediate vicinity only a very short time before he was aroused to find preparations for abandoning the ship in full swing, he would not at once have made known, at least to his brother, whom he admits he saw as soon as he reached the boat deck, what he had so lately seen? But it does not rest there. In cross-examination he was asked some pertinent questions as to this action and other matters, and the answers which I am about to read appear to me to throw grave doubt on his truthfulness. He is asked: "When did you first hear that there were suspicions about the manner in which the ship was lost? (A.) I did not hear that there were suspicions. (Q.) Have you never heard that there are grave suspicions about the manner in which this ship was lost? (A.) No. (Q.) Never? (A.) No. (Q.) Have you never heard that some of the crew have accused the master of throwing away his ship? (A.) No. (Q.) What do you think this case is all about? (A.) About the insurance. (Q.) Do you understand why your owners have brought this action? (A.) I can suppose the cause. (Q.) What do you suppose the cause is? (A.) I suppose because the underwriters will not pay. (Q.) And why do you think they won't pay? (A.) I do not think they will not pay, but are trying to get out of paying. (Q.) Have you heard that the underwriters are trying to get out of paying because they think that the ship was deliberately sunk? (A.) No." And further on he is questioned on some other matters as follows: "(Q.) Was there a fireman or second fireman in your boat? (A.) I think there was more than one. (Q.) Was there a man called Bestos? (A.) Yes. (Q.) You recollect him? (A.) No. (Q.) Was there any talk in the boat between these men about the loss of the ship? (A.) I do not think so. (Q.) What did you talk about in the boat? (A.) About getting ashore and about the wind. (Q.) Was the sinking of the ship and its cause never mentioned? (A.) I did not hear anything. (Q.) Witness

are you being quite frank in answering this question? (A.) Yes. (Q.) Are you quite sure that you are answering correctly? (A.) I do my best. (Q.) You are quite sure you are not hiding anything? (A.) I do not hide anything. (Q.) Do you know that some of the crew approached the captain at St. Nazaire? (A.) Many of us approached him for money. (Q.) Did you hear at St. Nazaire and at Bilbao some of the crew made charges against the master? (A.) I do not think so. (Q.) Are you certain that you have never heard of that incident? (A.) I do not remember, but I do not think so. (Q.) Is it a matter about which you can possibly be uncertain? (A.) I believe that I have not heard anything, and that I have no doubt about it? (Q.) This is a serious matter, witness, can you not be more certain than that? (A.) Had it been at the time, yes, but as it was a year ago, I do not remember. (Q.) Some of the crew had said they had made charges against the captain, but you never heard of them? (A.) I do not think I have heard anything. (Q.) I want to give you another opportunity of answering me with regard to the attitude of the underwriters. You have told me you had no idea of the attitude taken up by the underwriters with regard to the loss of the ship? (A.) No. (Q.) You really have no knowledge? (A.) No. (Q.) When was it first suggested to you by anyone that the ship was sunk deliberately? (A.) I do not think I have heard that. (Q.) Are you sure? (A.) I think I am sure of not having heard that." I do not think that is the evidence of a truthful witness, and in forming a judgment on the whole of his evidence the dearth of material for his cross-examination must not be overlooked. On the only crucial matter upon which he could be effectively cross-examined he appears to me to have given very unsatisfactory answers, and having regard to the date of his examination, Feb. 1922, to the fact that as early as June 1921 the possibility of litigation with the underwriters was being provided for by the plaintiff company, that this action had been commenced in Oct. 1921, and that he personally and his eight brothers and one sister were all very materially interested in the success of the claim to recover the insurance moneys, I do not believe he was ignorant of the circumstances in which the claim was being resisted or that his evidence was being given to refute the allegation of a wilful throwing away of the vessel. I do not, therefore, accept the story of the floating wreckage, and I agree with Bailhache, J. that if one does not believe this witness it is quite clear that the vessel was scuttled. What follows from that statement of the learned judge and the observation in his judgment to which I have already alluded, where he says, "accepting the evidence of the second mate the evidence of the engineer becomes possible and credible"? This means, surely, that unless the second mate spoke the truth, the engineer is not to be believed, an opinion which coincides entirely with the learned judge's attitude towards the latter when under examination. I share that opinion with this qualification, that even if I believed the evidence of the second mate I should not believe that of the engineer. Having reached these conclusions it is not necessary for me to examine in detail the theories put forward for establishing the case that the incursion of sea water was a fortuitous casualty, more particularly as they have already been exhaustively dealt with in the judgments just read, but I may perhaps point out that the first theory raised on the evidence of the chief engineer as to the locality, where he heard the noise attributed to the alleged collision with the floating wreckage, of a leak due to a damaged plate near the port bunker was effectually disposed of by the statements of the engineer himself, that when he climbed down from the upper deck into the bunker shortly after hearing the blow he found everything there as usual, and no water, a condition of things quite impossible according to Mr. Camp, if a hole had been made in the ship's side capable of admitting a column of water measuring eight tons per minute; and that the second theory of a stripping back of the bilge keel from somewhere near the foremast and the flow of water from No. 2 hold into the cross bunker, and from there through the bulk head doors into the boiler and engine rooms, is quite inconsistent with a few very plain answers given by the engineer in examination in chief. Thus he is asked: "What about the bulkhead doors: had they been open or shut up to then?"—this is up to the time when he went into the boiler room on hearing from a trimmer that there was a great deal of water in the place where they worked. His answer is: "Up to then they were open. (Q.) Why had they been kept open? (A.) They were opened to get the coal out. (Q.) Yes; but why had you not closed them before? (A.) So as to let any water run out and to be able to work longer in the engine room. (Q.) Then, finding you were unable to keep the water out and work longer in the engine room, you ordered them to be closed: is that right? (A.) Yes. When I found it was impossible I gave orders to close them and to make the engine room watertight." I am satisfied that the proof upon which those questions were framed had been prepared to support the case of a hole in the ship's side in the neighbourhood of the port bunker through which water was coming into the boiler room, and was passing forward through the bulkhead doors. The answers are quite inconsistent with the theory that the water was coming aft from No. 2 hold and the cross-bunker into the boiler room through those doors. In face of the opinion I have formed and expressed upon the evidence of the two most material witnesses called on behalf of the plaintiffs, it is quite unnecessary for me to dilate further on the acts and inactions of the master and other responsible officers following on the communications made to them by the chief engineer. Their conduct and attitude is inexplicable if they ever

contemplated making any attempt to save the ship, but is quite consistent with a preconcerted plan to throw her away.

At one time I entertained some doubt whether the evidence warranted the conclusion that the owners were privy to that plot, especially having regard to the fact that two—possibly three—of those who put it into execution were pecuniarily interested in the ship's destruction, but that qualification does not affect the master, who had no shares and was undoubtedly a participant in the crime, and I think the inference to be drawn from this, from the desperate financial position of the owners, from the intimate connection of the shareholders who were on board with those who were directing the company's affairs on land, from the course laid down for the voyage and from the other circumstances mentioned by my Lord and the Lord Justice, is that the throwing away of the ship was instigated by, and carried out with the connivance of, those most interested in the results which it was hoped—vainly, so far—such an act would bring about. Finally, I concur in the view that, in a case like this, where it cannot be said that the sinking of the ship was due to any unascertainable cause since it is demonstrated that she sank owing to the incursion of sea water, and where the evidence of everyone who was aboard her is available for the trial, had the evidence left the court in doubt on the question whether such incursion of sea water was due to a fortuitous casualty or a crime, the plaintiffs would not have been entitled to judgment, not having proved the material allegation in par. 2 of the statement of claim that "the steamer was sunk and was totally lost by perils insured against by the policy." I agree that the appeal must be allowed and the action be dismissed with costs here and below.

Appeal allowed.

Solicitors: for the appellant, *Holman, Fenwick*, and *Willan*; for the respondents *Botterell* and *Roche*.

Nov. 6, 7, 8, *and Dec.* 15, 1922.

(Before BANKES and SCRUTTON, L.JJ., and EVE, J.)

SAMUEL (P.) AND CO. v. DUMAS. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Insurance (Marine)—Ship—Mortgage—Interest of mortgagee—Separate insurance—Assignment of interest—Ship scuttled with connivance of owner—Perils of the sea—Barratry—"All other perils, losses, etc."—Right of mortgagee to recover on policy—Excessive insurance—Owner's warranty.

By a mortgage, consisting of a deed of covenant and a statutory first mortgage to be registered in Greece, a shipowner purported to mortgage his ship to secure moneys due, and to become due, on a current account. He assigned to the mortgagee all the shares in the ship, all present and future policies on the ship or freight, and a power for the mortgagee to sue in the name of the owner for insurance moneys; and he covenanted to insure the ship and freight and keep them insured, and to deliver to the mortgagee the policies duly indorsed, or give the mortgagee a broker's guarantee that he held the policies solely for the mortgagee; and he appointed the mortgagee his attorney, and in his name to sue for all insurance moneys on the ship. By the mortgage the owner covenanted to pay the sums for the time being due, and mortgaged the whole interest of the ship free from incumbrances. The mortgage was never in fact registered in Greece. The plaintiffs, who were ship brokers, took out, in pursuance of the covenant in the deed, a time policy for twelve months, "and (or) as agents as well in their own name as for and in the name of all and every other person or persons to whom the same doth, may, or shall appertain in part or in all" against perils of the sea, including barratry, "and of all other perils, losses, and misfortunes that . . . shall come to the hurt, detriment, or damage of the said . . . ship, etc., or any part thereof." During the currency of the policy the ship was scuttled with the connivance of the owner, but not with the connivance or complicity of the mortgagee. The plaintiffs sued on the policy on behalf of the mortgagee.

Held, by Bankes, L.J. *and* Eve, J. *(1) that the mortgagee had an insurable interest in the ship, although the mortgage was never registered in Greece; (2) that the mortgagee's interest was intended to be separately covered by the policy, and was not merely derivative from the owner's interest; and (3) (Scrutton, L.J. dissenting) that the mortgagee was not debarred from asserting that the ship was lost by perils of the sea.*

Small v. United Kingdom Insurance Company (8 *Asp. Mar. Law Cas.* 293; 76 *L. T. Rep.* 828; (1897) 2 *Q. B.* 311) *followed.*

The policy contained a warranty that the amount insured on freight should not exceed a specified sum. The freight was insured against war risks for an amount considerably exceeding the sum specified.

Held, that there had been a breach of warranty, notwithstanding that the insurance on freight was against war risks; and that the mortgagee could not recover on the policy.

Judgment of Bailhache, J. reversed.

APPEAL by the defendant from the judgment of Bailhache, J. in a non-jury action.

The plaintiffs, P. Samuel and Co. Limited, insurance brokers, sued on a policy of marine insurance, in which the plaintiffs were named as the assured, on behalf of D. G. Anghelatos, the owner of the steamship *Gregorios*, and one Percy Samuel, who carried on business as P. Samuel and Co., and was a mortgagee of the steamship.

The mortgage agreement was dated the 13th Sept. 1920, and made between Anghelatos

(a) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

(thereinafter called "the shipowner") and Percy Samuel, carrying on business as P. Samuel and Co. (thereinafter called "the mortgagee"). It recited that the shipowner was the absolute owner free from incumbrances of the steamship formerly called the *Grindon Hall*, but then called the *Gregorios*, and intended to be registered under the Greek flag at Piræus in Greece, and that the mortgagee had agreed to advance to the shipowner the sum of 22,500*l.* upon having repayment of the same and any other moneys to become due from the shipowner to the mortgagee with interest secured as thereinafter appearing and upon delivery to the mortgagee of (*a*) a statutory or formal first mortgage of the steamship duly executed and registered in Greece (thereinafter referred to as "the said mortgage"); (*b*) good and approved policies of insurance upon the vessel as thereinafter provided; (*c*) the said indenture itself; and (*d*) bills of exchange. It then assigned all the 100/100th shares in the vessel "and all policies cover notes slips certificates of entry effected or hereafter to be effected granted or issued on the said steamship and on its appurtenances and also on the freight and outfit of the said steamship and also in respect of the protection and indemnity of the said steamship and the full benefit thereof all powers rights remedies and authorities thereunder and in particular with full power for the mortgagee in the name of the shipowner or otherwise to ask demand sue for and recover the said insurance moneys including the right to compromise any claim or suit and to receive the said insurance moneys or any moneys payable by way of compromise and to give valid and effectual discharges for the same and all the right title interest and demand of the shipowner of in and to the said steamship policies and premises To hold the premises hereby assigned unto the mortgagee as security for the payment of all moneys secured by the said mortgage and of all moneys which may hereafter become payable under any of the provisions hereof." By the indenture the shipowner covenanted with the mortgagee as follows:

1. The shipowner shall pay to the mortgagee the said sum of 22,500*l.* on or before the 13th March 1921, together with interest for the same at the rate of 1½ per cent. per annum above the Bank of England rate current for the time being from the 13th Sept. 1920, and will also pay all other moneys which may be or become due under the security of the said mortgage and of these presents upon the dates whereon the same shall be or become payable or upon demand and until payment the same shall carry interest at the rate aforesaid.

2. In addition to the interest above provided for the shipowner shall pay to the mortgagee on the execution of these presents a commission of one-half per cent. on the said loan.

3. The shipowner will immediately upon the execution hereof hand to the mortgagee his acceptances for the whole of the principal sum aforesaid.

4. The shipowner shall be entitled to repay the whole or any part of the said principal sum of 22,500*l.* or such amount as may from time to time remain outstanding at any earlier period than that herein stipulated for upon giving fourteen days' previous notice in writing to the mortgagee of his intention to make such repayment and any interest included in the outstanding bills shall be deducted *pro rata*. . . .

6. The shipowner will without delay take such steps as may be necessary to effect the complete registration of the said steamship as a Greek steamship. . . .

9. The shipowner will at all times during the continuance of this security insure and keep insured the said steamship and her freights whether at home or at sea against all losses perils and misfortunes usually covered by marine insurance with first-class insurance offices or underwriters or mutual associations as the mortgagee shall from time to time in their (*sic*) discretion approve, and in effecting any such insurance the shipowner will also duly pay the premiums and other sums necessary to keep the said policies in force and produce the receipts therefor to the mortgagee or his agents and will immediately after effecting any such insurance deliver to the mortgagee the stamped policies therefor duly indorsed or give to the mortgagee the guarantee of a broker approved by the mortgagee that he holds such policies solely on account and for the benefit of the mortgagee. . . .

11. In the event of any claim arising under the hereinbefore mentioned policies of insurance . . . the proceeds of the insurance and all other moneys received shall be applied in the case of a partial loss in reinstating the damage which shall have been sustained and in the event of a total loss in repaying to the mortgagee the balance which shall then remain owing hereunder with interest and all costs charges and expenses which have been reasonably incurred by the mortgagee and any balance shall be paid to the shipowner. All other sums received under such policies of insurance . . . shall be applied in discharging the claim in respect of which they are paid.

12. If default shall be made in keeping the said steamship in good seagoing order and condition or in keeping her insured . . . or delivering any such policies receipts or orders as aforesaid the mortgagee may himself enter upon and repair the said steamship and may insure her and keep her insured or entered as aforesaid, and the shipowner will on demand repay to the mortgagee every sum of money expended for the above purposes or any of them . . . with interest at the rate of 8 per cent. per annum from the time of the same having been expended until repayment and until such repayment the same shall be secured by the said statutory mortgage and these presents and shall be a charge upon the mortgaged premises . . .

18. The shipowner for the purpose of giving effect to and carrying out the provisions of this indenture hereby constitutes and appoints the mortgagee to be his true and lawful attorney for him and in his name to ask demand receive sue for and recover all insurances and other moneys of the said steamship which may become due and owing under the security of the said statutory mortgage and of these presents with full power to compromise any claim or suit and to receive any moneys payable by way of compromise and to do such other acts and things in the name of the shipowner or otherwise as the mortgagee may in his absolute discretion deem to be necessary for the due preservation and enforcement of the said security and on receipt of any such money as aforesaid including any money payable by way of compromise to give proper receipts and discharges for the same. And whatever the mortgagee shall

lawfully do in the premises the shipowner does hereby and will thereafter ratify and confirm.

19. The mortgagee shall hold the security under the said mortgage of the said steamship not only for the said sum of 22,500*l.* but also for any sum or sums of money together with interest thereon as aforesaid and all charges and expenses incurred in respect thereof which may now or at any future time be owing to them by the shipowner.

The statutory mortgage was headed "Mortgage (to secure Account Current, &c.)," and was dated 13th Sept. 1920. After describing the *Grindon Hall* to be re-named *Gregorios*, and stating that she was registered at Piræus in Greece, it proceeded :

Whereas I Denis Anghelatos . . . shipowner am indebted in an account current to Messrs. Samuel and Co. . . . brokers and by an agreement under seal bearing even date herewith and made between myself and the said Samuel and Co. it has been agreed that all moneys now or hereafter to become owing to the said Samuel and Co. in respect of the said account shall become due and payable at the times and in the manner provided in the said agreement with interest as therein specified and if no time is provided for repayment of any such moneys then it is agreed that the same shall be payable on demand Now I the said Denis Anghelatos, covenant with the said Samuel and Co. and their assigns to pay to him or them the sums for the time being due on this security, whether by way of principal or interest, at the times and manner aforesaid And for the purpose of better securing the said Samuel and Co. the payment of such sums as last aforesaid, I do hereby mortgage to the said Samuel and Co. 100/100th shares, of which I am the owner in the ship above particularly described, and in her boats, guns, ammunitions, small arms, and appurtenances. Lastly I for myself and my heirs (*sic*) covenant with the said Samuel and Co. and their assigns that I have power to mortgage in manner aforesaid the above mentioned shares and that the same are free from incumbrances.

The policy of insurance was effected on the 19th Oct. 1920, by one F. T. Whelar, the manager of the plaintiffs. It was a time policy, and was taken out by the plaintiffs "and (or) as agents as well in their own name, as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain in part or in all," for twelve calendar months from the 25th Sept. 1920 to the 25th Sept. 1921. The amount insured was 24,000*l.*, part of a larger amount of 105,000*l* insured upon the hull and machinery of the *Gregorios*, valued at 110,000*l.* against adventures and perils of the seas and other contingencies, including barratry, of the master and mariners, "and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said . . . ship, etc., or any part thereof."

The policy included No. 22 of the Institute Time Clauses. That clause is as follows :

Warranted that (except as hereinafter mentioned) the amount insured for account of assured and (or) their managers on . . . freight . . . shall not exceed 15 per cent. of the values of the hull and machinery as stated herein but this warranty shall not restrict the assured's right to cover . . . (2) Freight and (or) chartered freight and (or) anticipated freight on board or not on board, insured for twelve months or other time.—Any amount not exceeding 25 per cent. of the value of hull and machinery as stated herein, but if the insurance be for less than twelve months, the 25 per cent. to be proportionately reduced. . . . Provided always that a breach of this warranty shall not afford underwriters any defence to a claim by mortgagees or other third parties who may have accepted this policy without notice of such breach of warranty.

On the same day F. T. Whelar effected for the benefit of P. Samuel an insurance on freight against war perils to the amount of 27,500*l.*

The mortgage was never registered according to Greek law ; and the evidence went to show that it never could have been so registered, because the amount secured thereby was an uncertain amount.

On the 26th Feb. 1921 the *Gregorios* was lost about nine miles from Cape de Gata on a voyage from Philippeville on the coast of Algeria to the Tyne with a cargo of iron ore. The plaintiffs claimed upon the policy for the benefit both of the owner and P. Samuel. The defendant Dumas was the underwriter whose name was first on the list of subscribers of the policy.

Bailhache, J. found that the ship was scuttled with the connivance of the owner, but not of the mortgagee, and he held that the policy was taken out in the interests of the mortgagee as well as of the owner ; that the mortgagee had an insurable interest in the ship, although the mortgage had not been registered in Greece ; and (following *Small's* case (*sup.*) and *Graham Joint Shipping Company* v. *Merchants' Marine Insurance Company* (No. 2) (1922) 38 Times L. Rep. 75) that the mortgagee should recover as for a loss by perils of the sea. He further held that, as the over-insurance on freight was against war risks and not against ordinary perils of the sea, it did not render the policy invalid. He therefore gave judgment for the plaintiffs.

The defendant appealed.

R. A. Wright, K.C. and *W. L. McNair* for the appellant.—Firstly, the mortgagee had no legal interest in the ship which he could insure, for the mortgage was never registered in Greece, and never could have been registered in Greece, for it was not a security for a fixed sum, but for a varying current account. It was never, therefore, valid by Greek law. A mortgagee of a ship is not deemed to be the owner (*Lewen* v. *Swasso*, 1742, Postlethwayt's Universal Dictionary of Trade, Tit. Assurance, 2nd edit. 1757, vol. 1, p. 147), and therefore the mortgagee had no equitable ownership of the ship either. Secondly, the mortgagee was never separately insured, so as to render him unaffected by the acts of the owner ; his interest was only derivative from the interest of the owner, and his interest was therefore subject to the defects of the owner's interest. Thirdly, assuming that the mortgagee was separately insured, he is bound by the acts of the owner, to whom he left

the dominion over the ship : *Holls* v. *Hannam*, 1811, 3 Camp. 93.) Fourthly, the loss was not due to a peril of the seas, but to the scuttling with the connivance of the owner. The ship was not lost by anything fortuitous or accidental, but she was deliberately cast away. Mere incursion of sea water into a ship does not necessarily constitute a peril of the sea : *Sassoon* v. *Western Assurance Company*, 12 Asp. Mar. Law Cas. 206 ; 106 L. T. Rep. 929 ; (1912) A. C. 561 ; and *Mountain* v. *Whittle*, 15 Asp. Mar. Law Cas. 255 ; 125 L. T. Rep. 193 ; (1921) 1 A. C. 615.) The loss must be by a peril of the seas, and the mere fact that a loss is caused directly by the sea does not necessarily constitute a peril of the seas : (*The Xantho*, 6 Asp. Mar. Law Cas. 207 ; 57 L. T. Rep. 701 ; 12 App. Cas. 503.) The facts in *Small's* case (*sup.*) are distinguishable. The real cause of the loss was the scuttling, and not the incursion of sea water (*cf.* the *Leyland Shipping Company* case, 14 Asp. Mar. Law Cas. 258 ; 118 L. T. Rep. 120 ; (1918) A. C. 350.) Lastly, there was a breach of warranty as regards the amount of the insurance on freight, and it is immaterial that the insurance was against war and not marine risks ; the mischief of over-insurance is the same in either case.

Miller, K.C. and *S. L. Porter* (Sir *John Simon*, K.C. with them) for the respondents.—The mortgagee had an insurable interest in the ship, according to English law, for he had the right in equity to call upon the mortgagor to execute a valid mortgage, whether the ship was a Greek or an English ship. As a matter of fact, she was never registered in a Greek port and was an English ship. Secondly, the learned judge found as a fact that the policy was taken out for the benefit of the mortgagee as well as for that of the owner. Thirdly, the loss was fortuitous and accidental as far as the mortgagee is concerned notwithstanding that she was scuttled with the connivance of the owner : (*Trim District School* v. *Kelly*, 111 L. T. Rep. 305 ; (1914) A. C. 667 ; *Reid* v. *British and Irish Steam Packet Company*, 125 L. T. Rep. 67 ; (1921) 2 K. B. 319 ; and *Thompson* v. *Hopper*, 1856, 2 E. & B. 172.) The loss was by a peril of the sea (*Small's* case) (*sup.*). If the ship was lost by barratry, barratry is a peril of the sea : (*Heyman* v. *Parish*, 1809, 2 Camp. 149.) The fact that there has been negligent navigation does not prevent a loss being due to perils of the sea : (*Trinder, Anderson, and Co.'s* case, 8 Asp. Mar. Law Cas. 373 ; 78 L. T. Rep. 485 ; (1898) 2 Q. B. 114.) *Small's* case establishes that an innocent mortgagee can recover, even though the ship has been deliberately scuttled, and *Small's* case is supported by the judgments of Lord Herschell and Lord Bramwell in *The Xantho* (6 Asp. Mar. Law Cas. 207 ; 57 L. T. Rep. 701 ; 12 App. Cas. 503) and *Hamilton* v. *Pandorf* (6 Asp. Mar. Law Cas. 212 ; 57 L. T. Rep. 726 ; 12 App. Cas. 518). If the loss was not due to a peril of the sea, it was due to barratry, for it was caused by a wrongful act committed by the master or crew with the connivance of the owner to the prejudice of the innocent mortgagee. This was either barratry or *ejusdem generis* with barratry, and is covered by the general words of the policy " all other perils, losses, and misfortunes that shall come to the . . . damage of the ship." Lastly, the over-insurance was against war risks and the proviso only applies to marine risks ; therefore there was no breach of warranty. If there was, the appellant was a party to both insurances, and must be taken to have waived the warranty in the proviso.

McNair, in reply, referred to *Nutt* v. *Bourdieu* (1 Term. Rep. 323).

Cur. adv. vult.

Dec. 15, 1922.—The following judgments were read :

BANKES, L.J.—The appellant was one of the subscribers to a policy of marine insurance for 24,000*l.* dated the 19th Oct. 1920, upon hull, machinery, &c., of the steamship *Gregorios*, valued at 110,000*l.* Whilst so insured the vessel was lost, and the learned judge who tried this action held that she was deliberately cast away with the connivance of the owner. There is no appeal from that decision. The question to which the present appeal relates is as to the position of Mr. Percy Samuel, who claims to be a mortgagee of the vessel. The respondents carry on business as insurance and chartering brokers. The policy was taken out in their name. In the present action they claimed to sue on behalf of Mr. Percy Samuel as mortgagee of the vessel. Both branches of this contention were disputed by the appellant. In the first place, it was contended that the policy was not taken out to cover the separate interest of the alleged mortgagee ; and secondly, it was contended that he had no insurable interest. The learned judge decided both points in the respondents' favour. In this I think that he was right. The first question depends upon what was the intention of the owner and of the mortgagee when the policy was taken out. The insurance was effected by a Mr. Whelar, the manager of the respondent company. He was called as a witness, and he deposed to facts upon which, in my opinion, the learned judge was quite justified in coming to the conclusion that the intention of all material parties was that the insurance should be taken out to cover the separate interests of both mortgagor and mortgagee. I understood that counsel for the appellant desired to raise a question as to whether it was possible to carry out such an intention in a single document expressed in the ordinary language of a policy of marine insurance. In this court no argument could possibly prevail. In many cases it has been held that an insurance of the two separate interests has been effectively made in the one document. Though the court differed in opinion as to the effect of such an insurance in *Ebsworth* v. *Alliance Marine Company* (29 L. T. Rep. at p. 483 ; L. Rep. 8 C. P., at p. 609). they agreed as to the possibility of its being effected. Bovill, C.J. says : " *Primâ facie*, an insurance by a mortgagee, whether legal or

equitable, would cover only his own particular interest in the goods ; but, if the insurance was. as between him and the underwriters, intended to cover the interest of all parties and the whole value of the goods, there would be no objection to a legal mortgagee so insuring in his own name to cover all the interests and the entire value of the goods : and we think there is equally no objection to an equitable mortgagee, or a person who stands in a similar position, insuring in like manner. An insurable interest is clearly not confined to a strict legal right of property. It then becomes a question of fact what was the interest intended to be covered by the policy. If it was only the individual interest of the mortgagee, he could recover only the amount of that interest ; but, if the insurance was intended to cover the interest of the mortgagor also, then he would be entitled to recover in his own name for both interests : see *Irving* v. *Richardson* (2 B. & Ad. 193)." This view has been acted upon in many subsequent cases, and notably in *Small's* case (8 Asp. Mar. Law Cas. 293 ; 76 L. T. Rep. 828 ; (1897) 2 Q. B. 311) ; to which I must refer later. The argument that Mr. Percy Samuel was a mere creditor of the owner of the vessel, and had an insurable interest in her at all, was rested upon the fact that Mr. Samuel had never acquired any interest in the vessel under the Greek law up to the time that she was lost. I think that the appellant did establish that fact ; but I consider that the learned judge was right in considering that, for the present purpose, the fact was immaterial, because under the mortgage agreement of the 13th Sept. 1920, and the statutory mortgage of the same date, Mr. Percy Samuel had acquired an equitable right which gave him an insurable interest in the vessel.

Assuming that the views which I have just expressed are correct, two questions of very considerable importance arise for decision—namely, the question whether a mortgagee can claim that his position is not affected by the deliberate casting away of the vessel by the mortgagor, and the question whether when a vessel has been so cast away the mortgagee can successfully contend that she was lost by a peril of the sea. After very careful consideration I have come to the conclusion that neither point is open for consideration in this court. This was the view taken of *Small's* case (*sup.*) by both Greer, J. and Bailhache, J. It is no doubt possible to point to distinctions between the facts of that case and the facts of the present case, and to note that in the court below Mathew, J. confined his judgment strictly to the question raised by the order to try the preliminary point, and that in the Court of Appeal counsel did not discuss what the position of the mortgagee would be if the court had to consider his position apart from the question of barratry. The fact, however, remains that the court did give as one of the two grounds upon which the judgment proceeded that, assuming that the master was not the servant of the mortgagee and his act in scuttling the ship consequently not an act of barratry, yet the mortgagee was entitled to recover, because the loss of the vessel was due to a peril of the sea. Much as I may suspect that a higher tribunal may take a different view, I feel that I am bound to respect and act upon what I believe to be a material part of the judgment in *Small's* (*sup.*) case, and not mere *obiter dicta* of the Lords Justices who decided that case.

I pass therefore, to consider another and again an important point. The appellant contends that there has been a breach of warranty of one of the Institute Time Clauses which vitiates the policy. The clause is that dealing with insurance beyond a specified amount. It is not disputed that an insurance against war risks upon freight was effected for a larger amount than that stipulated for in the clause. It was contended that this fact was immaterial, and no breach of the warranty, because the clause relied on was contained in a policy against marine risks and must be confined to insurance of those risks. The learned judge accepted this contention. With respect to him, I take the opposite view. The clause is one dealing with insurance of the subject-matter, and not with the nature of the risks to which their policy attaches. The language of the clause is quite general. There are no words indicating that it is to be confined to insurances against marine risks, nor do I think that there is anything in the nature of the contract contained in the warranty to require the court to narrow the ordinary interpretation of the language used by the parties. The object of the clause is to reduce the temptation which may follow upon over-insurance. There is no reason why in the absence of express words the court should seek to limit the operation of the clause. It was said, however, that assuming the view which I have just expressed as to the construction of the clause to be correct, the respondent is protected by the proviso to the clause, which is in these words : "Provided always that a breach of this warranty shall not afford underwriters any defence to a claim by mortgagees who may have accepted this policy without notice of such breach of warranty." Assuming, but not deciding, that the proviso has any application to the case of a single policy taken out to cover the separate interests of mortgagor and mortgagee, it is sufficient to say that in the present case there was notice. Mr. Whelar effected both the marine and the war risk insurances on the same day. Under these circumstances, want of notice cannot be established. As this point on the warranty clause goes to the root of the claim, it is not necessary to express any opinion on a number of other points which were raised in argument. In my opinion, the appeal must be allowed with costs, and the judgment entered for the respondents must be set aside and entered for the appellants with costs.

Scrutton, L.J.—This case raises, besides several points peculiar to the case, a question of great general importance and some difficulty. The plaintiffs had an agreement by which

certain shares in a ship were to be assigned to them as security for a loan. For the purposes of the question, I assume they had an insurable interest. A policy was effected which again, for the purposes of the question, I assume to have been effected directly on their behalf, and not merely assigned to them by the owner as additional security for the loan. In the latter case they would be subject to any defences available against the owner. The owner then scuttled the ship, which sank in consequence. The appellants were not privy to the scuttling. Can they recover against the underwriters for a loss either (1) by perils of the sea; (2) barratry; or (3) under the general words, "and other perils, losses, and misfortunes that have or shall come to the hurt, detriment or damage of the said . . . ship, &c., or any part thereof"? If they can, the underwriters are in effect insuring against deliberate scuttling by the owner in cases where the assured is a mortgagee, and it will become vital to the insurer to know what has been supposed to be immaterial—the name of the assured and his exact interest in the ship. Insisting on a loss by perils of the sea, the assured presented an argument based on the assumption that every loss by sea water was a loss by a peril of the sea, the cause of the entry of the sea water being a remote and not a proximate cause, and therefore to be disregarded. This contention is supported by the undoubted presumption that, if a ship is lost at sea and nothing else is known, she is taken to be lost by perils of the sea, loss by any other cause being generally heard of—*Green* v. *Brown* (2 Stra. 1894). On being asked whether a goods owner insured against perils of the sea could recover if a malicious stranger in a salt-water dock threw a pail of sea water over his goods, counsel, however, thought he could not. As Lord Finlay says in *Mountain* v. *Whittle* (15 Asp. Mar. Law Cas. 258; 125 L. T. Rep., at p. 197; (1921) 1 A. C., at p. 626): "A loss caused by the entrance of sea water is not necessarily a loss by perils of the sea." The loss must be a peril; and the peril must be of the sea, not merely on the sea: (see Lord Herschell in *The Xantho* (6 Asp. Mar. Law Cas. at p. 209; 57 L. T. Rep., at p. 703; 12 App. Cas., at p. 509; and Lord Halsbury in *Hamilton* v. *Pandorf* (6 Asp. Mar. Law Cas. 215; 57 L. T. Rep., at p. 728; 12 App. Cas., at p. 523).

The Marine Insurance Act, by rule 7 of the first schedule, defines "perils of the seas" thus: "The term 'perils of the seas' refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves." The expression is not happy; it is not clear what kind of "accident or casualty" is not "fortuitous," or what is an intentional accident. I imagine the draftsman took "fortuitous" from the judgment of Lord Halsbury in *Hamilton* v. *Pandorf* (6 Asp. Mar. Law Cas. 213; 57 L. T. Rep., at p. 728; 12 App. Cas., at p. 524), and "accident or casualty" from the judgment of Lord Herschell in *The Xantho* (6 Asp. Mar. Law Cas. 209; 57 L. T. Rep., at p. 703; 12 App Cas., at p. 509), and combined the two, without any very intelligent idea of why he did so. But it is clear that there must be a peril, an unforeseen and evitable accident, not a contemplated and inevitable result; and it must be of the seas, not merely on the seas. The ordinary action of the winds and waves is "of the seas," but not a "peril." Damage by taking the ground in the ordinary course of navigation in a tidal harbour is "of the seas," but not a "peril," being contemplated and intended: (*Magnus* v. *Buttemer*, 11 C. B. 876). So also damage by sea water directly and intentionally admitted by the owner may be said to be "of the seas," but not a "peril." As Collins, L.J. says in *Trinder, Anderson, and Co.* v. *Thames and Mersey Insurance Company* (8 Asp. Mar. Law Cas. 377; 78 L. T. Rep., at p. 489; (1898) 2 Q. B., at p. 127): "The wilful act"—of the owner inducing the loss—"takes from the catastrophe the accidental character which is essential to constitute a peril of the sea." In *The Chasca* (2 Mar. Law Cas. 600; 32 L. T. Rep. 838; L. Rep. 4, A. &. E. 446) Dr. Phillimore, in a bill of lading case, held that a ship which sank through sea water admitted through holes intentionally bored by the crew was not lost by perils of the sea.

Recent decisions of the House of Lords and Privy Council have elucidated the effect of the maxim, *Causa proxima non remota spectatur*, which used to be considered as directed to the proximate cause in time, but is now to be taken as referring to the "dominant" or "effective cause," even though it be not nearest in time. Thus, if a torpedo makes a hole in a ship whereby she is unable to resist a subsequent storm, the torpedo or hostilities is the dominant and proximate cause and not perils of the sea: *Leyland Shipping Company* v. *Norwich Union Society*, 14 Asp. Mar. Law Cas. 258) 118 L. T. Rep. 120; (1918) A. C. 350. Where a ship is insured against collision only, and a collision makes a hole which is negligently repaired, and owing to the negligence water comes in again, the collision, and not the negligence or subsequent entry of water, is the dominant and proximate cause, and the assured recovers on the policy against collision: (*Reischer* v. *Borwick*, 7 Asp. Mar. Law Cas. 493; 71 L. T. Rep. 238; (1894) 2 Q. B. 548), approved by the House of Lords in the *Leyland Shipping Company's* case (*sup.*). So in *Sassoon's* case (12 Asp. Mar. Law Cas. 206; 106 L. T. Rep. 929; (1912) A. C. 561), where cargo insured on a time policy with no warranty of seaworthiness in a hulk in a river was damaged by sea water, which entered in fine weather through the rotten condition of the hull, Lord Mersey, giving the judgment of the Privy Council, held the loss was not by perils of the sea. He said: "Although sea water damaged the goods, no peril of the sea contributed either proximately or remotely to the loss."

An event may be an accident against one person, though intentionally done by another.

In workmen's compensation cases murder may be an accident to the man murdered. In shipping cases the intentional sticking of hooks by stevedores into bags of goods may be an accident as against the shipowner or goods owner : (*The Torbryan*, 9 Asp. Mar. Law Cas. 358, 450; 89 L. T. Rep. 265; (1903) P. 194). This may well be an explanation of some of the perils where human action is the dominant cause. Damage by collision with a ship negligently navigated is a peril of the sea, because it is a sea risk that other sailors should be negligent and other ships collide and do damage which to the ship damaged is an accident. Damage by negligence of the crew of the ship insured, though a dominant cause, may still be an accident incidental to navigating a ship at sea, to which the owner who must employ crews at sea is exposed. But damage by intention of the owner certainly is not an accident to himself; and I know of no case where intentional damage by one co-owner has been held recoverable by an innocent co-owner unless the damage-feasor has held a position in the navigation of the ship as master or in control of the navigation, and then the innocent co-owner, in my view, recovers for barratry of the master, and not for perils of the sea. I am of the opinion which the judge below would have acted upon had he not held that he was bound by the view taken by Greer, J. of *Small's* case (*sup.*). I think that, where sea water is directly and intentionally admitted by the owner so that the ship sinks, the loss is not by perils of the seas. Assuming that it may be an accident against innocent persons interested in the safety of the ship, it is not an accident of the seas, though it happens on the seas.

The authorities which the learned judge followed are *Small's* case (*sup.*) and the judgment of Greer, J., who held that the principle of that case applied to the similar facts in *Graham Joint Stock Shipping Company* v. *Merchants' Marine Insurance Company* (*No.* 2) (1922, 38 Times L. Rep. 753). *Small's* case (*sup.*) requires the most careful consideration. A ship was scuttled by its master, Wilkes, who was one of three co-owners, the other two being innocent of the scuttling. Small, a mortgagee, sued on a policy for the loss of the ship. I gather from the report in the first court he alleged loss by barratry. The question whether the mortgagee could recover was ordered to be argued as a preliminary point on the assumption that the master had wilfully cast away the ship. A good deal of the judgments of the two courts is taken up with the discussion whether the mortgagee was directly insured, or whether only making title through Wilkes, the captain who effected the policy, he was affected by the defences available against Wilkes. That point is not material to this part of the case. Mathew, J. held that the mortgagee's position was analogous to that of a co-owner, and that he could recover for barratry even without the general words of the policy. On appeal the further point was raised that the wilful casting away by the master could not be barratry against the mortgagee, because the master was not appointed by the mortgagee. Lord Esher took the view that there was a dilemma. Either the captain was the captain for the mortgagee, in which case his conduct was barratry, or he was not, in which case his admission of sea water was a peril of the sea. A. L. Smith, L.J. thought that the master was the master of the mortgagee, and therefore his conduct was barratrous, but that if he was not there was a loss by the admission of sea water by a stranger to the mortgagee, which was a peril of the sea. The question of peril of the sea does not appear to have been raised in the lower court, or in the argument in the higher court.

I have given most careful consideration to this case, and have come to the conclusion that this court is not bound by the views expressed in it, though, of course, they must be treated as of great weight. I think so for two reasons: (1) *Small's* case (*sup.*) is the case of a master navigating a ship, who is treated as not the less master because he is co-owner. The distinction between the two characters is emphasised in *Westport Coal Company* v. *McPhail* (8 Asp. Mar. Law Cas. 378; 78 L. T. Rep. 490; (1898) 2 Q. B. 130), where negligence of a master was not attributed to the co-owner as such, but only in his character as master. In *Jones* v. *Nicholson* (*sup.*) the fraudulent act of a co-owner who is master was held to be barratrous because it is the act of a master in fraud of another owner, but, as Alderson, B. says (23 L. J. Ex., at p. 332; 10 Ex., at p. 38), "it cannot be a fraudulent act when he is sole owner." In the present case the scuttling is the act of the sole owner; any share of the master in it was not barratrous, for it was not a fraud against the owner, but with his privity. In *Small's* case (*sup.*) the vessel was cast away by a master in fraud of an owner. In the present case the casting away is by the sole owner; and I know of no case, and counsel could refer us to none, where the owner has recovered for a loss directly and intentionally caused by his co-owner, not being a master or member of the crew, or where an owner of goods has recovered for damage to his goods by sea water intentionally admitted by the owner of the ship, either for perils of the sea or barratry. Secondly, so far as two judges of the Court of Appeal say that intentional admission of sea water by a stranger is a peril of the sea, I am relieved, in my view, from following it, if I disagree with it, as I do, by the later authority of the House of Lords in the *Layland Shipping Company's* case (*sup.*), explaining the meaning of *causa proxima* as dominant or effective cause. I think it follows from that case that, where a stranger, and still more an owner, directly and intentionally lets sea water into a ship, the dominant, effective, or proximate cause of the loss is the deliberate action of the owner, and not any peril of the sea. For these two reasons I do not think we are bound by the decision in *Small's* case (*sup.*), but I am free to follow my own opinion that there is no loss here by perils of the sea.

I am of opinion there was here no loss by barratry. As Lord Mansfield said in *Nutt* v. *Bourdieu* (1 Term Rep., at p. 330); "The point to be considered is whether barratry . . . can be committed against any but the owners of the ship. It is clear beyond contradiction that it cannot. . . . An owner cannot commit barratry. He may make himself liable by his fraudulent conduct to the owner of the goods, but not as for barratry." Barratry can be committed by a master or person acting as navigator controlling the ship against a charterer who is charterer by demise, and temporary owner of the ship, under the old authorities reproduced in the definition in the schedule to the Marine Insurance Act. But in my view an owner scuttling the ship, though he may commit an act in fraud of the mortgagee who is not in possession, does not commit barratry, as defined in that schedule: "every wrongful act committed by the master and crew to the prejudice of the owner." Had not the judges in *Small's* case (*sup.*) thought otherwise, I should have been clear that sect. 34 of the Merchant Shipping Act 1894, which provides that the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, except so far as may be necessary for making a mortgaged ship available as security, did not enable a mortgagee not in possession to call himself an owner, not for the purpose of making the ship his security, but for the purpose of suing on a policy for barratry against himself as owner. Neither do I think the general words, "all other perils, losses, and misfortunes," enable the mortgagee to treat the deliberate act of an owner in fraud of a mortgagee as something like barratry. As explained in *Thames and Mersey Marine Insurance Company* v. *Hamilton* (*The Inchmaree* case) (6 Asp. Mar. Law Cas. 200; 57 L. T. Rep. 695; 12 App. Cas. 484) by the House of Lords, the general words are not inserted to cover every loss of whatever kind to the subject-matter insured, but are limited to perils of a like kind with those specifically mentioned. The deliberate act of the owner against his co-owner, mortgagee, or underwriter is not, in my opinion, of the like kind with the deliberate act of the captain or crew in fraud of their owner and principal, but a much more serious and entirely different kind of loss from barratry. I cannot bring this loss within the general words. In my opinion, therefore, the innocent mortgagee out of possession cannot recover on a policy for intentional scuttling of the ship by the owner, either as a loss by perils of the sea, or barratry, or under the general words.

The same result, however, follows on a narrower ground peculiar to this case. The policy sued on incorporates the Institute Time Clauses, clause 22 of which warrants that the amount insured for account of assured and (or) their managers on certain named matters, including freight, shall not exceed certain specified limits, in the case of freight "not exceeding 25 per cent. of the value of hull and machinery as stated herein, but if the insurance be for less than twelve months, the 25 per cent. to be proportionately reduced." The values stated therein were 110,000*l.*, 25 per cent. of which is 27,500*l.*, and the limit for a six months' insurance would be 13,750*l.* But in Sept. 1920 there was insured by the brokers for the benefit of the mortgagees 27,500*l.* on freight against war perils, and the policy was taken and kept by the mortgagees. It is argued by the mortgagees, and found by the judge, that as this is an insurance against war perils, it does not affect a policy on marine perils, because, as the judge says, the marine underwriter would not have to pay a loss by war perils. This involves reading into the policy the words "against marine perils" in the first line of clause 22 after the words "amount insured." I see no reason for inserting these words, and every reason for not inserting them. Warranties are construed strictly. The reason for this warranty is that the insured should not, by heavy insurances p.p.i., have an opportunity of over-valuing his ship, and a temptation to lose her. This temptation is just as great if the over-valuation and over-insurance are on war risk policies as if they are on marine policies. Indeed, so long as war risks, producing loss by sinking, may be argued to be losses by perils of the sea, by the incursion of sea water, war risk policies may be very important to the marine underwriter. In the present case the attempt was first made to recover on a fictitious explosion as a war risk, and then changed to a claim in respect of a marine peril. Two other defences were suggested to this clause. It was faintly said that under the proviso the mortgagees had accepted the marine policy without notice of the breach of warranty. But as the marine policy was delivered in October, and the war risk slip was written by the brokers for the mortgagees in September, this obviously failed. Lastly, it was said that one particular underwriter, Dumas, was a party to both marine and war risk policies, and by writing the latter had waived the breach of the former. I could not understand how this result followed. In my opinion, therefore, there was a breach of this warranty which would have prevented the mortgagees, if their claim was otherwise good, from recovering on this policy.

These two conclusions render it unnecessary finally to decide the points raised by the underwriters: (1) That the mortgagees were not originally interested in the policies, but only as assignees, in which case the admitted defence of scuttling against the owner could also be a good defence against his assignees. On this I am inclined to take the view that as the owner intended to insure for the benefit of the mortgagees, who themselves joined in the instructions to insure, they were original parties to the policy; and that the fact that they in the agreement contemplated an assignment was not available to the underwriters as a defence if the mortgagees did not in fact carry out the insurance in that way. (2) A variety of points were raised to the effect that the mortgagees had no insurable interest because they had no valid

insurance by Greek law, which does not recognise an insurance for an account current of unspecified amount, and requires registration before loss of the vessel. On this I was inclined to think that the mortgagees had an agreement to receive a charge on shares in the ship, if not lost, which gave them an insurable interest in the safety of the ship at the time of the loss, and was not defeated by her loss before the security was perfected. Upon some difficult points as to the law by which the security was to be governed, and the extent to which English courts would enforce some and what security, I should desire to reserve my opinion.

It is unnecessary to deal with certain questions of figures as to the amount of the judgment. But for the two reasons given, I am of opinion that the appeal succeeds, and judgment should be entered for the defendants here and below.

Eve J.—This action, instituted on the 20th May 1921, was brought to recover from the first defendants the sum of 20,000*l.*, and, alternatively from the second defendant, the sum of 75*l.*, their respective subscriptions to two policies of marine insurance, the one against war risks, and the other against the ordinary marine risks, effected by the plaintiffs for six months and twelve months respectively from the 25th Sept. 1920, on the steamship *Gregorios*. The plaintiffs alleged that the said insurances were, and each of them was, effected by them for and on behalf of G. Anghelatos, the owner of the ship, and Percy Samuel, the mortgagee thereof, and that on or about the 26th Feb. 1921 she became a total loss by the perils insured against or one of them. In the course of the trial the war risk undertakers were dismissed from the action, and at its conclusion the learned judge found that the ship had been wilfully cast away by some of the crew with the knowledge and connivance of the owner. He, however, gave judgment for the plaintiffs against the defendant Dumas for his proportion of the sum of 102,641*l.* 8*s.* 3*d.* alleged to be due to the mortgagee—who it is not suggested was in any way privy to the scuttling—feeling constrained so to do by the conclusion then recently arrived at by Greer, J. in *Graham Joint Stock Shipping Company* v. *Merchants' Marine Insurance Company* (*No.* 2) (*sup.*), that in *Small* v. *United Kingdom Insurance Company* (*sup.*) this court had decided that the loss of a ship by the incursion of sea water brought about by the felonious act of the owner, is a peril against which an innocent mortgagee is insured by the ordinary marine risk policy.

This appeal has been brought by the defendant Dumas primarily to have this important point decided, but before turning to consider the main grounds on which the mortgagee's right to recover is disputed, there are some preliminary matters raised by the appellant as a defence to the action and on this appeal with which it is necessary to deal.

The first point is that the mortgagee was never separately insured, but was merely an assignee of the policy, subject therefore to the equities affecting the mortgagor, and disqualified in the circumstances existing from asserting any higher right to recover the insurance moneys than the mortgagor could maintain. This question in the main falls to be determined as one of fact. I say "in the main" because there must be cases wherein its solution depends more on the true construction of the mortgage contract and the documents connected therewith than on direct evidence of intention on the part of either the mortgagee, the mortgagor, or the brokers. In this case there was some evidence to support the finding of the judge that the mortgagee was a party to the contract of insurance and not a mere assignee of the policy, and although clauses 9 and 18 of the deed of the 13th Sept. 1920 raise some doubt in my mind whether the evidence was altogether sufficient, I am not prepared to say the mortgage deed or any contemporaneous conduct was so inconsistent with that finding as to warrant this court in differing from it, and we must therefore accept it as concluding the matter.

Then it is said there is no mortgage, and that this is so according to Greek law the appellant has, in my opinion, conclusively established. But it does not follow therefrom that the mortgagee had no insurable interest; whether he had or not depends not upon what his position might have been had he attempted to perfect his security according to Greek law, but upon what his position was under the deed of the 13th Sept. 1920, and by virtue of that deed, construed as it undoubtedly must be by the law of this country, he obtained a good equitable charge over the whole of the owner's interest in the ship. It is, therefore, impossible to sustain the argument that he had no insurable interest on and after the date of that deed.

These matters disposed of, there remain two grounds upon which the appellant relies—the first the one I have already indicated, that the loss was not brought about by a peril insured against, and the second that the policy was avoided by a breach of warranty of which the mortgagee had notice when he accepted the policy. Upon the first of these points it has been strenuously contended that *Small's* case (*sup.*), in the light of more recent and authoritative pronouncements, and having regard to the restricted issue there presented to the court and the apparent absence of any argument by counsel on the larger question, ought not to be treated as finally deciding, so far as this court is concerned, that a loss due to the incursion of sea water is a peril insured against in a case where the proximate or dominant cause is really the felonious act of the owner and not the incursion of sea water. Put in this way the argument would seem rather to beg the question, which I take to be, which is the proximate or dominant cause—the felonious act of the owner or the incursion of sea water?

I cannot bring myself to hold that *Small's* case (*sup.*) does not cover the point argued in this case. I think the court did there decide

that a wrong done to the ship by reason of which the sea had got into the ship and she had been sent to the bottom, was a loss by perils of the sea for which an innocent mortgagee could recover. In substance we are invited to decide the same point in a contrary sense, and the invitation, in my opinion, is one which a well-settled and salutary rule prevents our accepting. If the contrary sense is to be established it must be by the final appellate tribunal.

The second point involves questions of fact and construction. The policy sued upon incorporates the Institute Time Clauses, by which certain limits are imposed on the amount insured (*inter alia*) on freight for account of the assured. It was proved at the trial that an insurance for six months on freight for 27,500*l.* was effected for the benefit of the mortgagee. This was 13,750*l.* in excess of the limit and *primâ facie* was a breach of the warranty. But it was argued—and the learned judge below adopted the argument—that inasmuch as the excessive policy was an insurance against war risks and was not therefore one on which a marine risk underwriter could suffer any loss, it could not be treated as a breach of the warranty contained in the marine risk policy. I cannot agree with that view. It introduces into the policy we have to deal with an exception or qualification which is not to be found therein and which certainly ought not to be implied in the absence of language justifying the implication, seeing that the limits are imposed with the intent to prevent over-insurance and the consequent temptation to malpractices.

I agree with the other members of the court that there was here a breach of warranty which affords an answer to the claim of the mortgagee, and, in my opinion, the appeal must be allowed and judgment in the action be entered for the defendant with costs here and below.

Appeal allowed.

Solicitors for the appellant, *William A. Crump* and *Son.*

Solicitors for the respondents, *W.* and *W. Stocken.*

Monday, Feb. 19, 1923.

(Before Lord STERNDALE, M.R., WARRINGTON and ATKIN, L.JJ.)

BURGESS *v.* OWNERS OF STEAMSHIP ANGOLIA. (*a*)

APPEAL UNDER THE WORKMEN'S COMPENSATION ACT 1906.

Workmen's compensation—" Workmen "—Crew of fishing vessel—Remuneration by wages and and poundage based on profits of voyage—Exception from Act—Workmen's Compensation Act 1906 (6 *Edw.* 7, *c.* 58), *s.* 7, *sub-s.* 2.

A member of the crew of a fishing vessel was remunerated by a fixed wage of 42*s. per week and* 2*d. in the £ on the net. earnings of the vessel.*

Held, that he was remunerated within the meaning of sect. 7, *sub-sect.* 2, *of the Workmen's Compensation Act* 1906, *and that the Act did not apply to him.*

Costello *v.* Owners of Ship Pigeon (108 *L. T. Rep.* 929 ; (1913) *A. C.* 407) *followed.*

IN April 1922 a trimmer, who had entered into a written contract with the owners of a fishing vessel, met with an accident arising out of and in the course of his employment. By the terms of the contract he was to be paid as wages and remuneration the sum and (or) the share in the profits against his name. These were 42*s.* per week and 2*d.* in the £ on the net earnings of the vessel. There was no mention of " liver money " or " stockabait." In arbitration proceedings commenced by him in the County Court the judge made an award in his favour. The employers appealed, the question being whether he was a workman to whom the Workmen's Compensation Act 1906 applied, in view of sect. 7 (2) of that statute by which it is provided " This Act shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the vessel."

Holman Gregory and *C. M. Knowles* for the appellants (the employers),

Picciotto for the respondent (the workman).

The following cases were referred to :

Costello v. *Owners of Ship Pigeon*, 108 L. T. Rep. 929 ; (1913) A. C. 407 ;

Newstead v. *Owners of Steam Trawler Labrador*, 114 L. T. Rep. 27 ; (1916) 1 K. B. 166 ;

Meader v. *Danum*, 14 B. W. C. C. 236 ;

Burman v. *Zodiac Steam Fishery Company*, 112 L. T. Rep. 58 ; (1914) 3 K. B. 1039 ;

Stephenson v. *Rossall Steam Fishing Company*, 112 L. T. Rep. 891.

Lord STERNDALE, M.R.—In my opinion this case cannot be distinguished from *Costello's* case. It is entirely covered, in my view, by that judgment, and whether or not one would like to agree with the dissentient Lords, Lord Loreburn and Lord Atkinson, we cannot do so. I do not say that we should, but we cannot.

(*a*) Reported by J. L. DENISON, Esq., Barrister-at-Law.

Therefore the appeal must be allowed and an award must be made in favour of the respondents, with costs here and below.

WARRINGTON, L.J.—I am of the same opinion.

ATKIN, L.J.—I am of the same opinion. I should only like to say that the two cases cited to us, *Newstead* v. *Owners of Steamship Labrador* (*sup.*) and *Meader* v. *Danum Steam Trawler Company* (*sup.*) are both cases where the agreement was, on the facts, a verbal agreement, and upon that agreement as found by the County Court judge the cases were brought within the distinction which was pointed out by Lord Parker, and which was referred to by the Court of Appeal. But the present case is a case like *Costello's* case (*sup.*), which turns upon a written agreement of precisely the same kind as this. I think it is therefore quite impossible to distinguish it.

Appeal allowed.

Solicitors: *Smith* and *Hudson*, for *Walter West*, Grimsby; *Peacock* and *Goddard*, for *Benno Pearlman*, Hull.

Wednesday, May 2, 1923.

(Before Lord STERNDALE, M.R., WARRINGTON and YOUNGER, L.JJ.)

LASHBROOK *v.* TIMES SHIPPING COMPANY. (*a*)

APPEAL UNDER THE WORKMEN'S COMPENSATION ACT 1906.

Workmen's compensation—Ship—Workman on leave for own purposes—Accident while returning—Only means of access not property of ship owners—Arising in the course of employment—Workmen's Compensation Act 1906 (6 *Edw.* 7, *c.* 58) *s.* 1, *sub-s.* 1.

The applicant, who was a ship's carpenter, when his ship was at Rosario, lying in the river against the end of a jetty, the property of the Argentine Railway Company, on the 30th Aug. 1921, *went on shore by leave, and on his return while going up steps which were part of the jetty the handrail broke and he fell into a small boat in the water underneath the jetty and seriously injured his arm. He was taken home on the ship and discharged on the 20th Oct.* 1921 *being paid full wages up to that date. In June* 1922 *he made a claim for compensation, and at the hearing the County Court judge found as a fact that the jetty was not the property of the respondents nor in any way under their control, that the applicant had landed from the ship for his own purposes, and at the time when the accident happened though returning to the ship he had not reached it and was in effect still on land, and he made an award in favour of the respondents on the ground that the accident did not arise in the course of the employment. The jetty was the only means of access to the ship. On appeal,*

(*a*) Reported by GEOFFREY P. LANGWORTHY, Esq., Barrister-at-Law.

Held, that this was a case on the border line, and though the court might not have come to the same conclusion as the County Court judge did, it was not possible to say that there was no evidence on which he could come to the conclusion to which he did.

THIS was an appeal from an award made by Judge Stanley Hill Kelly, of the County Court of Glamorganshire holden at Cardiff, sitting as an arbitrator under the Workmen's Compensation Act 1906.

William James Wood Lashbrook was a carpenter on the steamship *Levnet*, owned by the Times Shipping Company Limited. On the 30th Aug. 1921 the ship was at Rosario, lying in the river parallel with the bank and against the end of the jetty. There were no docks at Rosario and all ships were loaded from jetties for the use of which the ship paid dues. The jetty was the property of the Central Argentine Railway Company but was used by fishermen for mooring their boats and they could not get to their boats except by using the jetty. The public used a structure at right-angles to the jetty for fishing from, and they had to go along the jetty to get there. Lashbrook on the 30th Aug. 1921 went on shore by leave for his own purposes and on returning with Peter Alcock and Michael Fleming, A.B.'s, as they were walking up a ladder leading from the staging to the pier on which the ship's gangway was placed, Alcock overbalanced owing to the handrail of the ladder jumping out of its socket and in falling clutched at Lashbrook, both men falling over the pier, Alcock into the water and Lashbrook into a boat moored underneath the pier a distance of 21ft. A careful search was at once made but nothing whatever was again seen of Alcock, and Lashbrook injured his arm badly and was taken to hospital and medically attended to. He was taken home on the ship and was discharged on the 20th Oct. 1921, and until that date was paid full wages. He alleged that from the 20th Oct. 1921 till the 6th April 1922 he was totally incapacitated, but from the 6th April 1922 was earning 5*l.* a week now 4*l.* a week. In June 1922 Lashbrook made an application for arbitration claiming compensation under the Workmen's Compensation Act 1906.

After the hearing the County Court judge found the following facts:

The structure on which the workman was when he fell and was injured, that is to say, the jetty, was not the property of his employers, the respondents, nor in any way under their control. The workman had landed from the ship for his own purposes, and at the time when the accident happened, though he was returning to the ship, he had not yet reached it and was in effect still on land. In these circumstances the learned County Court judge made an award in favour of the respondents on the ground that the accident did not arise in the course of the employment.

The workman appealed on the ground that there was no evidence to support the findings of fact made by the County Court judge, and that he misdirected himself in point of law, holding that the fact that some persons were seen fishing near the place where the accident occurred made that place a public place and prevented the injury to the applicant from arising out of and in the course of his employment: and that he was wrong in law in holding that the injury to the applicant was not caused by accident arising out of and in the course of his employment.

L. R. Lipsett for the appellant.—The means of access to the ship were defective in such a way as to be the cause of the accident, therefore the accident was met with in the course of the employment. Once it is found that the sole means of access is defective it is immaterial whether the structure forming the sole means of access belongs to the employers or not:

Morgan v. *Guest, Keen, and Nettlefolds Limited*, 128 L. T. Rep. 239.

In that case it was simply the custom of the workmen for their own convenience to use that means of access, but the reason is stronger in the present case as a means of access was provided for the workmen. Dues were paid to the Railway Company for the use of this particular pier the only mode of access to which was the gangway this man was using. The appellant as a sailor was entitled to go on shore for leave and that was an implied term of his service and it was within his contract of service that he should return to the ship. The following cases were relied upon:

Webber v. *Wansborough Paper Company*, 111 L. T. Rep. 658; (1915) A. C. 51;
Stewart and Son Limited v. *Longhurst*, 116 L. T. Rep. 763; (1917) A. C. 249;
Cook v. *Montreal (owners)*, 108 L. T. Rep. 164.
Kitchenham v. *Johannesburg Steamship*, 103 L. T. Rep. 778; (1911) 1 K. B. 523; on appeal, 105 L. T. Rep. 118; (1911) A. C. 417;
Moore v. *Manchester Liners*, 103 L. T. Rep. 226; (1910) A. C. 498;
Davidson v. *M'Robb*, 118 L. T. Rep. 451; (1918) A. C. 304;

Alexander Neilson, K.C. and *A. T. James* for the respondents were not called upon.

Lord STERNDALE, M.R.—I think this is what Lord Moulton described in one of the cases as being a border line case, and it is very much so, and I do not say that I should have come to the same conclusion as the learned County Court judge. It is said that there ought to be a new trial on the ground that the judge misdirected himself in point of law. The ship was lying at the time the accident occurred at Rosario at a jetty which gave access to a gangway leading down to the ship; the appellant having gone ashore for his own purposes came back along the level part of the jetty and when he was on the ladder part of the jetty he fell into the water below or rather into a boat which was in the water below, and the question is whether that was an accident arising in the course of his employment. We have been referred to all the cases but naturally there is no case the same as this. The County Court judge found that the structure on which the appellant was at the time of the accident was not the property of the respondent company or under their control, that the appellant had landed from his ship for his own purposes and at the time of the accident he was still on land and had not reached the ship; he also found that the public had access to the jetty and on the facts the learned judge could find as he did. I do not think he misdirected himself but found that in all the circumstances the accident did not happen in the course of the employment. That word misdirection is sometimes used in a misleading sense; and the fact the judge has gone wrong in what he has done is not misdirection. I think the appeal should be dismissed.

WARRINGTON, L.J.—I agree. I do not think it is possible to say that there was no evidence on which the County Court judge could come to the conclusion to which he did come. It is not possible to say the County Court judge misdirected himself, he said it is true that the man was on land and not on the ship itself.

YOUNGER, L.J.—I agree.

Appeal dismissed.

Solicitors for the appellant, *Herbert Z. Deane*.
Solicitors for the respondents, *Botterell* and *Roche*, agents for *Donald Maclean, Handcock, and Hann*, Cardiff.

April 10 *and* 11, 1923.

(Before BANKES, SCRUTTON, and ATKIN, L.JJ.)

MARSHALL SHIPPING COMPANY v. BOARD OF TRADE. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—Shipping Controller—Licence to sell ship abroad—Alleged tort—Extortion of money colore officii*—Claim for money had and received—Cessation of Shipping Ministry—Transfer of liabilities to Board of Trade—Action against Board of Trade—Department of Crown—Service of writ—Ministry of Shipping (Cessation) Order* 1921*—Ministry of Munitions and Shipping (Cessation) Act* 1921 (11 *Geo.* 5, *c.* 8), *s.* 1.

In 1921 *the plaintiffs brought an action against the Board of Trade, the claim being endorsed for money had and received. They alleged that the Shipping Controller had, in* 1919, *wrongfully extorted money from the plaintiffs* colore officii. *By the Ministry of Shipping (Cessation) Order* 1921 *it was provided that the office of Shipping Controller should cease to exist, and that "all . . . liabilities . . . incurred by the Shipping Controller shall be transferred to the Board of Trade," which is an unincorporated*

(a) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

committee of the Privy Council. The defendants applied to strike out the writ on the ground that the Board of Trade, as such, and as a department of the Crown, could not be sued.

Held, that the Board of Trade, although an unincorporated body, could be sued in respect of any personal liabilities of the Shipping Controller for any wrongful acts committed by him in his office, as the intention of the order was to transfer to the board such laibilities.

Quære, *whether a subject, waiving the tort, can sue a Government official, who has extorted money from the subject for the use of the Crown, as for money had and received; or whether his remedy is limited to a petition of right.*

Held, further, that service of the writ on the Board of Trade, as the solicitor to the board did not accept service on their behalf, should have been made upon the individual members of the board personally, there being no rule of court which allowed the personal service to be dispensed with.

APPEAL from an order of Rowlatt, J. in chambers.

The plaintiff company, in Oct. 1919, desired to sell a ship named *Holms Island* to certain foreign purchasers, and applied to the Shipping Controller under reg. 39cc of the Defence of the Realm Regulations for permission to sell the ship. The Shipping Controller gave his permission subject to the condition (*inter alia*) "that it is understood that the sum of 20,000*l.* must accrue to the exchequer in respect of the sale." The ship was duly sold, and the plaintiffs paid out of the price the said sum of 20,000*l.* to the Shipping Controller.

On the 24th March 1921 the Ministries of Munition and Shipping (Cessation) Act was passed, by sect. 1, sub-sect. 1 of which "Any Order in Council . . . fixing . . . the date on which the office of Minister of Munitions . . . or the office of Shipping Controller . . . are to cease may (*a*) vest and transfer . . . in and to any Government department . . . any property rights and liabilities held, enjoyed or incurred by the Minister of Munitions or the Shipping Controller (or by any person who has held the office of Minister of Munitions or Shipping Controller)." On the same day the Ministry of Shipping (Cessation) Order 1921, No. 447, was made under the powers of that Act, and by clause 3 of the order, "All property rights and liabilities held, enjoyed or incurred by the Shipping Controller shall, by virtue of this Order, be transferred to and vest in the Board of Trade, who shall be deemed in law to be the successors of the Shipping Controller." By clause 7: "Where at the time of the transfer affected by this Order any legal proceeding is pending to which the Shipping Controller is a party the Board of Trade shall be substituted in such proceeding for the Shipping Controller, and such proceeding shall not abate by reason of the substitution." And by clause 9 (2): "The Interpretation Act 1889 applies to the interpretation of this Order as it applies to the interpretation of an Act of Parliament." By sect. 12 of that Act, "The expression 'the Board of Trade' shall mean the Lords of the Committee for the time being of the Privy Council appointed for the consideration of matters relating to trade and foreign plantations."

On the 5th July 1922 the plaintiffs brought this action against the Board of Trade to recover back the 20,000*l.* whch they alleged had been extorted from them by the Shipping Controller *colore officii*. The writ was endorsed: "The plaintiffs' claim is for 20,000*l.* money had and received by the defendants to the use of the plaintiffs." The plaintiffs intended to serve the writ upon the solicitor to the Board of Trade, but he declined to accept service on behalf of the board, and thereupon they served it upon Sir Sydney Chapman, the Permanent Secretary of the board. A conditional appearance to the writ was entered on behalf of the board, and a summons was taken out to set aside the writ on the ground "that the Board of Trade as such, and as a Government department, cannot be sued."

The master made the order asked for, and he also ordered the service of the writ to be set aside as irregular on the ground that the Board of Trade was not a corporation, but a committee of named individuals, and that the writ ought to have been served on the individual members of the committee personally. On appeal, Rowlatt, J. reversed the master's order on both points, and ordered that the writ and service should stand.

The Board of Trade appealed to the Court of Appeal.

Sir *Douglas Hogg* (A.-G.) and *G. W. Ricketts*, for the appellants.

Latter, K.C. and *R. W. Needham* for the respondents.

The following cases were referred to:

Attorney-General v. *Wilts United Dairies*, 1922, 127 L. T. Rep. 822;
Bombay and Persia Steam Navigation Company v. *Maclay*, 15 Asp. Mar. Law Cas. 334; 124 L. T. Rep. 602; (1920) 3 K. B. 402;
China Mutual Steam Navigation Company v. *Maclay*, 14 Asp. Mar. Law Cas. 175; 117 L. T. Rep. 821; (1918) 1 K. B. 33;
Rowland v. *Air Council*, 1923, 39 Times L. Rep. 228;
Snowdon v. *Davis*, 1808, 1 Taunt. 359;
Steel v. *Williams*, 1853, 8 Ex. 625;
Taff Vale Railway v. *Amalgamated Society of Railway Servants*, 85 L. T. Rep. 147; (1901) A. C. 426.

BANKES, L.J.—This is an appeal in which I confess my mind has wavered from time to time as to what is the true construction to be put upon the Act of 1921, and the Order in Council made thereunder. In my opinion, the question involved here turns entirely upon the construction to be put upon tha statute and that order.

An action was brought by the Marshall Shipping Company, and the writ was indorsed with a claim to recover the sum of 20,000*l.* as money had and received by the defendants, the Board of Trade, to the use of the plaintiffs. The writ was served upon Sir Sydney Chapman, the permanent secretary of the Board of Trade, and a conditional appearance was entered on behalf of the Board of Trade. A summons was taken out to set aside both the writ in the action and the service thereof on Sir Sydney Chapman, on the ground "that the Board of Trade as such and as a department of the Crown cannot be sued." Before us, and we understand also before the master and the learned judge, the point was taken that, even assuming for the purposes of argument that the action would lie against the Board of Trade, the service must be bad, and, therefore, whatever course ought to be taken in reference to the writ, the service should be set aside.

In my opinion, that contention is well founded because I think that in no circumstances can the service of this writ upon Sir Sydney Chapman, as representing the Board of Trade, be a good service, and for this reason, that the Board of Trade consists under that name of a committee of individuals unincorporated, some of them members of the committee because they occupy a certain official position, and some are persons selected and presumably are replaced from time to time as necessity arises; but they are a committee of individuals unincorporated. If, therefore, there is a right to sue that committee under the name of the Board of Trade, it seems to me that, under the rules, there is no way of serving the members of that committee except by personal service, because the service of the writ is regulated by the rules of court, and there is no rule of court applicable to this case which will admit of personal service being dispensed with. I think, therefore, that the appeal must certainly be allowed in so far as it claims that the service of this writ must be set aside. That is, as compared with the other point, a comparatively unimportant one, but inasmuch as it is insisted upon by the Attorney-General it is necessary to give a decision upon it.

The much more important point is whether the action in the present form will lie at all at the suit of the plaintiffs against the Board of Trade. Taking the writ as it stands it seems to me that there can be but one answer to that point, namely, that the action will not lie, because upon the indorsement of the writ it is stated that the claim of the plaintiffs is a claim arising out of contract, and, that being so, it seems necessarily to follow that no action would lie, but that the proper proceeding to enforce such a claim would be by way of petition of right. But it is said that the indorsement of the writ does not really express what the plaintiffs' cause of action is. The Attorney-General informed us what he understood the plaintiffs' real claim consisted of, and counsel for the respondents accepted the Attorney-General's statement with one small correction which is immaterial, and I did not understand that the Attorney-General objected or desired that the decision of this court should not proceed upon the real facts of the case as disclosed by him in his statement to us.

The real complaint of the plaintiffs is this, that when they, as the owners of a ship, applied for a licence to sell the ship, the Shipping Controller insisted as a condition of granting his licence that a certain percentage of the proceeds of the sale should be handed over to him, and, acting under compulsion, the plaintiffs did hand over the sum claimed, namely, 20,000*l.*, and they now claim the return of that money as money extorted from them *colore officii* by the controller in the circumstances which I have just mentioned. That claim, I think, does not arise, if I may use the expression, in its nature out of contract, but is a claim in tort which can be enforced only as against the Shipping Controller as an individual. It is true that the plaintiffs may select one or other modes of endeavouring to enforce that claim; they might have sued Sir Joseph Maclay in his own name for damages for the action of which they complained, or they might have waived the tort and elected to sue him in contract as and for money had and received, and that is the course which they have taken.

Now the authorities cited to us, I think, establish beyond all question that, where an action is brought to recover money extorted *colore officii*, the action lies against the person who extorts the money, even though he was acting in a representative capacity. *Steele* v. *Williams* (8 Ex. 625) was cited in support of that proposition. The argument in that case, and I think also the judgment in *Snowdon* v. *Davis* (1 Taunt. 359), was referred to, both of which, I think, quite clearly establish the truth of that proposition which was given effect to recently by Rowlatt, J. in *Bombay and Persia Navigation Company* v. *Maclay*. There Rowlatt, J. says (15 Asp. Mar. Law Cas. 334; 124 L. T. Rep., at p. 602; (1920) 3 K. B., at p. 406): "The action must be brought against Sir Joseph Maclay, if at all, as an individual. It has long been established that if an official of the State does something which, if done by anyone else, would be a tort, and there is no law authorising him, in virtue of his office, to do that particular thing, he must, notwithstanding his official position, answer for it in his own name." So much, therefore, for the position of things if the office of the Shipping Controller had not been abolished.

There is one further matter to which I ought to refer. The Shipping Controller was established by the New Ministries and Secretaries Act 1916, s. 5, and it is not disputed that there is nowhere any provision by the Legislature giving anyone authority to sue the Shipping Controller in his official title as if he were a corporation. The position, therefore, so long as the office remained, was this, that if complaint was made of anything done by the Shipping Controller arising out of contract, the Shipping Controller was under no individual liability in respect of that act, but the remedy

of the complaint, if any, would be by way of petition of right against the Crown. On the other hand, if the complaint of the act done by the Shipping Controller was a complaint of some tort committed by him, including such a tort as the one here complained of, extorting money by virtue of his office, the action would lie not against the Shipping Controller in his official title as if he were a corporation, but against him in his own name as an individual. That was the position, it seems, so long as the office continued. Reference has been made during the course of the argument to the fact that a number of cases have been before the courts in which the Shipping Controller was a party in his official title, and I think reference has also been made to the fact that the Board of Trade has been a party to proceedings in these courts, sued or suing in that name; but I do not intend to refer to the particulars of those cases for this reason that it is plain that in none was the objection taken or considered by the court, which has been taken in this case and which we are called upon to decide, and therefore I think it is of no practical use referring to the fact that those cases have been before the courts.

I now come to consider what appears to me to be the critical question in the case, namely, the proper construction to be placed upon the language of the statute of 1921 and the Order in Council made under it. The statute is the Ministries of Munitions and Shipping (Cessation) Act 1921 (11 Geo. 5, c. 8). The object of the statute was by Order in Council to declare the date, amongst other things, when the office of the Shipping Controller should cease, and to make provision for the necessary consequences of such cessation. In approaching this statute and the construction to be placed upon it and upon the order, I must say that I am very much impressed by the point which Atkin, L.J. put to counsel for the Crown as to what must have been the intention of the Legislature in reference to the personal position of Sir Joseph Maclay, who was the then Shipping Controller, in the event of the office being abolished, and his ceasing to occupy the position of Shipping Controller. What the statute says is that, that the order, after fixing the date when the office is to cease, may make provision for vesting, transferring, or providing for the vesting and transferring to any Government department, any property, rights and liabilities held by the Shipping Controller. Then to provide for the discontinuance of the powers of the Shipping Controller, to provide for the transfer to some other Government department of such of the powers and duties of the Shipping Controller as are not so discontinued, and to provide for the Government department to which any such property, rights, and liabilities are transferred being deemed in law to be successor of the Shipping Controller.

The two material parts of that section for the present purpose seem to be sub-sect. 1 (*a*), which enables the Order in Council to provide for the transfer of, among other things, liabilities incurred by the Shipping Controller, and sub-sect. 1 (*b*). Now what can those liabilities be, or what can they consist of? In regard to contracts which he made as a representative of the Crown he would, as Shipping Controller, or personally, be under no liability whatever; but, on the other hand, he would be under a liability personally, whether it was sought to be enforced against him by way of an action for damages for tort, or, alternatively, by way of an action for money had and received, in such a case as this in respect of an act such as the one complained of in this action, that is to say, if the statute and the order can be read as dealing with the liabilities of Sir Joseph Maclay personally when it speaks of the liabilities of the Shipping Controller. In that connection it seems to me material to consider what must have been the intention of the Legislature in providing for the transfer of a liability. What can be the use of transferring the liability of A. to B. unless it be merely to relieve A., and unless also it is for the purpose of giving to the person who is seeking to enforce a liability the right as against B. instead of A.; and when you come to consider sub-clause (*d*), force seems to be given to that view, in my opinion, by the language used, and the peculiar language used, because one must assume that the draftsman realised what the constitution of the Board of Trade was and the difficulties of suing, but in spite of that he inserted the provision that the Order in Council might provide for the Government department to which the liabilities are transferred being deemed in law to be, as respects such liabilities, the successor of the Shipping Controller.

Therefore, in the provision as to the constitution of the Government department, whether it is an incorporated body of persons, or an unincorporated body of persons, or whether it consists as here of a mere committee of individuals, the Legislature has chosen to say that that Government department, using that expression, shall be deemed in law the successor of the Shipping Controller; and a body which is deemed in law to be the successor of the Shipping Controller in relation to the Shipping Controller's liabilities must, I think, have had conferred upon it, by the language of the statute, the responsibility as successor of meeting the liabilities which have been transferred to it, and meeting them in the only way possible, by becoming liable to be sued in respect of them. That view of the statute is enforced and carried out by the language of the order. I do not think that clause 3 of the order carries the matter further than the statute itself, because in substance, in different language, it repeats the language of the statute; it provides that "all property, rights and liabilities held, enjoyed or incurred by the Shipping Controller shall by virtue of this order be transferred to and vest in the Board of Trade who shall be deemed in law to be the successors of the Shipping Controller."

I may mention in reference to the language that when the point was put to counsel for the

Crown, he was necessarily obliged to admit, from the point of view of the present contention for the appellants, that there were no liabilities which could possibly be affected by this clause, because in matters arising out of contract the Shipping Controller could be under no personal liability in respect of matters arising out of tort. The personal liabilities incurred by the Shipping Controller were not covered or included by the language of this rule; and it seems to me to be a remarkable conclusion, if one is forced to come to it, that an order has been made which includes a provision that liabilities which cannot possibly exist according to this provision shall be transferred to and vested in the Board of Trade.

There is this further provision which seems to me only consistent with the view which I have endeavoured to indicate as to the construction which ought to be put upon the language of the Legislature, and that is contained in rule 7 of the order, which provides: "Where at the time of the transfer affected by this order any legal proceeding is pending to which the Shipping Controller is a party, the Board of Trade shall be substituted in such proceedings for the Shipping Controller." That rule of the order sweeps aside all possible objections to the Board of Trade *qua* Board of Trade being a party to the action and all the objections that may arise in reference to the possibility of issuing execution against the individuals forming the committee, because it says in terms in respect of pending proceedings, "The Board of Trade shall be substituted in such proceedings for the Shipping Controller." It seems to me that is only following out what I venture to think was the intention of the Legislature in providing that, upon the cessation of the office of Shipping Controller and the transfer to a Government department, that Government department, whatever it really consisted of, shall be deemed to be in law the successor of the Shipping Controller.

For these reasons I have come to the conclusion that, although the appeal must succeed in reference to the question of the service of the writ, it fails on the more important point in reference to the question whether, having regard to the language of the statute and the order, this action is maintainable under the very special provisions of the statute and the order against this unincorporated committee under the title of the Board of Trade.

SCRUTTON, L.J.—This appeal from the judgment of Rowlatt, J. raises a question, in my view, of very considerable difficulty on the language of some not very clearly worded Act of Parliament and Orders in Council. I personally feel that the whole question of proceedings against Government departments is in a very unsatisfactory state. I feel that it is of the greatest public importance that there should be prompt and efficient means of calling in question the legality of the action of the Government departments who, owing to the great National urgencies of the War, have been inclined to take, and I think are still inclined to take, prompt action which they consider necessary in the interests of the State without any nice consideration of whether it is legal or not; and I hope that the committee which is considering the question of proceedings against the Crown will be able soon to do something to give the subject more effective remedies against Government departments than he has at present. But, of course, this court is not here to settle what the law ought to be, but what the law is, if it can.

In this case the Marshall Shipping Company have issued a writ against the Board of Trade, as defendants, claiming 20,000*l.* money had and received by the defendants to the use of the plaintiffs. One does not gather, of course, very much from the writ what the fight is about, but it appears from the statement of the Attorney-General, which is acquiesced in by counsel for the plaintiffs, that the sort of contest between the parties is this: The Shipping Controller had power to prevent the sale of ships to foreigners except under his licence. He required, as a condition of a British ship being sold to a foreigner, that a certain portion of the price should be paid to the State. I assume that the applicants for the licence took the licence under protest, and paid the sum claimed under protest. In those respects it is a case something like the case which has recently been to the House of Lords through this court of the *Attorney-General* v. *Wilts United Dairies* (127 L. T. Rep. 822) and I take the writ to be intended to be a claim against the Board of Trade, as the successors of the Shipping Controller, for money wrongfully claimed under duress, the tort being waived and a claim made in *assumpsit.*

In those circumstances there are three objections made, two to the writ and one to the service of the writ. I will take the point as to the service first. The writ has been served on a permanent official of the Board of Trade, which appears to be a Committee of Lords of the Privy Council unincorporated. I am not aware of any provision which enables an unincorporated body consisting of named persons to be served by service on one of their servants. The provisions in the rules apply to corporations, and it appears to me to follow that the objection to the service is a good objection; but inasmuch as far as I can see at present, though I am not expressing any final opinion, it can be cured by the plaintiffs going to the Archbishop of Canterbury and numerous other distinguished individuals who constitute the committee, and astonishing them very much by suddenly serving them with a writ, which will probably bring to their attention for the first time that they are members of a committee called the Board of Trade, I should imagine that the Government solicitor would be very well advised if he did not bother those distinguished people, but accepted service of the writ and so got rid of that difficulty. However, the objection to the writ is a good one, although it seems to me a very annoying and irritating one, and without any merits.

I now pass to the two more substantial objections, which are objections to the writ itself. They are stated in the summons in this way. It is asked that the writ " be set aside as irregular on the ground that the Board of Trade as such "—that I think is one objection —" and as a department of the Crown cannot be sued. That turns upon an Act of Parliament and an Order in Council which have, in some way not very clearly defined, made the Board of Trade, which is the statutory term by which the Committee of Lords of the Privy Council constituting the committee for trade are to be designated, the successors of the Shipping Controller.

By an Act of 1921 (11 Geo. 5, c. 8) an Order in Council made under the New Ministries Act 1916, fixing the date at which the office of Shipping Controller was to cease, may " vest and transfer or provide for the vesting and transfer in and to any Government department or departments of any property rights and liabilities held enjoyed or incurred by the Minister of Munitions or the Shipping Controller (or by any person who has held the office of Minister of Munitions or Shipping Controller)." That appears to show an intention on the part of Parliament that provisions may be enacted by Order in Council by which the liabilities that the Shipping Controller was under, if any, either as Shipping Controller or as a person who has done acts purporting to be done as Shipping Controller, may be transferred to a Government department. There does not appear any clear sign that the persons who drafted that Act thought how exactly a Government was going to hold property, unless it was incorporated in some way or was made a perpetual corporation in succession, but Parliament clearly seems to have contemplated that the Order in Council might transfer the rights and liabilities, if any, of the person who had been Shipping Controller to a Government department. Under that Act an Order in Council was made on the day on which the Act was passed, so that obviously the two were meant to work together, of which sect. 3 provided that " all property rights and liabilities held enjoyed or incurred by the Shipping Controller "—there has been only one Shipping Controller—" shall be transferred to and vested in the Board of Trade who shall be deemed in law to be the successors of the Shipping Controller." Sect. 7 says : " Where at the time of the transfer affected by this Order any legal proceeding is pending to which the Shipping Controller is a party, the Board of Trade shall be substituted in such proceeding for the Shipping Controller, and such proceeding shall not abate by reason of the substitution." I can quite see that extraordinarily difficult questions may arise under those two clauses. The only power given to the Board of Trade to hold property is a power to hold lands for which they have perpetual succession, and that power is given by sect. 66 of the Harbours Act 1861 (24 & 25 Vict. c. 47). What exactly Parliament or the draftsman of this Order in Council meant as to property other than lands transferred to a committee of changing members without perpetual succession I do not know ; but I think it is pretty clear that it was intended by this Order in Council to make the Board of Trade liable for whatever the Shipping Controller was liable for, either as an officer or for acts done while he was an officer, though beyond his power.

The first question, therefore, raised by the summons, which I take to be, can the Board of Trade as such—that is, as an unincorporated body—sue and be sued ? must be answered in this way, that I cannot construe this Act of Parliament or this Order in Council otherwise than as showing that it was the intention of Parliament and of the framers of the Order in Council by these words to render the Board of Trade entitled to sue and liable to be sued in respect of matters in which the Shipping Controller was entitled to sue or liable to be sued. My reasons for so holding are very much the same as, I gather, influenced Rowlatt, J., and are the same as those which induced the House of Lords to hold that a trade union could be sued in *Taff Vale Railway* v. *Amalgamated Society of Railway Servants* (85 L. T. Rep. 147 ; (1901) A. C. 426).

The second point raised by the summons is this, and I conceive it may give rise to questions of considerable difficulty, and upon which I do not propose to express a final opinion, that the Board of Trade, as a department of the Crown, cannot be sued. As I have said, it appears to me that this action is intended to raise the question whether the Shipping Controller in the first instance did something for which he was liable in demanding this money as a condition of granting the licence. If he had no power to demand that money he was (1) guilty of a tort ; (2) the tort could be waived and he could be sued in *assumpsit*. Whether suing him in *assumpsit* and waiving the tort made him personally liable in contract, a consideration which may have a good many effects in this case, I regard as a question of very considerable difficulty, and I do not wish to express a final opinion upon it ; but I do not think that one ought to decide it on a question of setting aside the writ, and I think that the writ ought to be allowed to go on, leaving that question and the effects of that question to be decided in the litigation.

For these reasons I think that as to the setting aside of the writ the appeal fails, but as to setting aside the service it succeeds.

Atkin, L.J.—I agree with everything that has been said in the judgments just delivered and I only desire to add a few words. In the first place, I think that the plaintiffs were entitled, if they desired, to sue the members of the Board of Trade in tort under the title of the Board of Trade. The Board of Trade itself is merely an unincorporated committee of the Privy Council, consisting, of course, of members whose tenure of office varies and is terminable in different ways ; but I think that, by virute of the Act of 1861 and the Interpretation Act of 1889, a short name—namely, the Board of

Trade—has been provided for those persons, and I think that they can be sued in that name. That does not, of course, go far to establish whether or not they can be used for this particular cause of action.

I do not propose to determine whether or not there is a good cause of action against them; but it does appear to me that, upon the true construction of the Ministry of Munitions and Ministry of Shipping (Cessation) Act 1921, it was contemplated that there should be events in which the Board of Trade could be sued. The Act of Parliament provides for an Order in Council being made providing for the vesting in any Government department "of any property rights and liabilities held enjoyed or incurred by the Minister of Munitions or the Shipping Controller." I am unable to conceive of a right or liability which cannot be enforced by an action. The two terms are necessarily co-relative, and therefore I think that no right or liability can be transferred which was not a right or liability enforceable by the Shipping Controller, and in the same way I think that, when it has been transferred, it would necessarily involve that the person to whom the right or liability is transferred can enforce that right or have that liability enforced against him by an action, and therefore I think, if there was any liability of the Shipping Controller which could be enforced by an action, then the Board of Trade can be sued in respect of it.

I think that the liability of the Shipping Controller contemplated in that Act of Parliament extends to the personal liabilities of the Shipping Controller incurred by him and by reason of acts or omissions done or omitted to be done by him by virtue of his office, and I think that that personal liability he was intended to be relieved of when the office ceased to exist, and it was intended that the liability should be transferred to the Board of Trade, who might be sued in respect of it. Indeed, unless it extends to the personal liability of the Shipping Controller, it is very difficult to see what it does extend to, because, eventually, under stress of argument, counsel for the Board of Trade was constrained to say that, in fact, when you consider it, there was no property vested in the Shipping Controller, because it was vested in the Crown; there were no rights of the Shipping Controller, because they were rights of the Crown; and there were no liabilities of the Shipping Controller, because there were no liabilities that you could enforce against the Crown. What you would be driven to in that view would be this, that the only rights and liabilities of the Shipping Controller would be personal rights and personal liabilities. I think it was not intended to leave the Shipping Controller personally liable to an action for acts which he might have done by virtue of his office as Shipping Controller, even if those acts involved him in personal liability, and I think that is made reasonably clear by the words which I have not yet read at the end of the clause which gave power by Order in Council to vest and transfer property, rights, and liabilities held, enjoyed, or incurred by the Shipping Controller "or by any person who has held the office of . . . Shipping Controller."

Whether or not the liability sought to be enforced in this case was a liability which could have been enforced by action against the Shipping Controller I am not prepared to say. I can well understand that there may be difficulties. The Shipping Controller might well be liable in tort for an unauthorised act done by him, and at the same time, if by reason of that tort he received the proceeds of the tort and accounted for them to the Government, which no doubt he would have done, and the plaintiff choosing to waive that tort, it may well be said that in those circumstances he was not liable in contract and that the only remedy was by a petition of right against the Crown. I propose to express no opinion upon that point except to say that I feel that the matter is one that admits of far too much doubt to justify us in setting aside the writ on the ground that such a claim would afford no cause for action; I have not made up my mind whether it would or would not, and I do not think it necessary to do so, but I am quite clear that we ought not to set aside the writ on that contention. I say nothing further about the service, which I agree was irregular, and I agree, therefore, that this appeal succeeds in part and fails in part.

Bankes, L.J.—The appeal will be allowed as to the service only, but that there ought to be no costs of the appeal on either side.

Solicitors for the appellants, *Solicitor to the Board of Trade.*

Solicitor for the respondents, *R. S. Fraser.*

April 19, 20, *and* 30, 1923.

(Before Sir Henry Duke, P., Bankes and Scrutton, L.JJ.)

United States of America (Represented by the United States Shipping Board) *v.* Durrell and Co. Same *v.* Duffell. Same *v.* Butt and Sons. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Bills of lading—General cargo—Unequal terms to various consignees—Discharge of ship—Demurrage—Varying conditions of—Greater burden on some consignees than on others—Implied condition—Prevention of discharge.

A general cargo was loaded on a steamer at Gothenburg for London, most of the cargo being loaded under bills of lading, which (1) *provided that the cargo should be discharged at a certain rate, and that demurrage should be payable at a certain sum a day in proportion to the amount of the freights; and* (2) *that time for discharging was to count twenty-four hours after the steamer's arrival in Gravesend Road, whether a berth was available or not. A portion of the cargo had been loaded under bills of lading,*

(a) Reported by W. C. Sandford, Esq., Barrister-at-Law.

from which the second clause had been deleted, while another portion had originally been shipped under a bill of lading on another ship and had been transferred to the ship in question without any further bill of lading, demurrage being payable under this bill of lading at a lower rate than that fixed by the other bills of lading. The steamer was unable to find a berth in Gravesend Road for eleven days after her arrival. Under those bills of lading which contained the above two clauses the holders became liable for their proportion of thirty-three days' demurrage, while under the bills of lading from which the second clause had been deleted the holders became liable for their proportion of twenty-two days' demurrage.

Held, that a shipowner by giving bills of lading, which impose on some of the holders greater obligations as regards discharge and demurrage than on the other holders, does not in law prevent those holders, on whom the greater obligations are placed, from performing their obligations.

Held, further, that the circumstances gave rise to no implied condition that all the bills of lading should be in the same terms.

Decision of Bailhache, J. (16 Asp. Mar. Law Cas. 112; 1923, 128 L. T. Rep. 695) reversed.

APPEAL from the judgment of Bailhache, J. in three non-jury actions which were tried together.

The plaintiffs claimed in each case for demurrage of their steamship *Bethlehem Bridge* in Oct. and Nov. 1919. The plaintiffs had chartered the vessel to one H. Jörgensen, a Norwegian shipowner, on the 17th Sept. 1919, on a voyage charter to proceed to Gothenburg and load a general cargo for London and there to discharge within a reasonable time with a fixed rate for demurrage. At Gothenburg she loaded some 150 parcels of general cargo including three parcels of timber of which the defendants were the consignees. When bills of lading for the cargo were presented Jörgensen stamped on most of them, including those of R. Durrell and Co. and Duffell, with a rubber stamp two marginal clauses as follows :

Cargo to be discharged at the rate of 450 tons, 200 standards, per regular working day, with a demurrage of 600*l.* per day payable *pro rata* freights.

Time for discharging to count twenty-four hours after steamer's arrival in Gravesend Road or other road or roadstead as steamer might be ordered by English authorities whether berth or not available, and always irrespective of turn war circumstances customs of the port and charter clauses on (*sic*) the contrary.

The clause commencing "Cargo to be discharged" was stamped on all the bills of lading ; that commencing "Time for discharging" was stamped on the bills of lading of the defendants Duffell and R. Durrell and Co., but it had been deleted from Butt and Sons' bill of lading.

Another steamer of the plaintiffs, the *Kaskaskia*, loaded a parcel of timber including thirty-two standards stowed on deck. The parcel was consigned to Messrs. Baynes and Sherborne of London under a bill of lading similar to the defendants' bills of lading except that the cargo was to be discharged at the rate of 400 tons, 200 standards, per regular working day and that demurrage was at the rate of 200*l.* per day. Soon after the *Kaskaskia* weighed anchor it was found necessary to tranship the thirty-two standards which were stowed on the deck of the *Bethlehem Bridge* without any further bill of lading.

The *Bethlehem Bridge* arrived at Gravesend Road on the 11th Oct. 1919. Under the bills of lading of the defendants Duffell and R. Durrell and Co., which contained the second stamped clause, the time for discharging was taken as beginning to run on the 14th Oct., and as expiring on the 24th Oct. Owing to the congested state of the Port of London the steamer could not get into a discharging berth until the 22nd Oct. She began discharging on the 23rd Oct. and finished on the 26th Nov. She was therefore on demurrage, according to two of the bills of lading, for about thirty-three days. The liability for demurrage incurred on the footing of these bills of lading amounted to 20,080*l.* 8*s.* 4*d.* The first two defendants were sued for sums bearing to 20,080*l.* 8*s.* 4*d.* the proportion which their freights respectively bore to the freight for the whole cargo of the *Bethlehem Bridge*.

According to Butt and Sons' bill of lading, from which the second stamp clause was deleted, the time for discharging did not begin to run until the 22nd Oct., when the ship got into a discharging berth, and the days of demurrage did not begin until the 2nd and 3rd Nov. The liability for demurrage incurred on the foot of this bill of lading amounted to 13,924*l.* 3*s.* 4*d.*, and these defendants were sued for a sum bearing to that amount the proportion which their freight bore to the freight for the whole cargo of the *Bethlehem Bridge*.

The defendants pleaded that it was an implied condition of the bills of lading that all the shippers or receivers of cargo should be bound by the same terms relating to the discharge of the steamer, and that all the goods on board the steamer should be liable to pay freight. They alleged (1) that, by stowing part of the *Kaskaskia's* cargo on the hatches of the *Bethlehem Bridge*, the plaintiffs had in point of fact hindered and impeded them in discharging their cargo, and they contended (2) that, by allowing some of the holders of bills of lading a longer time for the discharge of the ship than they allowed to others, the plaintiffs had prevented discharge within the shorter time.

Bailhache, J. held that it was an implied condition that all holders of bills of lading of goods shipped on the *Bethlehem Bridge* should be under the same obligation to discharge the ship, and that, by allowing some of the consignees a longer time than they allowed to others the plaintiffs had prevented the defendants from discharging the ship within the stipulated time and had thereby relieved them of their obligation to do so. He found that all the defendants had performed the obligation to discharge within a reasonable time and gave judgment for the defendants.

The plaintiffs appealed.

R. A. Wright, K.C. and *J. Dickinson* for the appellants.

Stuart Bevan, K.C. and *Claughton Scott*, K.C. for the respondents, the defendants.

The following cases were referred to :

Alexander v. *Aktieselskabet Hansa*, 14 Asp. Mar. Law Cas. 493 ; 122 L. T. Rep. 1 ; (1920) A. C. 88 ;
Budgett v. *Binnington*, 6 Asp. Mar Law Cas. 592 ; 63 L. T. Rep. 742 ; (1891) 1 Q. B. 35 ;
Dodd v. *Churton*, 76 L. T. Rep. 438 ; (1897) 1 Q. B. 362 ;
Fry v. *Chartered Bank of India*, 1866, 14 L. T. Rep. 709 ; L. Rep. 1 C. P. 689 ;
Hamyln and Co. v. *Wood*, 65 L. T. Rep. 296 ; (1891) 2 Q. B. 488 ;
Holme v. *Guppy*, 1838, 3 M. & W. 387 ;
Howard v. *Maitland*, (1883) 11 Q. B. Div. 695 ;
Mackay v. *Dick*, (1881) 6 App. Cas. 251 ;
The Moorcock, 6 Asp. Mar. Law Cas. 373 ; 1889, 60 L. T. Rep. 654 ; 14 Prob. Div. 64 ;
Porteus v. *Watney*, 4 Asp. Mar. Law Cas. 34 ; 1878, 39 L. T. Rep. 195 ; 3 Q. B. Div. 223, 534 ;
Roberts v. *Bay Commissioners*, 1870, 22 L. T. Rep. 132 ; L. Rep. 5 C. P. 310 ;
Straker v. *Kidd*, 4 Asp. Mar. Law Cas. 34n ; (1878) 3 Q. B. Div. 223.

Cur. adv. vult.

April 30.—The following judgments were read :

Sir HENRY DUKE, P.—The appellants in these cases claimed, in three actions which were tried in the Commercial Court before Bailhache, J., to recover against the respective defendants as consignees of goods shipped on board the plaintiffs' steamship *Bethlehem Bridge* at Gothenburg, and received by the respective defendants in London, various sums alleged to be due from the defendants by reason of non-completion of the discharge of the *Bethlehem Bridge* within a time fixed by the bills of lading under which the defendants received delivery of the goods. The learned judge gave judgment for each of the defendants on the ground that completion of the discharge of the *Bethlehem Bridge* within the stipulated time had been prevented by the plaintiffs. From these judgments the plaintiffs appeal. The appeals were by consent heard together. The form of the bills of lading in question and the circumstances of the case were exceptional, and some questions of law which were argued before us are said not to have been heretofore determined.

The *Bethlehem Bridge* was, as appeared, loaded at Gothenburg in Sept./Oct. 1919, as a general ship with a miscellaneous cargo. Separate bills of lading were issued for about 150 consignments. The goods discharged to the defendants consisted of sawn timber of various denominations. The bills of lading under which the first and second defendants took delivery were stamped with marginal clauses in these terms : " (*a*) Cargo to be discharged at the rate of 450 tons, 200 standards, per regular working day, with a demurrage of 600*l.* per day payable *pro rata* freights. (*b*) Time for discharging to count twenty-four hours after steamer's arrival in Gravesend Road or other road or roadstead as steamer might be ordered by English authorities whether berth or not available, and always irrespective of turn war circumstances customs of the port and charter clauses on the contrary." The second of the two clauses was omitted in the bill of lading issued to the shipper of the goods delivered to the third-named defendants. It was stated at the hearing that bills of lading with identical marginal clauses were issued in respect of each except three of the consignments which made up the cargo. The bill of lading under which the defendants, Butt and Sons, were sued, contained only the first of these marginal clauses, and one other consignee was said to hold a like bill of lading. One parcel of the cargo consisted, it was said, of timber goods originally shipped on another vessel of the plaintiffs, the steamship *Kaskaskia*, which, having fallen overboard from the *Kaskaskia*, had been reshipped by the plaintiffs on board the *Bethlehem Bridge* without a bill of lading. The defendants complained of the circumstances attending the issue of the bills of lading, alleging that they were handed out to the shippers of cargo without notice of the marginal clauses at so late a period as to give no fair opportunity of acceptance or rejection. No relief on this ground, however, was claimed in the actions, and in view of acceptance by each defendant of the goods comprised in the bill of lading of which he was holder, it is difficult to attribute to this alleged hardship any effect in law in relation to the dispute between the parties.

The cargo of the *Bethlehem Bridge* amounted to 2869 tons and 469,117 standards, and the time of discharge under the first of the marginal clauses to eight days, seventeen hours, seventeen minutes. This time expired on the 24th Oct. The discharge was completed on the 26th Nov., and on the footing of a period of demurrage of thirty-three days and upwards at 600*l.* per day the first and second defendants respectively were sued for such proportion of a total sum for demurrage of 20,080*l.* 8*s.* 4*d.* as the freight of their goods bore to the freight of the whole cargo of the ship. Under the bill of lading issued to the third defendants the time for discharge of the ship expired on the 3rd Nov., and the alleged period of demurrage is twenty-three days and part of a day. The total amount of demurrage for those days is stated at 13,924*l.* 3*s.* 4*d.*, and the proportion claimed from these defendants is the proportion of their freight to the total freight. The discrepancy between the liability to pay for detention of the ship imposed by the terms of bills of lading 1 and 2, and the liability imposed by bill of lading 3, was one of the main grounds

upon which counsel for the defendants contended that the defendants ought to be held free of liability for any detention.

The learned judge at the trial gave judgment in favour of the first and second defendants on the ground that it is an implied term of the first marginal clause that all holders of goods shipped on the *Bethlehem Bridge* should be in the same position as regards time for discharge. In support of this view he accepted an argument that the issue to many shippers of bills of lading containing the marginal clauses in question bound the plaintiffs to all the shippers by a scheme of shipment and discharge from which the plaintiffs could not deviate without discharging all the shippers from liability under the clauses. The learned judge also held that there had been prevention by the plaintiffs of performance of the defendants' obligations as to the discharge of the ship by the issue to different shippers of bills of lading stipulating for discharge within different periods of time. The plaintiffs, he said, contracted with one set of defendants to discharge the ship by an earlier date, say the 24th Oct., and with another set of defendants that they might keep their goods on board until a later date, say the 2nd Nov.

The plaintiffs appeal on the ground that the several bills of lading were independent contracts, and that the agreement constituted by acceptance of each parcel of goods on the terms of the relevant bill of lading, was an absolute agreement of the individual goods owner, in the terms of his bill of lading. For this proposition, counsel relied on the judgment in *Porteus* v. *Watney* (4 Asp. Mar. Law Cas. 34 ; 39 L. T. Rep. 195 ; 3 Q. B. Div. 223, 534), and other cases. Generally as to the effect of a bill of lading to bind the goods owner in respect of the terms of carriage of his own parcels of goods, they cited the judgment of Lord Esher in *Budgett* v. *Binnington* (6 Asp. Mar. Law Cas. 592 ; 63 L. T. Rep. 742 ; (1891) 1 Q. B. 35). They also insisted, on the authority of the latter decision and upon general legal principles, that the prevention by a shipowner of the performance of the terms of a bill of lading which will discharge the goods owner from liability for demurrage must be prevention in fact.

Counsel for the defendants supported the several judgments of the learned judge, not only upon the grounds therein stated, but upon others to which I shall briefly refer. Counsel argued that the alleged agreement for payment in respect of detention of the ship was void for uncertainty, chiefly as to whether "cargo" in clause 1 must be taken to mean the ship's cargo, or the consignment of the individual shipper. He contended also that the shipowners had impliedly covenanted to secure an equal obligation on the part of all shippers as to discharge of cargo and liability as to demurrage, and had shipped the goods upon an implied condition whereby the liability of each shipper and consignee was to be discharged upon failure of the shipowners to perform their implied covenant. He claimed likewise to establish, by means of the marginal clauses, the existence of a scheme of shipment and discharge upon uniform terms, to which all the shippers became parties at the invitation of the shipowners. Counsel based the case of the defendants upon an implied condition in the contract of carriage with each shipper, that no other shipper should be placed upon more favourable terms as to discharge.

It was conceded by counsel for the defendants that the finding by the learned judge of prevention by the plaintiffs of performance of the obligations of the defendants, in respect of dispatch, rests wholly upon the alleged inconsistency of the terms contained in the several bills of lading. They pointed out, however, that each of the defendants, by their respective points of defence, alleged prevention in fact, and they said that the course taken by the learned judge at the trial had led them to refrain from making proof of this allegation in each case, and they asserted their ability to show that a quantity of timber from the *Kaskaskia* shipped under circumstances already mentioned, was stowed on the hatches of the *Bethlehem Bridge*, and that her due discharge was thereby hindered.

The contention of the defendants that the marginal clauses are void for uncertainty, seems to me not to be well founded. I can find no reason in the bills of lading or in the facts for limiting the meaning of the word "cargo" in clause 1 to the parcel of goods of the individual shipper, or for entertaining a doubt that what is designated is the cargo of the ship. Nor did I observe at the hearing any indication that any doubt on this subject had in fact arisen as between the parties.

The allegation of a comprehensive scheme of shipment and discharge agreed upon by terms which would make the shipowners on the one hand, and the whole body of shippers on the other, participants on mutual terms in one joint undertaking is, in my opinion, not warranted by the facts. No such scheme was ever offered to any of the shippers, and no goods were shipped on the faith of such a scheme. If there are inherent in the several bills of lading terms which bind the shipowners by implication, they must therefore be found in the language of the documents and the nature of the transaction.

In *Porteus* v. *Watney* Lord Esher said with regard to bills of lading which bound the holders to terms of discharge contained in the charter-party under which the ships were employed (39 L. T. Rep., at p. 198 ; 3 Q. B. Div., at p. 54) : "There is no relation whatever between the holders or takers of other bills of lading and any one holder of a bill of lading. They are not co-sureties. When, therefore, it is said we can look at all the bills of lading and then divide the days of demurrage or the lay days between them, we are looking at other bills of lading which cannot be given in evidence. They cannot be received in evidence in an action

between the shipowner and the holder of a bill of lading. . . . Then what is the contract represented by the bill of lading with the conditions in it? . . . It is that if the ship is not able to discharge the whole of her cargo within the given number of days after she is at the usual place of discharge, the holder of that bill of lading will pay a certain sum for each day beyond those days, however the delay may be caused, unless it is by default of the shipowner." Lord Esher used language of like effect in *Budgett* v. *Binnington* (*sup.*). The fact that the bills of lading here do not incorporate the conditions of a charter-party, but stipulate independently the period of discharge of the ship's cargo to which the shipper is to be bound, does not seem to me to help the defendants. How is it material to the liability that the terms are stated at length in one document, and not incorporated from another by reference? And why is a joint scheme to be inferred from bills of lading which themselves contain the terms of discharge, and not inferred when the bills of lading incorporate such terms from the charter-party?

The substantial questions are, whether the terms of the bill of lading in each case are such as to necessitate the implication the learned judge has made, and whether the issue of bills of lading to one shipper stipulating for discharge of the ship within, say, thirty-five days, is a prevention by the shipowner of performance by another shipper of his obligation for payment of demurrage in the event of failure to discharge the ship within, say, ten days.

Where the court can, or ought, to imply terms in a contract, and what terms can be or ought to be implied, depends upon well-established principles of law. The implication of any covenant or condition is permissible only if it shall appear beyond doubt on the face of the contract that the parties must have intended the suggested covenant or condition to be a term of the contract. *Mackay* v. *Dick* (6 App Cas. 251) was relied upon for the defendants; reference can usefully be made also to the judgment of Bowen, L.J., in *The Moorcock* (6 Asp. Mar. Law Cas. 373; 60 L. T. Rep. 654; 14 Prob. Div. 64) and that of Lord Esher in *Hamlyn and Co.* v. *Wood* (65 L. T. Rep. 286; (1891) 2 Q. B. 488). There it was said that an implication will be made if the contract cannot otherwise have effect. But in this case the agreement of one shipper for discharge of the ship's cargo in ten days and payment at a specified rate in default, and the independent undertaking of another shipper for discharge in a period now ascertained as thirty-five days and payment at a specified rate in default, were alike taken for the benefit of the plaintiffs, and each, without any implication, can have an effect beneficial to the plaintiffs. I think that no such implications as are contended for by the defendants can be made.

As to the question of prevention of performance, the general rule of law which is applicable has long since been laid down in definite terms. Parke, B. stated it in *Holme* v. *Guppy* (3 M. & W., at p. 389): "If the party be prevented, by the refusal of the other contracting party, from completing the contract within the time limited, he is not liable in law for the default." Blackburn, J., in *Roberts* v. *Bury Commissioners* (22 L. T. Rep., at 134; L. Rep. 5 C. P., at p. 326) affirmed the same principle, and, as Lord Blackburn, he applied it in *Mackay* v. *Dick* (6 App. Cas., at p. 263). The defendants, however, insist upon a wider proposition. Each claims to be released by the act of the plaintiffs in making contracts inconsistent with their contract with that defendant, and it is to this contention that effect has been given in the several judgments. Assuming the alleged total inconsistency of the several contracts, does it of itself discharge the obligations of the defendants? No authority for the affirmative proposition is produced, and there is modern authority of a contrary tendency.

In *Howard* v. *Maitland* (11 Q. B. Div. 695) a decree which established a right of entry upon land previously conveyed with a covenant for quiet enjoyment was held to be, without entry or actual disturbance, no breach of the covenant for quiet enjoyment. The rules of law by which to determine whether acts inconsistent with a contract, which have been done by one party, suffice to discharge the liability of the other party, were, however, formulated long ago. In Comyn's Digest, under the title Condition (L. 6), the Lord Chief Baron says: "The performance of a condition shall be excused by the obstruction of the obligee; as if a condition be to build a house; and he . . . hinders his coming upon the land. . . . But it ought to be an obstruction which disables the performance." Under covenant (E. 2) the Lord Chief Baron says: "It shall be a breach of covenant, if the covenantor be disabled to perform;" and again, under condition (M. 2), this: "As if a condition be to enfeoff the feoffer, and he enfeoffs a stranger . . . or suffers a recovery against him by default, if execution be sued upon it." An act in the law done by a party may, no doubt, be deemed a prevention by that party of performance by him of his covenant to do some other act in the law; but it must first be proved to create disability. The question here is whether the plaintiffs prevented the defendants from performing an agreement for the speedy discharge of a ship. Counsel for the defendants were not able to point out, upon the evidence as the case stands, any particular wherein the plaintiffs in fact prevented discharge of the *Bethlehem Bridge* at a date earlier than the time of the actual completion of her discharge, or in fact disabled themselves from performing their own part of the contract of affreightment.

I am of opinion that the making by the plaintiffs of contracts with the various defendants and others, which contained different dates for completion of discharge of the *Bethlehem Bridge*, was not in itself a prevention by the plaintiffs of the performance by either set of defendants of their own contract, and that the judgment below, for this reason, cannot be sustained.

Application was made on behalf of the defendants for leave to adduce proof of prevention in fact by the plaintiffs of performance of the defendants' obligation as to the discharge of the *Bethlemen Bridge*. I wish they had given below such evidence as they in fact had, but in view of the nature of the discussion which led to their failure to insist on doing this, I think that, upon proper terms as to costs, they ought to be allowed to try this question of prevention in fact.

Bankes, L.J.—In these three actions, tried by Bailhache, J., claims were made for demurrage by the owners of a vessel called the *Bethlehem Bridge* against consignees and holders of bills of lading. The vessel had been put up as a general ship at Gothenburg for the conveyance of cargo to this country, and as many as 150 bills of lading had been issued. The defendants disputed their liability upon a point of law as to the construction of the bills of lading, and also upon the facts. At the suggestion of the learned judge the action was disposed of upon the point of law without investigating the questions of fact, which, on the view I take of these appeals, have become material.

The point of law which is raised is a novel one, and can be stated quite shortly. It arises under these circumstances: The majority of the bills of lading had stamped upon them two marginal clauses. The first was in the following terms: "Cargo to be discharged at the rate of 450 tons, 200 standards, per regular working day, with a demurrage of 600*l*. per day payable *pro rata* freights." The second, in these terms: "Time for discharging to count twenty-four hours after steamer's arrival in Gravesend Road or other road or roadstead as steamer might be ordered by English authorities whether berth or not available, and always irrespective of turn war circumstances customs of the port and charter clauses on the contrary." On some of the bills of lading the second clause was omitted. The effect of the omission was, in those cases, to make the lay days run from the date when the vessel arrived in berth, whereas in the cases in which the second clause was included, the lay days ran from arrival in Gravesend Road.

In the events which happened, the vessel arrived in Gravesend Road some eight days before she got into berth. Under these circumstances the contention for the respondents was that the provision for the discharge of the vessel, contained in the first marginal clause, was part of a general scheme under which each consignee accepted the obligation to be responsible for the discharge of the whole of the cargo of the vessel within the given time, or to pay his *pro rata* proportion of the very large sum fixed as the demurrage rate, and that, as a consequence of this, it followed as a matter of law that the shipowner must include in each bill of lading the same terms in reference to demurrage, in order that each bill of lading holder should be under the same incentive to discharge, and under the same liability for not discharging as every other bill of lading holder. It was further contended that the mere fact that the terms in reference to demurrage were not the same in all the bills of lading, was sufficient of itself to get rid of any obligation to discharge within the agreed time, and that it was quite immaterial to consider whether any of the respondents had been in fact hindered or delayed in the discharge of their cargo owing to some other consignees having by their bills of lading been allowing a longer period for discharge than that to which the respondents had agreed.

I am not quite sure as to the ground upon which this contention was based. As a matter of business, it is easy to understand a contention that it would be very convenient to place such a construction as that contended for upon the contracts entered into by the respondents. As a matter of law, I find great difficulty in doing so. Counsel for the defendants relied, as the foundation of his argument, upon a passage in Lord Blackburn's speech in *Mackay* v. *Dick*, where he says (6 App. Cas., at p. 263): "I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect." He argued, as I understood him, that the making of identical contracts by the shipowners with the cargo owners was something "necessary to be done" in order to carry out the scheme of the discharge of the vessel within the agreed time, which was a combined operation. If this argument is to prevail, it can only, in my opinion, do so on the ground that a term to that effect must be implied in the contract. Is it necessary, in order to give business efficacy to the contract, that such a term should be implied? I think not. The ordinary rule that, if the performance of the obligation of a contract by the one party is prevented by the action of the other, the former is excused, is in my opinion a sufficient protection to the respondents, and the implication they ask to have introduced into their contracts is too violent to be accepted. On the construction of the contracts which I prefer, if the respondents have been prevented from discharging, or hindered or delayed in the discharge of their goods by the action of any other cargo owner who has been allowed a longer time for discharging than they themselves have, they have their remedy either in a release from their obligation, or in damages. On the other hand, why should they be relieved of any liability if the fact be that all the goods in respect of which the longer discharging time has been given lie at the bottom of the holds, where they cannot possibly interfere with the discharge by the respondents of their goods? I know nothing as to what the facts are, as they were not gone

into, but on the question of law as to the interpretation of the contract made by the parties, I find myself unable to agree with the view taken by the learned judge, though I differ from him upon such a point with great hesitation.

I think that the appeal must be allowed with costs, and I agree with the other members of the court in thinking that the respondents should have the opportunity, if they desire it, of going into the facts upon a further inquiry.

Scrutton, L.J.—These cases raise a novel point in shipping law, under the following circumstances: Mr. Jörgensen, a Norwegian shipowner, had chartered a ship from the United States Shipping Board to proceed from Norway to Gothenburg and thence to London, her discharge was to be in reasonable time, and a demurrage rate was fixed. He then put the ship up as a general ship and received some 150 parcels of cargo. When the bills of lading on his ordinary form were presented for signature, he stamped on them two clauses which, in his interpretation of them, imposed an obligation as to demurrage and a rate of demurrage, much more onerous than the charter obligation. The circumstances under these clauses were stamped would raise considerable doubt whether they were really part of the contract, but for the fact that the consignees presented the bills of lading and took delivery under them. Owing to the circumstances of the Port of London there was great delay in discharging the ship, and at the rate of 600*l.* a day some 20,000*l.* of demurrage was incurred, for which the shipowner sued the various consignees *pro rata* to their freight paid. Some, at least, of the consignees had got their goods out of the ship within their agreed lay days, but the shipowners contended they had agreed to be liable for the complete discharge of the ship, and that no fault of his was responsible for the delayed discharge.

Some of the consignees then relied on the defence that the shipowners, through Jörgensen, had (1) made, at any rate, two contracts with shippers, under which the lay days began at a much later date than the date relevant to the other bills of lading; (2) taken some goods on board on the top of the deck cargo, shipped under a bill of lading by another ship, on quite different terms of discharge. They argued that the existence of these contracts, without more, relieved them from any obligation to pay the named demurrage. They also proposed to prove that what happened under these contracts had in fact prevented compliance with the obligation of discharge. But on this the judge below suggested that it was enough to deal with the possibilities under the contract without investigating what in fact took place, and counsel for the defendants acquiesced in this suggestion or direction. In the result the cases were decided without the knowledge of the facts of discharge, and the judge took the view that the mere existence of contracts of that nature relieved the defendants from their obligation to pay agreed demurrage for delay beyond fixed days, and substituted an obligation to discharge in reasonable time, which the judge held was complied with.

Before considering the reasons for the judgment of the judge below, it occurred to me, though it had not been argued in the court below, to doubt whether the wording of the clause as to demurrage was clear enough to impose on a consignee the responsibility for the delay by other consignees in discharging other goods than his own. As far as I know, and as counsel could inform me, the cases in which such a startling result has followed have been either cases in which the consignee has been made liable for the provisions of the charter as to demurrage: "He or they paying freight and all other conditions as per charter-party," which naturally relate to the whole cargo, or cases like *Straker* v. *Kidd* (4 Asp. Mar. Law Cas. 34, n; 3 Q. B. Div. 223), where the clause ran: "Three working days to discharge the whole cargo," and clearly covered other goods than the shipper's. I am inclined to think that a shipowner who wanted to make a consignee liable for failure to discharge other people's goods than his own must do so in very clear terms. The language here was: "(*a*) Cargo to be discharged at the rate of 450 tons, 200 standards, per regular working day, with a demurrage of 600*l.* per day payable *pro rata* freights. (*b*) Time for discharging to count twenty-four hours after steamer's arrival in Gravesend Road" . . . and I doubted whether "cargo" might not be limited to the goods shipped by that consignee, just as the charterer's lien for freight was limited to freight on the particular shipper's cargo in *Fry* v. *Chartered Mercantile Bank of India* (14 L. T. Rep. 709; L. Rep. 1 C. P. 689). But on consideration I do not think this view is sound. "Cargo" is more naturally read as a whole cargo than one shipper's consignment; the provision of a double rate, tonnage and standard, points to a mixed cargo, and it is difficult to apply the rate to one consignment in view of the clause determining when lay days are to begin, as time *pro rata* for all consignments can hardly begin at the same moment. I think the clase is a rather clumsy attempt to carry out the decision in *Porteus* v. *Watney* (4 Asp. Mar. Law Cas. 34; 39 L. T. Rep. 195; 3 Q. B. Div. 534), while modifying the severity which would make each consignee liable for the whole demurrage, though it had been paid already by another consignee. I take it, therefore, that the consignee has primarily made himself liable for the discharge of the whole cargo of other goods by other consignees. What then is the effect on that obligation of the shipowners making other contracts as to demurrage with other shippers on different terms? For instance, if with shipper A. of half the cargo the contract is to discharge the ship—that is, the whole cargo—by the 1st June, and with shipper B., of the other half, the contract is to discharge the whole cargo by the 10th June, one can understand that if shipper B., relying on his contract, does not discharge his cargo till

the 10th June, shipper A. may say: "You, the shipowner, by the contract you have made with B. permitting what he has done under it, have prevented me from fulfilling my contract, and cannot therefore claim demurrage under it." But can shipper A. say, before he knows what will happen under the contract, that its mere existence excuses him, though its actual performance may not prevent him? For instance, if A's contract is "lay days to commence on arrival in roads, and B.'s lay days to commence on arrival in dock," it may be there is so little difference in time between the two that there is no prevention in fact; there may be a long interval, and A.'s lay days may expire before B.'s lay days have begun. Is the possibility of this enough to discharge the first shipper? The defendants contend that it is, and I understand the judge to agree with them.

The obligation of a consignee with fixed lay days, as laid down in *Budgett* v. *Binnington* (*sup.*) and by the House of Lords in *Alexander* v. *Aktieselskabet Hansa* (122 L. T. Rep., at p. 3; (1920) A. C., at p. 94), is an absolute engagement, unless he is excused by exceptions in the contract, or the impediment arises "through the fault of the shipowner or those for whom he is responsible." This is, I think, merely an example of the old principle that, where performance of a term has been rendered impossible by the act of the other party, the party to perform is exonerated from performance. "If a man agrees to do something by a particular day or in default to pay a sum of money as liquidated damages, the other party to the contract must not do anything to prevent him from doing the thing contracted for within the specified time"—*Dodd* v. *Churton* per Chitty, L.J. (76 L. T. Rep., at p. 440; (1897) 1 Q. B., at p. 568). Where this happens the contractor is excused, not only from the delay actually caused, but for all the stipulations as to time and damages, a liability to do the act in a reasonable time being usually substituted. But in my view there must be delay actually caused, though it is possible the contract objected to may be of such a nature that its performance must, not may, cause delay; in which case the rights can be ascertained before performance. But in this case the appellants desire to allege more, and to say that in a contract of this character, by which one consignee makes himself liable for the discharge of the whole cargo, including goods of other consignees, there is to be implied a term that the shipowner shall make exactly similar contracts with all other consignees, as a joint scheme of liability. It may be reasonable to make such contracts, but business necessity, not reasonableness, is the essential condition for such an implication. In my view, actual or necessary prevention, not the possibility of prevention arising from different contracts, is the test.

From this point of view it is regrettable that the learned judge stopped the facts as to actual prevention from being investigated. It is quite possible that the presence on the deck cargo of Baynes and Sherborne's transhipped cargo did delay the discharge; it is possible that the different date for commencing the lay days in Butt and Sons' case did effect the discharge of their deck cargo and delay the discharge, while there is a third shipper whose dates have not been investigated at all. Some parts of the learned judge's judgment suggests that he is finding prevention or delay as a fact, but he must have failed to remember that he had declined to take evidence on this point.

I should be ready to consider an application by the respondents to have the issue of actual prevention tried, on proper terms, as to costs thrown away. I should be the more ready to do this, as I am not aware of any previous case in which a consignee who has in fact discharged his goods within his lay days, as appears to be Butt and Sons' case here, has been held liable for the failure of other consignees to discharge their goods, and I am not favourably impressed with the way in which these clauses were inserted in the bills of lading.

But on the point under appeal I cannot hold that there is an implied term in these bills of lading that all other bills of lading by the ship shall be in exactly the same terms, and that the existence of one or more different bills, without proof of actual or necessary prevention of discharge thereunder, is sufficient to defeat the claim for demurrage. A judgment for the consignees, based on this ground, must be set aside, but, as I have said, I am ready to consider the question of the trial of the issue as to actual prevention on proper terms as to costs.

Bankes, L.J.—The appeal will be allowed with costs. If the respondents elect to accept the offer of a further hearing, the costs of the first hearing will be paid by the respondents in any event; the rest of the costs to abide the event of the second hearing. That will be on the pleadings in those actions. If the respondents do not desire a further hearing, the appellants will have the costs below.

Appeal allowed.

Solicitors for the appellants, *Thomas Cooper and Co.*

Solicitors for the respondents, *Trinder, Capron, Kekewich, and Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Wednesday, April 18, 1923.

(Before MCCARDIE, J.)

BALLANTINE AND CO. v. CRAMP AND BOSMAN. (*a*)

Sale of goods—Description—Average weight—Shipment in instalments—Rejection of instalment for non-compliance with description—Divisibility of contract.

By a contract dated the 8th Dec. 1920 the plaintiff sold to the defendants about 2500 carcases of frozen meat "weight under 72lb., average not to exceed 60lb." Each month's or steamer's contract was to be considered a separate contract, and payment was to be made against documents on arrival of steamer.

The plaintiffs shipped the carcases on two vessels, the W. which arrived on the 14th Aug. 1921, and the P. C. which arrived in Oct. 1921. The W. contained 1092 carcases of average weight of 62.81lb. The average weight of the carcases on the P. C. was 53.43lb. The average weight of the whole quantity shipped was under 60lb. The defendants rejected the carcases shipped on the W. on the ground that their average weight was over 60lb., and the plaintiffs brought an action for damages.

Held, that the defendants were entitled to reject the W. shipment. The words "average not to exceed 60lb." constituted part of the description of the goods. The contract was in substance an instalment contract under sect. 31 of the Sale of Goods Act 1893 as to which each instalment must conform to the description.

ACTION for the price of goods sold and in the alternative for damages for breach of contract. The parties concurred in stating the question of law arising in the following case for the opinion of the court.

By a contract in writing dated the 8th Dec. 1920 the plaintiffs sold to the defendant and the defendants agreed to buy from the plaintiffs certain frozen meat on the following terms :

Quantity ...	About 2500 carcases.
Description ...	New Zealand wethers and maiden ewes. (First grade of the brand or brands shipped.)
Weight ...	Under 72lb. Average not to exceed 60lb.
Price ...	8¾d. per lb. c.i.f. London.
Shipment ...	Not later than the 30th June 1921.

The contract was a typewritten form filled up as to quantity, description, weight, price and shipment as above set out, and thereon were the following terms signed at the foot by the plaintiffs and signed as confirmed by the defendants.

Each month's or steamer's contract to be considered as a separate contract. Insurance to be effected under conference clauses for not less than 2 per cent. above invoice value (strikes, riots, civil commotions, and war risks excepted and at buyer's risk and charge). Payment nett cash against documents on arrival of steamer or steamers at port of discharge or approximate due date thereof, ship lost or not lost, on Colonial (shipping) weights. Colonial weights and grading for quality to be accepted as final with all liberties as per bill of lading. This contract is subject to *force majeure* and strikes. Not liable for non-delivery or delay due to fires, strikes, lock-outs, breakdowns, war government, or government's action. Any disputes arising under this contract to be settled by private treaty if possible, failing which by arbitration in the usual manner. Notice of claims (if any) to be handed to us in writing within twenty-one days after final discharge of vessel carrying the goods.—L. C. BALLANTINE AND CO.—We confirm the above, CRAMP AND BOSMAN.

By letters dated the 6th and 30th May and the 6th June 1921 the plaintiffs notified to the defendants shipments against the said contract per steamship *Whakatane* and steamship *Port Caroline* subject to revision upon receipt of documents and the plaintiffs in fact shipped from New Zealand goods in purported compliance with such contract in the following manner :

Date.	Ship.	Quantity.	Weight lbs.	Average per Carcase.
1921. 11th May / 10th June	Steamship *Whakatane*	1,092	68,597	62·81
23rd May	Steamship *Port Caroline*	1,494	79,820	53·43
	Total ...	2,586	148,417	57.77

The carcases shipped on the steamship *Whakatane* were shipped under bills of lading dated as follows :

Date.	Number of Carcases.	Weight lbs.	Average per Carcase.
11th May, 1921 ...	110	7,438	67·61
11th ,, 1921 ...	117	6,238	53·31
10th June 1921 ...	428	25,943	60·61
10th ,, 1921 ...	402	27,317	67·95
10th ,, 1921 ...	35	1,661	47·46
	1,092	68,597	62·81 av.

The steamship *Whakatane* arrived in London on or about the 14th Aug. 1921 and on the 15th Aug. 1921 the plaintiffs twice tendered the shipping documents relating to the said shipment to the defendants and required the defendants to pay 2500*l.* 18*s.* 7*d.* the price of the same. The defendants refused to take up the documents or pay for the goods comprised in such shipment on the ground alleged in a letter from the defendants to the plaintiffs dated the 16th Aug. 1921 that the average weight of the goods was above 60lb., being the average weight stipulated in the contract and that the tender was therefore a bad tender. The defendants did not rely on any other ground for claimnig to repel the tender.

The plaintiffs contended that the tender was a good tender, and the plaintiffs after notice to the

(*a*) Reported by J. S. SCRIMGEOUR, Esq., Barrister-at-Law.

defendant sold the said goods when the same realised nett, 1990*l.* 17*s.* 4*d.*

The steamship *Port Caroline* arrived in London on the 4th Oct. 1921, and on or about the said date the plaintiffs tendered the shipping documents relating to the said shipment to the defendants. The defendants duly took up the said documents and paid to the plaintiffs the said price.

The wholesale prices current in mid-August 1921 for frozen New Zealand sheep were shown in the printed list of weekly quotations issued by the British Incorporated Society of Meat Importers dated the 19th Aug. 1921 which list was annexed to and formed part of the case.

In consequence of the defendants' refusal to accept the tender of the documents referred to above arbitrators and an umpire were appointed with a view to arbitration in pursuance of the contract. Subsequently, however, the parties agreed that the dispute should be determined by the court, and that a case should be stated for the opinion of the court under Order XXXIV., of the Rules of the Supreme Court. The questions for the opinion of the court were :

(1) Whether on the true construction and effect of the said contract and in the events above stated the defendants were entitled to reject the said tender. If the court should be of opinion in the negative of the said question (1) then judgment should be entered for the plaintiffs for 510*l.* 1*s.* 3*d.*, and costs to be taxed.

(2) If the defendants' contention were held to be right, whether upon the true construction and effect of the contract and in the events stated the plaintiffs were entitled to recover from the defendants pro rata damages in respect of such of the consignments made on the steamship *Whakatane* the average weight of which was under 60lb.

If the court should be of opinion in the affirmative of the said question (1) and the negative of question (2) then judgment should be entered for the plaintiffs for 20*l.* 9*s.* 1*d.* with costs to be taxed.

P. B. Morle for the plaintiffs.

T. E. Haydon for the defendants.

McCardie, J.—This is a special case stated by the parties under Order XXXIV. of the Rules of the Supreme Court, and it raises several points of practical interest upon the effect in law of a contract made between the parties. The bargain related to the sale of frozen meat. It was made in writing on the 8th Dec. 1920, when the plaintiffs sold to the defendants a quantity of 2500 carcases of New Zealand sheep. The material terms of the contract are these : first, the weight of the carcases was to be under 72lb. ; secondly, the average was not to exceed 60lb. ; shipment to be not later than the 30th June 1921. Amongst the further terms were these : " Each month's or steamer's contract to be considered as a separate contract " ; and insurance was to be effected at a certain amount ; and then " payment net cash against documents on arrival of steamer or steamers at port of discharge." Then, omitting several immaterial provisions, there is this further statement, that " Notices of claims, if any, to be handed to us " that is, the vendors, " in writing within twenty-one days after final discharge of vessel carrying the goods." Now that is the bargain, and the facts are most concisely stated in this special case. What happened was that the vendors sent forward a quantity of meat in two ships ; the first was the *Whakatane* steamship, and she carried 1092 carcases of a total weight of 68,597lb. at an average of 62.81lb. per carcase. The other vessel was the *Port Caroline*, and she carried 1494 carcases of a total weight of 79,820lb. at an average per carcase of 53.43 lbs. If you take the two ships together, the average per carcase was 57.77. But now what happened was this, that the *Whakatane* arrived in London in the month of Aug. 1921 ; all her goods had been shipped within the contract period, and the day after the arrival of that vessel the plaintiffs tendered certain documents to the defendants and required the defendants to pay 2500*l.* 18*s.* 7*d.* for them. The contract, as is clear, was c.i.f. contract. The documents revealed the fact that the meat upon the carcases was of the average weight of 62.81lb. per carcase. That is above the average of 60lb. mentioned in the contract ; and thereupon for that reason the buyers refused the documents. They alleged that the tender was bad. The plaintiffs did not accept the view of the buyers. They sold the goods, with the result that a loss accrued of 510*l.* 1*s.* 3*d.*, which is now sought as damages against the buyers. That is what occurred with regard to the *Whakatane*. Two months later, namely, on the 4th Oct. 1921, the *Port Caroline* arrived, and she carried on board the goods I have mentioned of the average weight of 53.43lb. per carcase. The plaintiffs tendered the documents to the defendants ; the defendants took them up and paid for them, and no further question arises as to those.

The serious question at issue is whether or not the buyers were entitled to refuse the tender of the *Whakatane* documents and goods. The argument for the sellers is that the court must look, not at the average weight of the goods on board the *Whakatane*, but must look also at the average weight of the goods on the *Port Caroline* which arrived a couple of months later. The buyers, on the other hand, say that upon the proper intrepretation of this bargain regard must be had to the average weight of the meat upon the *Whakatane* as tendered to them in August, 1921. The point at issue, in my view, is not peculiar to this contract at all, because it is a point that is common to a vast number of contracts of this description. The question is what is the proper meaning of this bargain ? In the first place I take it to be clear that the words " average not to exceed 60lb." constitutes a part of the description of the goods. That seems clear upon the cases of *Manbre Saccharine Company* v. *Corn Products Company* (120 L. T. Rep. 113 ; (1919) 1 K. B.

at p. 20), and *Moore and Co. Limited* v. *Landauer and Co.* (125 L. T. Rep. 372 ; (1921) 2 K. B. at p. 524).

The next question is as to whether this contract is to be deemed a divisible contract and divisible in the sense that with respect to each part of the contract, each stage of performance, the sellers must comply with their obligations. In my view, this contract is in substance an instalment contract. The effect of the words " each month's or steamer's contract to be considered as a separate contract " is to provide that under the one contract there may be different stages of performance. It is for practical purposes to be deemed an instalment contract within sect. 31 of the Sale of Goods Act 1893. With regard to a contract of that description, I think Mr. Benjamin's book rightly describes it at p. 816 of the sixth edition as a contract which is a contract for the whole quantity, though it is divisible in performance. If it be a divisible contract, then there arises a question as to the obligations of the vendors with regard to each stage of the performance, and in my opinion the burden rests upon the vendor, if he elects, as he may, to fulfil his contract by different steamers, to provide that the shipment on each steamer shall comply with the requirement that the average is not to exceed 60lb. Unless that effect be given to it, I am unable to see how the contract could satisfactorily work in practice. It is to be noticed that the last clause of the contract is " notice of claims, if any, to be handed to us in writing within 21 days after final discharge of vessel carrying the goods," and it is very difficult to see how that clause could apply at all if the contention of the vendor is correct. Further, if one takes another illustration, namely, the case where goods are delivered in five instalments, it would be of interest to reflect upon the position of the buyer if the contention of the vendor is correct. Suppose the first instalment was 65lb., the second, third and fourth instalments a like weight, what is the buyer to do ? Is he merely to hope that the average may conceivably be made up by the fifth instalment to be delivered by the vendor ? Quite apart from such an illustration as that, it seems to me that one must look at the practical working of this matter. The buyer would resell ; he would make a sale to arrive. And it seems to me that if, as is quite common, those resales are to be made the buyer would require with respect to each shipment the fulfilment of the obligation that the average is not to exceed 60lb. Both upon the wording of the contract and upon the practical considerations applicable to it, illustrated by what I have just said, I am of opinion that the buyers were right in this case in rejecting the goods.

I do not think I need refer to the points which were discussed in the very interesting and able argument of Mr. Morle as to the position of the buyers if they were not entitled to reject any one cargo on the ground that the average was not in accordance with the contract but were bound, as he suggests, to keep over the right of rejection until the last of the instalments had been delivered. The impracticability of that is obvious when, as pointed out by Mr. Haydon, it is seen that the period for shipment by the vendor may range from December 1920, until the end of June 1921. Various decisions have been quoted before me upon this point. I shall not discuss them in detail, but I will mention them for the reason which I stated in the course of the argument. There is first of all the English case of *Jackson* v. *Rotax Motor and Cycle Company* (103 L. T. Rep. 411 ; (1910) 2 K. B. 937). Then the Scottish case of *Aitken* v. *Boullen* (10 Fraser, 490 ; (1908) S. C. 490), and also *Molling and Co.* v. *Dean and Son Limited* (18 Times L. Rep. 217). I mention those cases because I think it is desirable that it should be known that they have been referred to in the argument before me, and I also for that purpose only mention *Pohnghi Brothers* v. *Dried Milk Company* (10 Com. Cas. at p. 42) ; and *Biddell Brothers* v. *E. Clemens Horst Company* (103 L. T. Rep. 661 ; (1911) 1 K. B. 221) has also been mentioned for consideration by the court. For the reasons given, therefore, I am of opinion that upon the main point the buyers are right.

But there is a third point and a most ingenious point raised by the sellers here. The sellers say : " Assuming we are wrong on the main point, yet there is this further question that we desire the court to decide ; and it arises upon this fact, that although the average weight of the *Whakatane* cargo was over 62lb. per carcase, yet in fact that cargo was represented by five bills of lading, and the five bills of lading represented lots of goods of varying average weights ; the highest weight was 67lb. per carcase, but the average weight of the lots of meat included in two of the bills of lading was 47lb. and 53lb. respectively ; and, therefore," say the sellers, " we ought to get damages because you refused the tender of the various bills of lading, two of which include meat of an average weight which accorded with the contract." That is, as I have said, a most ingenious point, but in my humble opinion it is an unsound one ; the steamer's contracts in substance were one ; various bills of lading were given for convenience' sake, but the shipments were one shipment by this steamer, the *Whakatane.* It was notified by the sellers' letter as one shipment by that boat ; one tender of the documents was made. There was no division indicated by the vendors at all. The tender was an indivisible tender of a given number of documents for which the price of 2500*l.* 18*s.* 7*d.* was demanded. In my opinion, there was no business or legal element of divisibility in that proffer of documents, and for that reason I am of opinion that the vendors must also fail upon this subordinate point. So far as authority goes, I will only say that *Reuter* v. *Sala*, reported in 4 C. P. Div. 239, so far as it is relevant to the matter before me, is in favour of the buyers rather than in favour of the sellers. On

this matter also I may add, for the purpose of which counsel are aware, that the court has had the advantage of a discussion upon the decision of the Court of Appeal in *Brandt* v. *Lawrence* (1 Q. B. Div. 344).

The result is, therefore, upon these questions put before me, I am of opinion that there must be judgment for the defendants with costs.

Action dismissed.

Solicitors: *Constant* and *Constant*; *Thos. Wm. Hall* and *Sons*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Friday, March 23, 1923.

(Before HILL, J. and ELDER BRETHREN.)

THE PORTREATH. (*a*)

Salvage—Services by the crew—Abandonment—Order by master to "abandon ship"—Subsequent determination of master to return to ship—Call for volunteers—No order to crew to return—Contract of service—Right of crew to salvage remuneration.

The crew of a vessel are only entitled to salvage remuneration for services rendered to their vessel when she has been finally abandoned without hope of recovery, and their contract of service is thus dissolved. It is not sufficient that the master has at first given an order to abandon the ship, and the crew have in fact left her, to bring about a final abandonment and dissolution of the seamen's contracts. If, upon maturer judgment, the master considers that the vessel is not sinking, and decides to return to her, there has been no final abandonment, and the fact that he calls for volunteers, instead of giving an order to the crew to return, has no bearing upon the question whether an end has been put to the crew's contracts of service.

The Florence (1852, 16 *Jur.* 572) *and* The Warrior (1862, Lush. 476) *followed.*

CONSOLIDATED SALVAGE ACTIONS.

The plaintiffs were (1) the owners, master, pilots on station duty, and crew of the steam pilot cutter *Ilona*; (2) the second officer and seven members of the crew of the steamship *Portreath*. The defendants were the owners of the *Portreath*, her cargo and freight.

Shortly before midnight on the 25th-26th Oct. 1922, when the *Portreath*, a vessel of 3726 tons, in the course of a voyage from Buenos Aires to Avonmouth with a cargo of grain, was lying at anchor in the Bristol Channel about one mile from the Breaksea Light vessel, she was run into by the American steamer *Remus* and extensively damaged, a huge hole being made in her starboard side from about the break of the forecastle head leading aft. A quantity of her cargo was washed out and the remaining grain absorbed water. From about 5.30 a.m. a Dutch vessel stood by, and about daybreak the *Ilona* arrived. The master of the *Portreath* then noticed that his vessel was taking a list, and he accordingly gave orders to lower the boats and abandon her, saying, as the plaintiffs alleged: "Abandon her; she's sinking fast." The *Portreath* was then much down by the head, and the master and crew accordingly after rowing round for a time, went on board the *Ilona*. Shortly afterwards the master, realising that his apprehensions were unfounded, determined to return to the *Portreath*, and called for volunteers to return to her with him. The second officer and fifteen out of twenty-eight members of her crew, including the seven plaintiffs in addition to the second officer, agreed to return. They did so, and, with the assistance of the *Ilona* and the Dutch vessel, the *Portreath* was subsequently beached in safety.

Stephens, K.C. and *G. P. Langton* for the plaintiffs, the owners, master, pilots on station duty, and crew of the *Ilona*.

Dumas for the plaintiffs, the second officer and seven members of the crew of the *Portreath*.—These plaintiffs are entitled to salvage remuneration. The vessel was abandoned by the order of the master, and the seamen's contracts of service were thereby dissolved: (*The Florence*, 1852, 16 Jur. 572). [HILL, J.—There must be abandonment *sine spe revertendi*.] Had the contracts of service still been operative the master could have ordered his crew to return. He did not do so, but called for volunteers. There was no *spes recuperandi*. There was actually a consultation amongst the ship's officers before leaving, and it was not until later that the master decided to return. [Reference was made to *The Warrior* (1862, Lush. 476).] No magistrate would have convicted these seamen if they had refused to return. [HILL, J.—Were they not paid their wages on the 26th?] Yes, and they worked upon that day.

Bateson, K.C. and *Noad*, for the defendants, referred to *The Neptune* (1824, 1 Hagg. Adm. 227). [They were stopped.]

HILL, J. (after stating the facts and dealing with the services of the pilot cutter *Ilona*, in respect of which he awarded 1260*l*., continued:) The claim by the eight members of the crew of the *Portreath* raises important and quite distinct issues.

In my opinion there is no foundation for this claim. The plaintiffs are members of the crew, and Mr. Dumas, who has argued the case with his usual ability, recognised that they can only claim as salvors if the circumstances were such as to put an end to their contract of service. He contended that the contract of service was at an end when the master, apprehensive that the ship would sink, gave orders to "abandon ship." Mr. Dumas said that his contention was further borne out by the fact that ten or

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

fifteen minutes later, when the master was minded to return to the ship, he did not order the crew to go back but called for volunteers.

In my view it would be most dangerous to regard seamen, owing a duty under a contract, as entitled in such circumstances to convert themselves into salvors, and I have come to the conclusion, dealing with the case without any reference to the authorities, that there is no justification for saying that there was anything which determined the plaintiffs' contract of service. But I have a better guide than my own view on the matter, because the case seems to me absolutely covered by the authorities cited. In the first place there is the old general principle of a seaman's duty, for which I was referred to the judgment of Lord Stowell in *The Neptune* (1 Hagg. Adm. 236): "What is the obligation," his Lordship said, "which a mariner contracts with the ship in which he engages to serve? It is not only to navigate her in favourable weather, but likewise in adverse weather inducing shipwreck, to exert himself . . . to save as much of the ship and cargo as he can. It is part of his bounden duty, in his character of a seaman of that ship. It is certainly a laborious, and probably a dangerous portion of his service, but certainly not less a service, and a meritorious service on those accounts. In performing that duty he assumes no new character. He only discharges a portion of that covenanted allegiance to that vessel which he contemplated, and pledged himself to give in the very formation of that contract which gave him his title to the stipulated wages. I ask, is he to have no recompense for this continuation of his service in its most formidable shape, which that service to that ship can assume? Nobody, I think, ventures to say that. But, say they, he should have it by way of salvage, or on *quantum meruit*. There are, I think, decisive objections to both these views of the matter. The doctrine of this court is justly stated by Mr. Holt—that the crew of a ship cannot be considered as salvors. What is a salvor? A person who, without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of the ship; not so the crew, whose stipulated duty it is (to be compensated by payment of wages) to protect that ship through all perils, and whose entire possible service for this purpose is pledged to that extent. Accordingly we see in the numerous salvage cases that come into this court the crew never claim as joint salvors, although they have contributed as much as, and perhaps more than, the volunteer salvors themselves. I will not say that in the infinite range of possible events that may happen in the intercourse of men, circumstances might not present themselves that might induce the court to open itself to their claim of a *persona standi in judicio*. But they must be very extraordinary circumstances indeed, for the general rule is very strong and inflexible, and they are not permitted to assume that character."

Then I come to the consideration of the application of that principle by Dr. Lushington in two cases. In *The Florence* (16 Jur. 572, 573) he said that the question is "whether when a merchant ship is abandoned at sea *sine spe revertendi aut recuperandi*, in consequence of damage received and the state of the elements, such abandonment taking place *bonâ fide* and by order of the master, for the purpose of saving life, the contract entered into by the mariners is by such circumstances entirely put an end to, or whether it is merely interrupted, and capable, by the occurrence of any and what circumstances, of being again called into force." He then considers the various circumstances under which the contract can be determined, and says that in the first place the abandonment must take place at sea and not upon the coast. I am satisfied that in this case what occurred was "at sea" within the meaning of Dr. Lushington's judgment. Then the learned judge says: "Secondly, the abandonment must be *sine spe revertendi;* for no one would contend that a temporary abandonment, such as frequently occurs in collisions, from immediate fear, before the state of the ship is known, would vacate the contract. Thirdly, the abandonment must be *bonâ fide* for the purpose of saving life. Fourthly, it must be by order of the master, in consequence of danger by reason of damage to the ship and the state of the elements."

Dr. Lushington contemplates precisely this case. It was not, it is true, an abandonment, a leaving of the ship in the moment immediately after the collision, but it was in consequence of the collision, at a time when the master supposed that the ship was exposed to risk of sinking; and in order to save himself and his crew he gave the order to take to the boats. In *The Warrior* (Lush. 476, 482), in discussing the ways in which a seaman's contract of service may be dissolved, and leaving aside the question when it is dissolved by warlike capture, the learned judge says: "It may be dissolved by final abandonment of the ship or by the act of the master giving the seaman a discharge." "With respect to the abandonment," the learned judge continues, "I should be sorry to go the length of saying, looking at the facts, that there was such an abandonment of the ship as would have justified the seamen in saying that their contract was at an end, and that they were not bound to render further assistance. If the case rested entirely upon the ship having been finally abandoned, I should be inclined to come to the conclusion that the abandonment has not been proved. Where the circumstances are doubtful, the court will be slow to infer that property of great value has been abandoned, unless it is proved that there was no reasonable hope of recovery. Abandonment is abandonment *sine spe recuperandi*."

In my view, when one finds a master giving orders to his crew to abandon ship and go on board another vessel because he thinks

his ship is sinking, and then, within a short time, on maturer judgment, he arrives at the conclusion that the ship is not sinking, there is no foundation for saying that there was any final abandonment of the ship. There was no dissolution, no determination of the contract of service. The fact that the master called for volunteers instead of ordering the crew to go back appears to me to have no bearing on the question. The claim of these plaintiffs will be dismissed with costs.

Solicitors for the plaintiffs, *Wm. A. Crump* and *Son*, agents for *Gilbert Robertson* and *Co.*, Cardiff.

Solicitors for the defendants, *Downing*, *Middleton*, and *Lewis*, agents for *Downing* and *Handcock*, Cardiff.

PRIZE COURT.

Feb. 1 *and* 26, 1923.

(Before Sir HENRY DUKE, P.)

THE WILHELMINA (*a*).

Prize Court—Limitation of actions—Alleged illegal seizure of trawler—Confiscation of the cargo—Detention—Claim for declaration of illegality of seizure and detention—Claim against Procurator-General as representative of captors—Claim lodged more than six months after the cause of action arose—Public Authorities Protection Act 1893 (56 *&* 57 *Vict. c.* 61).

The Public Authorities Protection Act 1893, *by which no action will lie against any person for any act done in pursuance or execution or intended execution of any public duty or authority, has no application to proceedings in the Prize Court.*

In an action against the Procurator-General alleging illegal seizure and detention of a certain trawler and her cargo, brought more than six months after the cause of action in respect thereof arose,

Held, that the claim was not statute barred by reason of the Public Authorities Protection Act 1893.

THE claimants were the owners and crew of the Dutch trawler *Wilhelmina* and her cargo, which were seized by British cruisers on the 26th June 1916 at a point some twenty-nine miles south of the Icelandic fishing grounds, when the vessels were returning to Ymuiden, Holland, on the conclusion of a fishing voyage. The *Wilhelmina* was taken to Peterhead, where she was required to discharge her cargo of fish, the proceeds of which were in court, and subsequently to Dundee, where she was released and permitted to return to Holland.

On the 10th Feb. 1922 the writ in the present action was issued against the Procurator-General, representing the captors, claiming a declaration that the seizure and detention of the *Wilhelmina* was illegal and that her owners were entitled to damages in respect thereof. and for consequential relief. The Procurator-General by his answer raised. amongst other defences, the defence that the action was barred by sect. 1 of the Public Authorities Protection Act 1893.

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

By sect. 1 of the Public Authorities Protection Act 1893, it is provided :

Where after the commencement of this Act any action, prosecution or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority or in respect of any alleged neglect or default in the execution of any act, duty or authority, the following provisions shall have effect : (*a*) The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of . . .

The question of the application of the statute was tried as a preliminary issue.

Bateson, K.C., *J. H. Harris*, and *G. St. C. Pilcher* for the claimants.—The Public Authorities Protection Act does not apply for the following reasons :—(i.) These proceedings are not an " action or other proceeding " within the meaning of the Act. (ii.) The claim is against the captor. The Procurator-General, representing the captor, is not a public authority. (iii.) Assuming the act of the captor to be wholly illegal, it could not therefore have been done in the execution or purported execution of a public duty. An " action " is defined by sect. 100 of the Judicature Act as a civil proceeding. Prize proceedings are not " civil " proceedings, and therefore statutes of limitation do not apply to them :

Story's Principles and Practice of Prize Courts (Pratt's edition, at p. 40) ;
The Mentor, 1799, 1 c. Rob. 179 ;
The Huldah, 1801, 3 c. Rob. 235.

The Act is strictly construed and has been held not to apply to a number of different classes of actions, *e.g.*, a prerogative writ of *mandamus* (see *Rex* v. *Port of London Authority*, 120 L. T. Rep. 177 ; (1919) 1 K. B. 176), a writ of *certiorari* (see *Roberts* v. *Metropolitan Borough of Battersea*, 110 L. T. Rep. 566), claims for compensation under the Lands Clauses Acts (see *Delany* v. *Metropolitan Board of Works*, 16 L. T. Rep. 386 ; L. Rep. 2 C. P. 532 ; affirmed 17 L. T. Rep. 262 ; L. Rep. 3 C. P. 111), an action *in rem* (see *The Burns*, 10 Asp. Mar. Law Cas. 424 ; 96 L. T. Rep. 684 ; (1907) P. 137 ; *The Longford*, 6 Asp. Mar. Law Cas. 371 ; 60 L. T. Rep. 373 ; 14 Prob. Div. 34 ; an arbitration (see *Glasgow Corporation* v. *Smithfield Argentine Meat Company*, 1912, S. C. 364, 373). There was formerly a limitation period of six months provided by sect. 51 of the Naval Prize Act 1864, but that section did not apply to proceedings like the present proceedings. Sect. 51 is admittedly repealed with parts of other Acts by sect. 2 of the Public Authorities Protection Act. The claim is against the captor, and the Procurator-General stands in the same position as the captor for all purposes :

The Oscar II., 15 Asp. Mar. Law Cas. 14; 123 L. T. Rep. 474; (1920) A. C. 748.

The detention was wholly illegal, and the act of the captor is not, therefore, an act in execution or intended execution of any public duty.

Sir *Douglas Hogg* (A.-G.), Sir *Thomas Inskip* (S.-G.), and *Lilley* for the Procurator-General.—As to the first point, "action" in sect. 100 of the Judicature Act means "civil" as opposed to criminal proceedings. An "action" means an action for damages: (see Bankes, L.J., in *Rex* v. *Port of London Authority, sup.*). The other cases cited are distinguishable on the ground that there was no action against "any person." It has been held that the Act applies to officers of the Crown:

The Danube II., 15 Asp. Mar. Law Cas. 187; 125 L. T. Rep. 156; (1921) P. 183.

This action must, therefore, if it be against the captor, be against an officer of the Crown, who is a protected person; for otherwise it is an action against the Crown, against whom no action lies. The repeal of sect. 51 of the Naval Prize Act 1864 by sect. 2 of the Public Authorities Protection Act indicates an intention in the Legislature that proceedings in prize should be made subject to the Act. [Reference was made to *The Zamora*, 13 Asp. Mar. Law Cas. 330; 114 L. T. Rep. 626; (1916) 2 A. C. 77.]

Bateson, K.C. replied.

Sir HENRY DUKE, P.—On the 10th Feb. 1921 the plaintiffs, the owners and crew of the Dutch steam trawler *Wilhelmina*, instituted by a writ in prize, to which His Majesty's Procurator-General was made defendant, a cause in which they claimed declarations that a certain seizure and detention of the *Wilhelmina* were illegal and that they are entitled to damages in respect thereof, and for consequential relief. The writ was issued in pursuance of the Prize Court Rules of 1914, Orders II. and V. The Procurator-General appeared, and the plaintiffs delivered a petition whereby they allege that in June 1916 the *Wilhelmina*, being a neutral vessel with no contraband on board, was taken as prize by one of His Majesty's ships on the high seas in a voyage from the Iceland fishing grounds to Ymuiden in Holland, was placed under a prize crew and brought into Lerwick, and from thence successively ordered to Kirkwall, Peterhead, and Dundee, and detained until Sept. 1916; that her perishable cargo of fish had to be jettisoned and that the remainder, consisting of salted fish and livers in barrels was sold and the proceeds paid into court. The petition concludes by praying the declarations set out in the writ, with an alternative claim for payment to the plaintiffs of the proceeds of the alleged sale.

The Procurator-General by his answers justifies the acts complained of in the petition on grounds which would appear *primâ facie* to warrant a seizure and detention in prize, and a sale under the Prize Rules, and pleads further as to the proceeds of sale his consent before writ to the release of such proceeds to the plaintiffs "subject to the proper deductions shown in the accounts of the Admiralty Marshal." The Procurator-General further pleads by par. 4 of his answer, as follows: "In answer to the claims made by the petition herein other than the claims to the said proceeds the defendants will rely upon the provisions of the statute 56 & 57 Vict. c. 61, s. 1." The statute so pleaded is the Public Authorities Protection Act 1893.

The question of law raised by the answer of the Procurator-General has been brought to hearing and is now to be disposed of.

The limitation of actions contained in the Public Authorities Protection Act 1893, and relied upon by the Procurator-General, is expressed so far as is material here, in the words following: "Where after the commencement of this Act any action prosecution or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such act, duty or authority . . . the action prosecution or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of or in case of a continuance of injury or damage within six months next after the ceasing thereof."

No question was raised at the hearing as to the precise mode in which the claim of the plaintiffs has been framed in their writ and petition, the object in view on the part of the defendant being, as I understand, to determine whether the claims in prize of the plaintiffs are barred by the statute. The principal points discussed were these: Is this cause in prize an action or proceeding within the meaning of the statute? Is the Procurator-General within the protection of the statute? The plaintiffs alleging that the acts complained of were wholly illegal, does the statute in any event apply?

By reason of the payment into court of the proceeds of the sales in question the jurisdiction in prize has undoubtedly attached. As is pointed out in the judgment of the Privy Council in *The Zamora* (13 Asp. Mar. Law Cas. 330; 114 L. T. Rep. 626; (1916) 2 A. C. 77, at p. 108). "The jurisdiction of the Prize Court attaches as soon as there is a seizure in prize. If captors in prize do not promptly bring in property seized for adjudication the court will at the instance of a party aggrieved compel them to do so, and from the moment of seizure the rights of all parties are governed by international law." Under the circumstances of the case if any question had arisen as to the form of the plaintiffs' claim I should no doubt have so dealt with it as to secure that the broad question raised by the plea of the statute could be determined.

In the course of the argument numerous decisions of English courts of municipal jurisdiction as to the construction and scope of the statute in question were cited on both sides. The Attorney-General relied in particular upon the judgment in *The Danube II.* (15 Asp. Mar. Law Cas. 187; 125 L. T. Rep. 156; (1921) P. 183), for the proposition that a commissioned naval officer in the service of the Crown acting in the course of his duty is a person acting in the execution of a public duty or authority and entitled to the protection of the statute.

Upon the question of construction reference was made also to the definition of "action" in the Judicature Act 1873, s. 100, and in answer to an observation that statutes of limitation have not heretofore been deemed to apply to claims in prize the Attorney-General argued that the Public Authorities Protection Act 1893 falls outside of any presumption founded on the old practice in prize by reason that it deals expressly with a limitation of actions which was enacted with regard to certain matters in this jurisdiction by the Naval Prize Act 1864.

A point was raised under the Prize Rules 1914, as to the extent of the liability of the Procurator-General in a cause where he becomes a party in substitution for a commissioned captor. On behalf of the claimant Mr. Bateson asserted a right of the plaintiffs to insist, if and when this case comes to be heard, upon alternative allegations that the seizure, detention, and sale in question were made in the exercise of belligerent rights, and that they were acts wilfully done in excess of belligerent rights. Upon this question the judgment of the Privy Council in the case of *The Oscar II.* (15 Asp. Mar. Law Cas. 14; 123 L. T. Rep. 474; (1920) A. C. 740, 753); and in particular the observations made by Lord Sumner with regard to the limits of the liability of the Procurator-General, were brought to my attention. For the purposes of the present interlocutory inquiry only I have assumed merely that the Procurator-General is before the court as the proper representative or the commissioned captor. I purposely postpone the question of possible liability of the Procurator-General in case a wilful excess should be proved against the captor, and of the limits within which, if at all, that liability may be enforceable.

The limitation of actions in the Naval Prize Act 1864 protects a person acting under the authority or in the execution or intended execution or in pursuance of the Act from liability to any action or proceeding for any alleged irregularity or trespass or other act or thing done or omitted by him under the Act, unless the action is commenced or the proceedings brought within six months. Among the provisions of the Act which are material for consideration in this case are sect. 16, which provides that every ship taken in prize and brought into port within the jurisdiction of the Prize Court shall forthwith be delivered to the Marshal; sect. 17, which, read together with sect. 31, imposes upon a captor of a ship or goods the duty with all practical speed to bring the ship's papers into the Registry and to make the proper affidavit; sect. 18, which provides that as soon as the affidavit as to ship's papers is filed, citations shall issue to show cause why ship (or goods) should not be condemned; sect. 23, which provides for the admission of claims of interest in ship or goods at any time before the decree in the cause; sect. 26–29, which deal with the sale and custody of proceeds of sale of ships and goods in prize; and sect. 32, which gives statutory effect to the old practice whereby a claimant is entitled to have a monition to proceed to adjudication in case a captor shall fail to institute or prosecute with effect proceedings for adjudication. Sect. 55 of the Act of 1864 is also material. It provides that nothing in the Act shall "take away abridge or control further or otherwise than is expressly provided by this Act the jurisdiction or authority of a Prize Court to take cognisance of and judicially proceed upon any capture seizure prize or refusal of any ship or goods and to hear or determine the same according to the course of Admiralty and the law of nations . . . or any other jurisdiction or authority of or exerciseable by a Prize Court." I pause here to say that no action has been taken in this court—or as it appeared elsewhere—to raise directly the question whether the enactments in sect. 17 to 22 of the Naval Prize Act 1864 have been obeyed by the captors of the *Wilhelmina*, and that the limitation enacted in sect. 51 of the Act is now no doubt an effectual bar to any effective proceeding in that behalf. Considerations arise with respect to this matter which are relevant to the question I have to determine.

That any statute of limitations extended to any proceeding in Prize before the Naval Prize Act of 1864 was not contended. I think it could not be. Lord Stowell's judgments in cases like *The Mentor* (1 C. Rob. 179), *The Huldah* (3 C. Rob. 235), and *The Susannah* (6 C. Rob. 48), make it clear, on the one hand, that the right to prosecute a claim in prize might be lost long before six years had elapsed after its accrual, and on the other hand that it might be brought to hearing long after six years had expired. My reference to six years relates, of course, to the principal limitation in the statute of 16 Jac. 1, c. 21. *The Mentor* was a case where sixteen years had elapsed between the alleged accrual of the right to claim in prize and the date when a monition to proceed to adjudication was brought before the court. Lord Stowell dealt with the matter in his judgment, at p. 180, in these words: "It is not within my recollection that a case of such antiquity has ever been suffered to originate in this court. I do not say that the Statute of Limitations extends to prize cases; it certainly does not."

The old rule as to the limitation of claims in prize is summed up in Pratt's Story on Prize, p. 40, and placed upon the grounds of natural justice on which it was no doubt always held to depend.

A certain sense of surprise is inevitable when, at this period in the administration of prize law, after more than eight years of the very active exercise of the jurisdiction in a time when both the Naval Prize Act of 1864 and the Public Authorities Protection Act 1893 are familiar statutes, the court is invited to declare that by virtue of provisions in our municipal law any proceeding in prize by a neutral against a commissioned captor in respect of a seizure, detention or sale of the ship or goods of such a neutral must be taken within six months of the accrual of the right of claim. This fact was among the reasons why I took time to consider my judgment.

Although the matter in question depends upon the construction of an Act of the Imperial Parliament, it seems to me to be of little use to examine decisions of the courts of municipal jurisdiction in order to ascertain, for example, whether a claim in prize is analogous to an action *in rem* like that in the case of *The Burns* (10 Asp. Mar. Law Cas. 424 ; 96 L. T. Rep. 684 ; (1907) P. 137) ; or to a claim for compensation under a statute, like that in the case of *Delany* v. *Metropolitan Board of Works* (17 L. T. Rep. 262 ; L. Rep. 3 C. P. 111) ; or to a claim in respect of a wrongful seizure under a Sanitary Act, like that of the *Glasgow Corporation* v. *Smithfield Meat Company* (1912, Sess. Cas. 364) ; or to an action to restrain a public authority by injunction, like *Fielden* v. *Morley Corporation* (82 L. T. Rep. 29 ; (1900) A. C. 133).

A claim in prize is not a claim under municipal law and cannot be instituted or determined before any municipal tribunal. In *Le Caux* v. *Eden* (2 Doug. 594, 600) the Court of King's Bench decided in 1789 in accordance with a view often previously declared by Lord Mansfield, that an action will not lie for false imprisonment where the imprisonment was merely in consequence of taking a ship as prize, although the ship has been acquitted. Buller, J. explained the decision in a famous judgment. Lord Mansfield, as the learned reporter says, "did not go into the argument at large, but adhered to the opinion he had so repeatedly and peremptorily given at *nisi prius* and probably thought it more decent to leave the discussion of it to the other judges." It was held by the Court of Queen's Bench in 1782 in the case of *Smart* v. *Wolff* (1789, 3 T. R. 323, 341) that "Where there is a question of prize a Court of Common Law cannot even take cognisance of a claim for freight." The ground of this judgment was that even the demand of freight "involves in it the question of prize, and whether or not the goods are contraband, and many other questions . . . all which must be subjected to the direction of some forum governed by the same law in all countries."

In any other court than a Court of Prize, a commissioned captor would seem to have no need of the protection of Statutes of Limitation against civil proceedings for any act done by him in good faith under his commission, unless a thing done or omitted contrary to the statutory directions in the Naval Prize Act 1864 could be made the subject of proceedings under municipal law. As to that I need not pronounce any opinion. The suppositious case of a wilful abuse of armed power by a commissioned captor need not be separately considered, for there certainly is jurisdiction in prize to deal with such a case, and, so far as I know, no authority to deal with it elsewhere. I assume for the purposes of to-day that an action or proceeding in respect of such an abuse of power would be no less and no more within the provisions of the Public Authorities Protection Act 1893 than any other action or proceeding in prize by a neutral claimant.

The first question to be considered here is whether, apart from its reference to the Naval Prize Act 1864, the Public Authorities Protection Act 1893 could be held to extend to proceedings in prize. This cannot be determined, in my view of the matter, upon a mere consideration of words, as, for example, by construction of the words "action or other proceeding" in the Act of 1893 in the light of the definitions in the Judicature Act 1873. Nor does the fact that the present proceeding was commenced by a writ carry the argument further. That is a matter of form. What is to be regarded is the scope and intended operation of the statute.

The prime characteristics of the jurisdiction in prize are first that it is exercised by a tribunal deemed by common consent of the civilised States of the World to be invested with authority to determine the rights of the subjects of any of them in respect of claims which arise out of captures at sea in the exercise of belligerent rights, and, secondly, that it is governed by international law. In the words of the commission which before 1864 conferred the jurisdiction in prize in this country, the court is "to proceed upon all and all manner of captures seizures prizes and reprisals of all ships and goods that are or shall be taken ; and to hear and determine according to the course of the Admiralty and the law of nations." This ancient jurisdiction is embodied in the statutory powers of the court as defined by the Prize Act 1864.

The position and functions of the Prize Court as a tribunal which administers international law in questions of belligerent right arising between its own State and foreign States and persons was considered in the Privy Council in the case of *The Zamora* (13 Asp. Mar. Law Cas. 144, 330 : 114 L. T. Rep. 626 ; (1916) 2 A. C. 77, 91), and is discussed in the judgment there delivered by Lord Parker : "Of course the Prize Court is a municipal court"—Lord Parker said—"and its decrees and orders owe their validity to municipal law. The law it enforces may therefore, in one sense, be considered a branch of municipal law. Nevertheless, the distinction between municipal law and international law is well defined. A court which administers municipal law is bound by and gives effect to the law as laid down by the Sovereign State which calls it into being. It

need inquire only what that law is, but a court which administers international law must ascertain and give effect to a law which is not laid down by any particular State, but originates in the practice and usage long observed by civilised nations in their relation towards each other, or in express international agreement."

To determine the scope and intent of the Public Authorities Protection Act 1893 with regard to the "action or proceeding" here in question it is necessary to bear in mind a principle of construction of statutes long established in the municipal law, namely, that *primâ facie* the British legislation is deemed to legislate only with regard to the rights and duties of subjects of the British Crown. Lord Hatherley, when he was Sir William Page Wood, in *Cope* v. *Doherty* (1858, 4 K. & J. 367, 390), defined this principle, which, as he held, "renders it proper for every Court of Judicature" in this country "in construing the enactments of the Legislature, to presume *primâ facie* and unless the contrary be expressed or be implied from the absolute necessity of the case, that the Legislature intended by its enactments to regulate the rights which should subsist between its own subjects, and not in any way to affect the rights of foreigners, whether by way of restricting or augmenting their natural rights." Lord Hatherley thus adopted and applied a judgment of Dr. Lushington in the case of *The Zollverein* (1856, Swa. 96), where the same principles had been invoked in order to determine whether by a statute relating to the instance jurisdiction in Admiralty the British legislation could be deemed by an enactment in general terms to have restricted "the privileges which foreign owners enjoy under the general law of nations."

That the effect of statutes of limitations as between litigants before municipal tribunals is deemed to be among the matters of procedure which are governed by the *lex fori* is not, I think, a relevant consideration in the present inquiry. Sir Albert Dicey says in his treatise on the Conflict of Laws, 2nd edit., p. 708, "while the principle that procedure is governed by the *lex fori* is of general application and universally admitted, it extends in its general acceptance only to proceedings under the law of this country by which the restriction upon the right of suit is imposed."

Reading the Public Authorities Protection Act 1893 with due regard to its purport and scope I am of opinion that that Act was primarily designed to deal, as it does effectually deal, with actions brought and proceedings taken in English municipal courts by public authorities and persons acting or purporting to act under public authority in England, and that it ought not to be held to apply to the claim here in question unless its provisions show an unmistakeable intention to that effect. To quote from Dr. Lushington's judgment in the case of *The Zollverein* (*ubi sup.*) there must be words "so clear that there can by no possibility be a mistake." But if there be found in the Public Authorities Protection Act 1893 a clearly expressed intention to include proceedings in prize within the limitations there enacted by the Legislature I have no other duty in the matter than to give effect to the Act. In the course of giving judgment in the case of *The Zamora*, Lord Parker declared the law thus: "It cannot, of course, be disputed that a Prize Court, like any other court, is bound by the legislative enactments of its own Sovereign State. A British Prize Court would certainly be bound by Acts of the Imperial Legislature. But it is none the less true that if the Imperial Legislature passed an Act the provisions of which were inconsistent with the law of nations, the Prize Court in giving effect to such provisions would no longer be administering international law. It would in the field covered by such provisions be deprived of its proper functions as a Prize Court." This last-mentioned conclusion strongly emphasises, in my mind, the importance of a careful examination of the statute now in question.

The express provision in the Public Authorities Protection Act 1893, which is relied upon as showing an intention in the Legislature to include proceedings in prize within the limitations established by the Act, is the provision in sect. 2. This section repeals "so much of any public general Act as enacts that in any proceeding to which the Act applies the proceeding is to be commenced within a particular time," and in particular the Naval Prize Act 1864—in part, namely, sect. 51. Sect. 51 of the Act of 1864 contains the limitation of actions which I have already cited. The words in the Act of 1893 which are to be considered are those then which impliedly, if not explicitly, describes an "action or proceeding" such as is specified in the Naval Prize Act 1864, s. 51, as a proceeding to which "this Act"—the Act of 1893—applies. It was argued by the Attorney-General that the words I have cited must be so construed as to bring within the limitation in the Act of 1893 any proceeding in prize against a commissioned captor, and by consequence if not *a fortiori* any proceeding in prize against the Procurator-General.

Now the limitation in the Act of 1864 for which the general provision of the Act of 1893 is now substituted was a limitation only upon actions and proceedings for things alleged to be done or omitted under the Act of 1864. That Act, with its various regulations as to things to be done in prize, no doubt imposes some statutory duties upon captors, as I have already indicated, as well as upon persons concerned in the matter of administration with which the statute deals. It does not, however, purport to deal with the substantive law of prize, the right of capture, and the relative interests of captor and claimant in captured goods. Sect. 55 of the Act, indeed, expressly provides that Courts of Prize shall as heretofore take cognisance of and judicially proceed upon any capture, seizure, prize or reprisal, and hear and determine the same according to the course of Admiralty and the law of nations.

How and where an action or proceeding for breach of duty under the Act of 1864 may be judicially dealt with it is not necessary to consider. *Primâ facie* such a delinquency falls to be adjudicated upon in a municipal court. At any rate, the statutory limitation upon such an action or proceeding which was expressed in the Act of 1864 is not a limitation upon a proceeding in prize, and the Act of 1893 does not in terms alter its character or extend its operation.

Since the Naval Prize Act 1864 did not introduce any limits of time for proceedings in prize, properly so called, and the Public Authorities Protection Act deals expressly with the limitation in that statute, does not in express terms extend its scope, and is not primarily or specifically an Act to alter the law of prize, I am satisfied the Legislature did not intend to make and has not by the Act of 1893 made the drastic change in the law of prize which has been contended for on behalf of the Crown in this case.

Whether the plaintiffs have been guilty of delay which ought on equitable grounds to bar their claims, and whether the captor as represented by the defendant has been prejudiced by the delay which has occurred so as to be entitled to be relieved from making any answer on the merits of these claims, are not among the material questions now to be determined. Nor have I to decide whether any innocuous lapse of time would have been an answer without more to a claim by the plaintiffs for a monition to the defendant as representing the captor of the *Wilhelmina* to proceed to adjudication. That matter which was mentioned at the hearing can be dealt with if and when it arises.

Upon the point of law raised by par. 4 of the Answer there must be judgment for the plaintiffs.

Solicitors for the plaintiffs, *Wm. A. Crump and Son.*

Solicitor for the defendants, *The Treasury Solicitor.*

Feb. 12 *and March* 5, 1923.

(Before Sir HENRY DUKE, P.)

IN THE MATTER OF THE NAVAL OPERATIONS IN MESOPOTAMIA 1914–15 (H.M.S. ESPIÈGLE AND OTHER VESSELS). (*a*)

Prize bounty—"Armed ship" of the enemy—Vessels without armament structurally attached to them—Evidence of number of persons on board—Naval Prize Act 1864 (27 *&* 28 *Vict. c.* 25), *s.* 42.

Enemy vessels carrying troops "armed or provided with arms" with which they could have fought and destroyed His Majesty's vessels (by which in fact they were destroyed or captured) are "armed ships" of the enemy within the meaning of sect. 42 *of the Naval Prize Act* 1864 *and the Order in Council of the* 2nd *March* 1915, *notwithstanding that there is no armament structurally attached to them.*

H.M. Submarine E. 14 (14 *Asp. Mar. Law Cas.* 533; 122 *L. T. Rep.* 443; (1920) *A. C.* 403) *applied.*

In the absence of other evidence as to the numbers of persons on board the enemy vessels destroyed, the court accepted the estimate of the claimants, believing it to have been made with the intention of accuracy.

MOTION for an award of prize bounty under sect. 42 of the Naval Prize Act 1864 and the Order in Council of the 2nd March 1915, putting that Act into operation, by Captain Wilfrid Nunn, R.N., and the officers and crews of various vessels and craft present at the capture or destruction of certain armed Turkish vessels, the following particulars of which were scheduled to the notice of motion:

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

Name of H.M. vessel engaged.	Date of capture or destruction.	Name of enemy vessel captured or destroyed.	No. of persons on board enemy vessel.	Amount of prize bounty at 5*l*. per head.
H.M.S. *Espiègle* ...	Nov. 9 1914	Turkish river gunboat ...	12	60*l*.
Do. ...	Nov. 19 1914	Do. ...	12	60*l*.
Do.	June 1 and 2 1915	Turkish gunboat *Marmans* ...	At least 66	330*l*.
H.M.S. *Odin* ...		Turkish armed vessels *Mosul* and *Bulbul*	At least 230	1150*l*.
H.M.S. *Clio*		Seven armed Turkish barges	At least 714	3570*l*.
H.M.S. *Shaitan* ...		Seven armed Turkish mahelas	At least 315	1575*l*.
Do. ...	June 3 1915	Armed Turkish vessel *Shetah*	20	100*l*.
H.M.S. *Comet* ...		Armed Turkish vessel *Samarra*	26	130*l*.
H.M.S. *Sumarra* ...		Armed Turkish lighter ...	At least 300	1500*l*.
H.M.S. *Lewis Pelly* ...		Three other armed Turkish lighters	At least 300	1500*l*.
H.M.S. *L.* 3 ...				
Three armed horse-boats				
H.M.S. *Shushan* ...	July 24 1915	Turkish river gunboat ...	12	60*l*.
			Total:	10,195*l*.

The facts fully appear from the judgment.

Wilfrid Lewis for the claimants.

C. W. Lilley, for the Procurator-General, contended that some of the many vessels in respect of which a claim was made were not "armed ships," since, although they were carrying troops armed with rifles, there was no armament structurally attached to them.

Cur. adv. vult.

March 5, 1923.—Sir HENRY DUKE read the following judgment: These are a series of claims for prize bounty under the provisions of the Naval Prize Act 1864, s. 42, on behalf of Captain Wilfrid Nunn, R.N., and the officers and crews of various sloops, launches, and armed horse-boats in His Majesty's service which were engaged during 1914 and 1915 in operations on the River Tigris and Euphrates against naval forces of the Ottoman Empire.

Prize bounty is payable under sect. 42 by distribution among such of the officers and crews of any of His Majesty's ships of war as are actually present at the taking or destruction of any armed ship of any of His Majesty's enemies of a sum calculated at the rate of 5*l.* for each person on board the enemy's ship at the beginning of the engagement. By sect. 2 of the statute the term "ship of war of His Majesty" includes any vessel of war of His Majesty and any hired armed ship or vessel in His Majesty's service. Captain Nunn, as senior naval officer of the Persian Gulf Division of the East Indies Station, had under his command at the time of the various operations here in question a diversity of vessels, including horse-boats, but there is no dispute that all the claimants' vessels come under the description of ships and vessels of His Majesty which are included in the provisions of sect. 42.

The operations for which prize bounty is claimed are the sinking and destruction of a Turkish river gunboat on the 9th Nov. 1914 by His Majesty's ship *Espiègle* near Mahammareh, on the Tigris, at a point distant some forty or forty-five miles from the river mouth; the sinking on the 19th Nov. 1914 by the *Espiègle* some miles further up the Tigris of a Turkish gunboat which was salved and became His Majesty's ship *Flycatcher*; the sinking of the Turkish gunboat *Marmans*, and capture of the steam vessels *Bulbul* and *Mosul*, and the capture of numerous barges and mahelahs on the 1st and 2nd June 1915 in the Tigris up river from the junction of the Tigris and the Euphrates at Qurnah; the capture on the 3rd June 1915, at Amdrah, some ninety miles up river beyond Qurnah, of various steam vessels and lighters; and the destruction on the 24th July 1915, at Nasiriyah on the Euphrates, some 120 miles beyond Basra, of a Turkish river gunboat. The distances I have stated, which are roughly estimated, indicate the extent of Captain Nunn's field of operations.

The questions raised at the hearing were whether the capture and destruction of the various vessels in respect of which the claims arise were effected solely by the respective claimants or were joint operations of naval and military forces; whether the ships and vessels captured and destroyed were "armed" within the meaning of the term as used in sect. 42; and what are the numbers in respect of which, if at all, these claims for prize bounty ought to be allowed.

The duty of the naval forces in Mesopotamia, in course of which the vessels under consideration were captured or sunk, was that of co-operation with the military expeditionary force under the immediate command of General Sir Charles Townshend. Apart from this general duty, Captain Nunn, as senior naval officer, was under the orders of the Commander-in-Chief on the East Indies Station and of the Board of Admiralty.

The claims made in respect of the sinking, on the 9th Nov. 1914, of a Turkish gunboat above Mahammareh Island, the sinking on the 19th Nov. 1914 of another gunboat higher up the Tigris, the sinking on the 1st June 1914 of the gunboat *Marmans*, and the sinking on the 24th July 1915 of an unidentified gunboat on the Euphrates, were not disputed at the hearing.

The allegation on the part of the Treasury that the events out of which the claims arise were joint acts of military and naval forces depended upon the scheme of the operations in which the same occurred and the terms in which the incidents themselves were described in military despatches, the pronouns "we" and "ours" being used as to each of them, though without anything of a precise nature to indicate that the language employed was used with regard to things actually done by troops as distinguished from naval forces. The issue here depends upon ascertaining what was in fact done. At the end of May 1915, when the Turkish forces retreated from Qurnah towards Basra, a combined advance of British troops and naval forces took place which covered the period of the disputed claims. The naval forces during this time reconnoitred for the army, conducted the transport operations when river transport was used, and from time to time successfully engaged Turkish naval forces and overtook and captured various vessels which were conveying Turkish troops and munitions, inclusive of field guns, bombs, mines, rifles and ammunition. Sir Charles Townshend was at material times, with an officer of his staff, on board of whatever vessel was being used by the senior naval officer as his flagship; military officers were distributed among other vessels in the command. The bridge of the flagship commanded the surrounding country, and the General used it for purposes of observation. His communication with his forces was, to some extent, maintained by wireless telegraphy from the flagship. He was kept informed of what was being done under Captain Nunn's command, but he did not direct and he took no part in the operations of the naval force. On board of one of the vessels was a detachment of an English regiment, who had been detailed for service under naval command, and who acted in the capacity of marines. The advance beyond Basra to Amdrah was one in which the Army and Navy closely co-operated, and I believe the knowledge that troops were advancing was an inducement to the surrender by Turkish forces of some of the captured craft. But no troops were upon the scene when any of the sinkings and captures in question were carried out, and I am of opinion upon like grounds of principle to those which I stated in the somewhat similar case of the *Sulman Pak* (15 Asp.

Mar. Law Cas. 504; 126 L. T. Rep. 607; (1922) P. 73), that these several sinkings and captures were solely effected by the respective claimants.

The question whether the lighters and mahelahs in question were armed vessels is perhaps not directly covered by the case of *H.M. Submarine E.* 14 (14 Asp. Mar. Law Cas. 533; 122 L. T. Rep. 443; (1920) A. C. 403), to which reference was made, but guidance is to be found there which helps in its determination. On behalf of the Crown it was submitted that only the gunboats manned by Turkish naval forces were armed vessels so as to be the subject of claim for prize bounty. The material fact with regard to the lighters and mahelahs here in question is that they were conveying armed troops who had at their disposal on board these vessels an abundance of weapons capable of being used for the destruction of His Majesty's ships and vessels which were in action against them. These troops with the weapons at their disposal could, without any exceptional display of skill or courage, have put out of action most, if not all, of the claimants. The substance of the question, as it was presented to me, was whether vessels so provided as these craft were must be excluded from the category of armed vessels by reason of the fact that they were not built for combatant action, and had not at the time of their capture any armament which was structurally attached to them. Inasmuch as the several vessels were ships of the enemy, and in each instance carried troops "armed, or provided with arms" with which they could have fought and destroyed His Majesty's vessels (by which in fact they were destroyed or captured), I must decide this question in favour of the claimants.

No accurate figures are available to establish the numbers of the persons who were on board the several enemy vessels described in the claim at the beginning of the various engagements. It is a matter of estimate, and, as I believe the estimate of the claimants to have been made with the intention of accuracy, I accept it.

There will accordingly be awards in favour of the several claimants of the amounts stated in the schedule of the Notice of Motion. That will be a total award of 10,500*l.*

Solicitors: *Woolley, Tyler,* and *Bury,* for *Stilwell* and *Son,* Navy and Prize agents, for Captain Nunn and others; *Treasury Solicitor.*

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, July 27, 1923.

(Before BANKES, SCRUTTON, and ATKIN, L.JJ.).

TENERIA MODERNA FRANCO ESPANOLA *v.* NEW ZEALAND INSURANCE COMPANY. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Insurance (Marine)—Practice—Loss of cargo—Action by cargo owners—Discovery—Affidavit of documents—Order for production of ship's papers—Manifest and stowage plan—Form of order.

Where a cargo-owner is suing underwriters on a policy of marine insurance, the affidavit of ship's papers, which the underwriters are entitled to require, is not limited to documents in the possession of the plaintiff or of other persons interested in the insurance, but should include all material documents in whosesoever possession they are.

APPEAL by the plaintiffs from an order of Roche, J., at chambers.

The action was by cargo owners against underwriters, the claim being for a total loss upon certain policies of marine insurance on hides per the steamship *Lila* from Barcelona to Genoa. The policies covered the goods from warehouse to warehouse (*inter alia*) against theft, pilferage and non-delivery, barratry of the master and mariners and all perils of a similar nature.

The goods were delivered at the dock at Barcelona to the ship's agent for shipment on board the *Lila*, and the plaintiffs alleged that they had been lost by one or more of the abovementioned perils. Bailhache, J. made an order for the production of the ship's papers in the Law Stationers' form, whereby it is ordered that the plaintiff "and all persons interested in these proceedings and in the insurance the subject-matter of this action" do produce and show to the defendants all documents relating to the insurance of the ship or cargo, and all documents relating to the alleged loss of the cargo; also various specially mentioned classes of papers, including log books and manifests, relating to matters in question in the action "which now are in the custody possession or power of the plaintiffs and the said other persons as aforesaid," and that "the plaintiffs and the said other persons as aforesaid do account for all such documents as were once but are not now in their or any or either of their possession custody or power." The plaintiffs in their affidavit of ship's papers did not disclose the ship's manifest or the stowage plan. The master of the *Lila* made an affidavit in which he deposed as follows: The ship having arrived at Barcelona and being ready to

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

load, one Klat, the principal owner of the ship, directed him to take his instructions relating to the steamer and her cargo from a man named Cohen; that Cohen tendered to him for signature bills of lading for hides and other goods which had not been shipped representing that the bills were not for goods shipped but for goods received for shipment, which would in due course be shipped, and that he in good faith and under pressure from Cohen signed them; the goods to which the above bills of lading related were never put on board; Cohen then proposed to him that after leaving Barcelona he should sink the ship and promised him a bribe of 3000*l.* or 4000*l.*; he refused to entertain the proposal, whereupon Cohen began to threaten him so that he dared not leave the ship, but he drew up a report of what had taken place and sent it to the British Consul at Barcelona. The defendants applied to Roche, J. for a further and better affidavit of ship's papers, and the learned judge made the order. The plaintiffs appealed.

J. Dickinson for the appellants.—Bailhache, J. was right, in accordance with the ordinary practice, in limiting the documents which the plaintiffs must produce, or account for, to those in the possession or control of persons interested in the insurance, the subject-matter of the action. In *Graham Joint Stock Shipping Company* v. *Motor Union Insurance Company* (15 Asp. Mar. Law Cas., at p. 449; 126 L. T. Rep., at p. 624; (1922) 1 K. B., at pp. 580–581), Scrutton, L.J. said that the assured "must make the fullest disclosure of documents that he has in his possession, and, if the documents are in the possession of other persons interested, he must do his utmost to get them and explain on affidavit, if he has not been able to get them, what he has done to get them, and why he has not been able to get them; and he must account on oath for the disappearance of documents which have been but are no longer in the possession of himself or persons interested." That passage limits the obligation to produce or account to documents in the possession of persons interested in the insurance. The manifest and stowage plan are presumably in the possession of the shipowner, who is not interested in the cargo or its insurance, and there is therefore no obligation to produce them. The general words in the earlier part of the order made by Bailhache, J. are controlled by the specific words of the later clause, and the production of any specific document mentioned in the later clause should only be ordered if it is in the possession of the plaintiffs or of some other person interested. According to the defendants' contention, the plaintiffs would have to produce all documents relating to the goods on board belonging to other cargo owners, which would be oppressive, or impracticable.

David Davies, for the defendants, was not called upon.

Bankes, L.J.—This is an appeal from an order of Roche, J. directing in general terms that the plaintiffs should make a further and better affidavit of ship's papers. The action is brought by cargo owners against underwriters, and, having regard to the extraordinary story told by the captain in his affidavit, one can well understand that the underwriters desire to get the fullest possible information to which they are entitled. It is well known that defendants in an action on a policy of marine insurance are entitled to a much wider discovery than are other litigants in an ordinary commercial case, and I am not satisfied that what was said by this court in *Graham Joint Stock Shipping Company* v. *Motor Union Insurance Company* (15 Asp. Mar. Law Cas. 445; 126 L. T. Rep. 620; (1922) 1 K. B. 563) with reference to the extent of that discovery was quite correctly expressed. In what I may call the official form of order for production of ship's papers, Form No. 19 in Appendix K. to the Rules of Court, there are two spaces left blank, one in the first line which runs: "It is ordered that the   do produce and show" &c., and the other in the later clause of the order dealing with certain specific classes of documents which runs "which are now in the custody, possession, or power of the   his brokers solicitors or agents." In the form of order adopted by Bailhache, J. in the present case the first of those two blanks has been filled up by inserting words "plaintiffs and all persons interested in these proceedings and in the insurance the subject of this action," and the second blank by inserting the words "plaintiffs and the said other persons as aforesaid."

I do not think that it is correct to fill up the second of those blanks in that way. In the *Graham Joint Stock Shipping Company's* case, I should have made it clear that I was referring only to the contents of the first blank space in the form of order. In the present case, Bailhache, J. having made the order for production of ship's papers in the Law Stationers' Form, the plaintiffs omitted to produce certain documents of which the defendants required discovery, amongst others the manifest and the stowage plan. One of the mysteries is what has become of the plaintiffs' goods, and at what stage in their passage from the warehouse did they disappear. It is most material to ascertain whether they ever reached the vessel, and as production of the two documents specified may assist in clearing up that point, I think it is plain that the plaintiffs must either produce the documents or account upon oath for their inability to do so. Bailhache, J.'s order, as drawn up, in so far as it required production only of documents which were in the possession of persons interested was, in my opinion, too limited. Mr. Dickinson, for the plaintiffs, contended that a distinction was to be drawn between the general words at the beginning of the order and the later clause dealing particularly with certain special documents, and that the fact that a particular document was specially mentioned in the later clause, excluded it from the operation of the

earlier general words, with the consequence that its production would only be ordered if it was in the possession of the plaintiffs or of some other person interested. I have never before heard anyone attempt to draw a distinction between the two parts of the order. I have no doubt that the ship's papers order has grown up gradually, and that additions have been made to it from time to time to meet particular cases, with the result that sweeping general words are followed by a clause dealing only with particular documents. But it has always been held that the order in its widest and most comprehensive form is justified by the practice which has prevailed over a very long period. I think the order of Roche, J. was right, and that the appeal should be dismissed.

Scrutton, L.J.—I agree that this appeal fails, and I only add anything to what my Lord has said because certain expressions of mine in *Graham Joint Stock Shipping Company* v. *Motor Union Insurance Company* (*sup.*) were relied on as supporting the appeal.

The facts of the case are very remarkable. The goods were to be shipped in Spain for carriage to Italy, and an affidavit by the captain was produced to the effect that a person connected with the owner procured him to sign bills of lading purporting to show that goods were shipped which were never in fact shipped, and then asked him to sink the ship, offering him a large bribe if he would do so and threatening that something very serious would happen in the event of his refusal, in consequence of which he remained on board and got a secret message conveyed to the British Consul. The plaintiffs' goods for which bills of lading were signed have entirely disappeared, and the Spanish owners now seek to recover from the underwriters. Upon such a statement of facts one can fairly say that if ever there was a case in which underwriters were entitled to the fullest discovery before they are called upon to settle what defence they shall make this is that case. An affidavit of ship's papers was made and the underwriters complained that it did not contain certain documents, amongst others the manifest and the stowage plan, and if it is a question whether the goods were ever put on board it is obvious that these documents are most material.

But Mr. Dickinson says that the plaintiffs are under no obligation to make an affidavit about these documents because they are neither in the plaintiffs' possession nor in that of any person interested in the policy, and those he says are the only people to whom the affidavit of ship's papers applies. I confess that that contention startled me, for it is entirely opposed to what I always understood to be the rule during a long practice at the Bar in which I acted for most of the leading underwriters. I always understood it to be settled practice under an affidavit of ship's papers that a plaintiff cargo owner must either produce or account for the ship's papers notwithstanding that the shipowner is not in any way interested in the policy in which he is suing. In *China Traders Insurance Company* v. *Royal Exchange Assurance Corporation*, A. L. Smith, L.J., who when at the Bar had one of the leading marine insurance practices of that day, said (78 L. T. Rep., at p. 784; 8 Asp. Mar. Law. Cas., at p. 411; (1898) 2 Q. B., at p. 191), "It is conceded that the old rule applies to insurance on goods just as it does to insurance on ship. If the plaintiff in the action has not got and cannot get the papers, and does not know where they are, he must say so," and Chitty, L.J., agreed. It is to be observed that the counsel for the plaintiffs who then conceded that proposition was Mr. J. A. Hamilton, and he probably conceded it because he had as his opponent Mr. Joseph Walton, Q.C., at that time the leading counsel in insurance matters. Mr. Dickinson endeavours to support his contention by reliance on certain language which I used in the *Graham Joint Stock* case (15 Asp. Mar. Law Cas. at p. 449; 126 L. T. Rep., at p. 624; (1922) 1 K. B., at pp. 580–581), but that language ought not to be detached from its context and read without reference to the subject-matter of the case. There the plaintiffs, who were mortgagees of the ship, made an affidavit of ship's papers which did not disclose a number of documents in the possession of the owner. But the advance by the mortgagees was less than the amount insured by the policy, and therefore to the extent of the balance the shipowner was a person interested in the insurance. It was under those circumstances that I there more than once said that the plaintiff must produce, or explain why he cannot produce, material documents which are "in the possession of other persons interested." Nothing was further from my intention than to lay down the proposition that an owner of subject-matter insured may excuse himself from trying to get material documents which are in the possession of another person because that person is not interested in the policy. That would be contrary to the whole experience of my professional life in insurance matters, and I hope that the passage cited from my judgment will not be used again for the purpose of suggesting that that was my view. If the plaintiff satisfies the court on affidavit, and not merely by letters, that he has made all reasonable endeavours to get the papers from a person over whom he has no control and has been unable to get them, the court will usually dispense with their production; but nothing short of that will suffice.

Atkin, L.J.—I agree. I am satisfied that Roche, J. in making the order appealed from acted in accordance with the long-established practice dealing with claims by cargo owners on policies of marine insurance. It appears to me that original order made by Bailhache, J. is drawn in too limited a form. It is certainly not in the Form No. 19 in Appendix K. to the Rules of Court. At the same time Form 19, as has been pointed out on more than one occasion, is itself too limited, as it does not

provide for the case of documents which were once but are no longer in the plaintiffs' possession. The order made in this case no doubt follows the form of order given in a work of great authority, Arnould on Marine Insurance. In the edition of 1909 the clause of the order specially dealing with certain particular documents—"all protests surveys," &c.—is, as here, limited to those "which are now in the custody, possession, or power of the said plaintiff and the said other persons aforesaid," which I think means all persons interested in the insurance, "his, or their, or any or other of their brokers solicitors or agents." The reference given for that form is, oddly enough, said to be Form 19 of Appendix K. As I have already said I think that limitation as to documents which are in the possession of the plaintiffs "and the said other persons as aforesaid" is wrong. The real principle is that expressed in Arnould, at the beginning of par. 1271, where he says, "There is one important point of practice which is peculiar to actions on policies of marine insurance; this is the practice whereby the underwriter is entitled, as a matter of course, to an order against the assured, requiring the latter to discover on oath, and to produce, all the ship's papers." Then the author goes on to say that that also applies to the assured on cargo. I think that is right, and that the assured on cargo is obliged to produce all the ship's papers even though they are where they normally would be, in the possession of the shipowner and not of persons interested in the cargo. Of course he can discharge that obligation by showing that he has made all reasonable efforts to get the papers and cannot get them. In my opinion the practical result of what has been said by the other members of the court is that the order for production of ship's papers requires to be redrafted. I may add that I think the particular documents which are called for here would be covered by the general words in the first part of the order, but inasmuch as specific documents are mentioned it would be better to make it clear that discovery of those specific documents is not confined to such as are in possession of the plaintiff and persons interested in the proceedings. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Thomas Cooper and Co.*

Solicitors for the respondents, *Parker, Garrett, and Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION

April 24 and 27, 1923.

(Before BAILHACHE, J.).

BOSTON CORPORATION *v.* FENWICK AND CO. LIMITED. (*a*)

Wrecks—Removal—Stranded ship in fairway—Channel blocked—Ship treated by owners as constructive total loss—Notice of abandonment to underwriters—Liability of shipowners.

The expense of removing a wreck can only be recovered from the owners at the time the expense is incurred. Where the owners of a vessel that has become a wreck treat it as a constructive total loss, and give a notice of abandonment to their underwriters, they divest themselves of their property in the vessel abandoned and cease to be its owners.

Quære, *whether the property in the wreck is automatically transferred to the underwriters when they have refused to accept the notice, or whether the wreck becomes a* res nullius.

ACTION tried by Bailhache, J. in the Commercial Court.

The plaintiffs, the harbour authority of Boston Port, claimed from the defendants, who were shipowners, the expenses of removing a wreck of one of the defendants' steamers.

On the 28th Feb. 1922 the defendants' steamer, the *Lockwood*, left Boston with a cargo of coal for Hamburg. As the steamer was proceeding down the river, her steering gear jammed and she ran aground. She was got off, and proceeded on her voyage; but shortly afterwards, she ran aground again and on the next flood tide the steamer heeled over and capsized and blocked the channel. Notice of abandonment was given by the defendants to the underwriters but the underwriters refused to accept the notice.

The plaintiffs removed the wreck, and brought this action to recover from the defendants the expenses of doing so.

The defendants pleaded (*inter alia*) (1) that they had given notice of abandonment to the underwriters, and had told the plaintiffs that they had done so, and had thereby ceased to be the owners of the wreck; (2) that the plaintiffs had acted under an agreement which precluded them from suing; and (3) that the expenses incurred by the plaintiffs were unauthorised.

C. R. Dunlop, K.C. and *G. P. Langton* for the plaintiffs.

R. A. Wright, K.C., and Sir *Robert Aske* for the defendants.

Cur. adv. vult.

April 27, 1923.—BAILHACHE, J. read the following judgment:—

On the 28th Feb. 1922, the defendants' steamship *Lockwood* stranded in the river Witham and blocked up the fairway to Boston Harbour

(*a*) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

The plaintiffs are the harbour authority, having the right under sect. 29 of the Port of Boston Act 1842, and under sect. 56 of the Harbours, Docks and Piers Clauses Act of 1847, to remove wrecks impeding the harbour and to recover the cost of so doing from the owners. They may also, on non-payment, sell the wrecks.

The plaintiffs removed the *Lockwood* and asked the defendants to pay the cost. The defendants refused. The plaintiffs sold the wreck and they seek to recover the balance of the cost from the defendants, who deny liability. The plaintiffs base their claim on the statutes mentioned.

The relevant facts are these: On the 2nd March 1922 the defendants, rightly treating the *Lockwood* as a constructive total loss, gave notice of abandonment to their underwriters. The notice was good, although the underwriters did not accept it. On the 8th March the defendants told the plaintiffs what they had done. There is at Boston a deep-sea fishery company of which a Mr. Parkes is the manager. He is not a member of the plaintiff corporation, but he is in close touch with them. He suggested to the corporation that something might be made for both of them out of the salvage of the *Lockwood*. Accordingly an offer was made by him and was accepted by the corporation, which is embodied in a minute dated the 11th March 1922, which records that the corporation accepted Mr. Parkes' offer to raise the *Lockwood* and to share the profit or loss.

Shortly afterwards, it occurred to Mr. Parkes that a still larger profit might be made if the *Lockwood* was not only raised but repaired as well. The plaintiffs fell in with this view, and Mr. Parkes went to London and saw the Salvage Association, who by this time were representing the underwriters. They, too, liked the scheme, as it was proposed to do the whole work for 12,000*l.* on "no cure no pay" terms.

The *Lockwood* was insured against total loss for 15,000*l.*, the repaired value to be the insured value. If, therefore, an agreement could be come to on the lines suggested, the underwriters would pay a particular average loss and not a constructive total loss and would be saved a considerable sum, and everybody, except the defendants, would be pleased.

Sir Joseph Lowry pressed the defendants to fall in with the suggestion, and this they did, stipulating, however, with Sir Joseph Lowry that they should do so without prejudice to their notice of abandonment, to which he assented.

A contract embodying the arrangement was drawn up and signed on the 15th March 1922. It was signed on behalf of the plaintiffs by Mr. Parkes, and is in the following terms:—

"It is hereby agreed between the Boston Dock and Harbour Commissioners, hereinafter called the contractors, and Messrs. France, Fenwick and Co., Limited, hereinafter called the owners, as follows: (1) The contractors agree on the terms of 'no cure no pay' to raise, float, and repair the s.s. *Lockwood*, now stranded in the river Witham, without delay. To make good to the satisfaction of the surveyors to Lloyd's Register, and so that the vessel can regain her class at Lloyd's, all the damage which the vessel has sustained through sinking or may sustain during the operations of refloating, docking, repairing, and otherwise, until she is redelivered to the owners. The owners' representative to have the right of watching the operations throughout. (2) In consideration of the above, the owners agree to pay the sum of 12,000*l.* (twelve thousand pounds) on the successful completion of the raising, floating and reconditioning of the vessel as aforesaid. In the event of it proving impracticable to float and repair the steamer no payment is due under this agreement. (3) The contractors agree to hold the owners indemnified from any liability they may have sustained or be under for removing the said vessel or her cargo from the fairway."

The contract is short, and contains as many fatal defects as it is possible to compress into so small a compass. It is on "no cure no pay" terms. It is a contract to recondition. And it is not under seal. The first two defects make the contract *ultra vires*, and the third makes it unenforceable, to say nothing of the signature.

The plaintiffs bethought themselves, later, when much of the salvage had been done, that a contract with a corporation is the better for a seal, and they asked the defendants to consent to the affixing of a seal, but the defendants refused. Meanwhile, it had been discovered that Mr. Parkes's 12,000*l.* was totally inadequate, and that the expense of salving and reconditioning would be nearer 20,000*l.* or 22,000*l.* Mr. Parkes declined to go on; so did the corporation; but the *Lockwood* was placed on the mud out of the fairway and was ultimately sold.

On the 29th Sept. 1922, the question what was to be done came before the corporation, and a resolution of that date records that there were originally two projects before the corporation—one, for removing the wreck and selling or destroying her; and the other, for reconditioning her and selling her when finished to the owners.

The minute plaintively adds: "The latter having been adopted, the whole matter developed complicated legal questions."

The corporation sought comfort in the opinion of an eminent counsel who had a wide knowledge of Admiralty law, but the comfort which they found was cold. In these circumstances the corporation, having raised the *Lockwood* under the contract of the 15th March, find themselves unable to sue upon it because in addition to its vices it has not been performed. They therefore seek to throw the contract on the scrap-heap, alleging that they were all along acting under their statutory powers, and they claim the amount which they may have to pay Mr. Parkes from the defendants as a debt.

Meanwhile, they have paid poor Mr. Parkes nothing, and he is suing them in another action.

It is very doubtful whether the corporation, having acted under the contract of the 15th March, can ignore that contract and claim to have been exercising their statutory rights.

A good deal of the reasoning in the House of Lords in the case of *Sinclair* v. *Brougham* (111 L. T. Rep. 1 ; (1914) A. C. 398) seems to point the other way. I do not, however, decide the point, as I am attracted by another and simpler defence which has the great merit of being covered by authority, subject only to a point which is sought to be made on the abandoned contract of the 15th March.

Assuming the corporation to be able to fall back on their statutory powers, it is to be observed that the expense of removing a wreck can only be recovered from the owners, and by the word "owners" is meant owners at the time the expense was incurred : (see *The Crystal* (7 Asp. Mar. Law Cas. 513 ; 71 L. T. Rep. 346 ; (1894) A. C. 508).

Treating the issue between the parties, then, as dependent upon the plaintiffs' statutory powers, as the plaintiffs now wish to do, the defendants deny that they were the owners at the material time, that is, when the expenses were incurred, and they rely on their notice of abandonment to the underwriters and their communication of that notice to the plaintiffs. In this I think they are right, both on principle and authority. On principle it must be borne in mind that in the case of a constructive total loss an owner can only abandon to his underwriters. Having done this, he divests himself of his property in the thing abandoned and ceases to be its owner.

On authority, *Barraclough* v. *Brown* (8 Asp. Mar. Law Cas. 290 ; 76 L. T. Rep. 797 ; (1897) A. C. 615) is conclusive ; but in view of Mr. Dunlop's strenuous argument to the contrary, I had better make good that point by a further reference to the case itself. The facts were that the steamship *T. M. Lennard*, belonging to the defendants, outward bound from Goole, went ashore in the Ouse and became at once an impediment to navigation and a constructive total loss. The owners abandoned the wreck to their underwriters, who tried to raise it, and, having failed in their turn, abandoned to the plaintiffs. The plaintiffs blew the wreck up and sued the original owners for the expenses. It was held that the plaintiffs could not recover, as the defendants had, by abandoning to their underwriters, ceased to be owners when the expenses had been incurred.

Mr. Dunlop contended that the abandonment which defeated the plaintiffs' claim in that case was the abandonment to them by the underwriters. This was a bold contention in view of the sentence in the judgment of Lord Esher, M.R., in the Court of Appeal, reported in 1 Com. Cas., at p. 331. Lord Esher, M.R. asks who were the owners, and goes on : "The defendants, before the expenses were incurred, had abandoned her to the underwriters, and therefore we must decide that the defendants were not liable."

Although that case went on a different point in the House of Lords, Lord Watson says (76 L. T. 797 ; (1897) A. C., at p. 621) : "I am content to rest my opinion of the merits of the case on the reasons assigned by Mathew, J. and the learned judges of the Court of Appeal."

There would thus be an end in the defendants' favour but for a point which the plaintiffs seek to make upon the contract. They say that, although the defendants did at one time abandon to their underwriters, they receded from that position and took up the position of owners, and they refer to the negotiations leading to the contract of the 15th March and to the contract itself wherein the defendants are "hereinafter called the owners."

To this there is more than one answer : First, if the plaintiffs abandon that contract as so much waste paper, as they do and must, the contract and all the negotiations leading to it are excluded from consideration. Next, the contract, if carried out by the plaintiffs, would have rendered the loss a particular average and not a constructive total loss, and the defendants for the purposes of that contract, were necessarily the owners, and their abandonment was at an end. It is obvious, however, that they were describing themselves as owners for the purposes of that contract only, and not otherwise, and were certainly not resuming the position of owners *vis-à-vis* the plaintiffs exercising their statutory powers.

This clearly appears from the correspondence between the Salvage Association and the defendants' solicitors, and is also clear from clause 3 of the agreement itself. The fact is that the owners had little faith in the contract, and only entered into it at the request of their underwriters.

Further, the plaintiffs themselves knew quite well the position taken up by the defendants, because in describing the arrangements made between the parties, they say, in their minute of the 29th Sept. 1922, that the other project was for "reconditioning her and selling her to the owners," a description quite inconsistent with their present contention. One does not sell to a man what is already his.

I need not pursue the matter further. My first reason seems to me fatal to the plaintiffs. It would be as sensible to try to hold the plaintiffs to clause 3 of the contract as to try to draw an inference adverse to the defendants from the description contained in it.

Mr. Dunlop referred me to the case of *Smith* v. *Wilson* (8 Asp. Mar. Law Cas. 1907 ; 75 L. T. Rep. 81 ; (1896) A. C. 579). I only refer to it to say that it is wholly irrelevant for the reasons which sufficiently appear in the judgment. By the statutes the expense of raising a wreck is to be repaid. I could not in any case give judgment for the plaintiffs for any specific sum. They have paid nothing and are disputing their liability, and until that question is determined it cannot be known what expense they have incurred. As, however, I have come to the conclusion that the defendants are not liable, the point is immaterial.

I have refrained from expressing any opinion whether a valid notice of abandonment, unaccepted by underwriters, while it divests the owner of his property in the wreck at the ame time automatically transfers the property to the underwriters. I will only say that there is a good deal to be said against this view in favour of the wreck becoming in such circumstances a *res nullius*. The point does not call for decision.

My judgment is for the defendants, with costs.

Judgment for the defendants.

Solicitors for the plaintiffs, *Thomas Cooper and Co.*

Solicitors for the defendants, *Botterell* and *Roche.*

June 6 *and* 7, 1923.

(Before Lord HEWART, C.J. and a Special Jury).

ATTORNEY-GENERAL *v.* KIRSTEIN. (*a*)

Customs — Prohibitions of and restrictions on imports—Spirits—Concealment on board ship in port—Prohibited goods—Ship exceeding 250 *tons—Condemnation of ship—Fine—Customs Laws Consolidation Act* 1876 (39 *&* 40 *Vict. c.* 36), *ss.* 42, 179—*Customs Consolidation Act* 1876 *Amendment Act* 1890 (53 *&* 54 *Vict. c.* 56), *ss.* 1, 2, 3.

By sect. 42 *of the Customs Laws Consolidation Act* 1876, *certain goods therein enumerated and described in a table are prohibited to be imported into the United Kingdom, save as thereby excepted, and if any goods so enumerated and described are imported into the United Kingdom contrary to the prohibitions or restrictions therein contained such goods shall be forfeited and may be destroyed or otherwise disposed of as the Commissioners of Customs may direct. The table contained the following : "Spirits (not being cordials, or perfumes or medicinal spirits), unless in ships of forty tons burden at the least, and duly reported, or unless in glass or stone bottles, properly packed in cases, and forming part of the cargo of the importing ships and duly reported." By sect.* 179 : *If any ship or boat shall be found or discovered to have been within any part of the United Kingdom having on board any spirits in packages of any size or character in which they are prohibited to be imported into the United Kingdom or any spirits imported contrary to the Customs Acts the ship or boat together with the spirit shall be forfeited. But by sect.* 1 *of the Customs Amendment Act of* 1890 *no ship shall be liable to forfeiture under sect.* 179 *of the Act of* 1876, *unless the ship or boat shall be under* 250 *tons burden. By sect.* 2 *of the Act of* 1890, *with regard to any ship or boat of or exceeding* 250 *tons burden which but for the Act of* 1890 *would be liable to forfeiture, the Commissioners of Customs have power to fine any such ships or boats in any sum not exceeding* 50*l. where in their opinion a responsible officer is implicated actually or by neglect. If the fine of* 50*l. be considered inadequate for the offence committed proceedings may be taken for condemnation of the ship or boat in a sum not exceeding* 500*l.*

The Attorney-General by information alleged that the defendant's ship (a German ship exceeding 250 *tons burden, being about* 2000 *tons dead weight) was found within a port in the United Kingdom having on board concealed in the coal bunkers* 97 *gallons of spirits in packages of a size and character prohibited by the Customs Consolidation Act* 1876 *to be imported, being in bottles not packed in cases and not forming part of the cargo duly reported and in tins each of the size and content of less than nine gallons, and that the responsible officers of the ship were implicated in the offence.*

The jury having found that there was an illicit importation of spirits into this country by the defendant's ship, and that a responsible officer of the defendant's ship was implicated,

Held, that the ship must be condemned in the sum of 500*l., with costs against the defendant.*

INFORMATION by the Attorney-General.

By a writ, issued on the 3rd Nov. 1922, His Majesty's Attorney-General sued the defendant Adolf Kirstein and informed the court that on the 29th July 1922 the defendant's ship *Cleopatra* of a burden exceeding 250 tons was found within a part of the United Kingdom, namely, the port of Newcastle-upon-Tyne, having on board concealed in the coal bunkers a large quantity, to wit, ninety-seven gallons of spirits in packages of a size and character in which they were prohibited to be imported into the United Kingdom. They were in bottles not packed in cases and not forming part of the ship duly reported and in tins each of the size and content of less than nine gallons contrary to the statute in that case made and provided. and the responsible officers of the ship were (in the opinion of the Commissioners of Customs) implicated in the offence either actually or by neglect.

The commissioners alleged that the penalty of 50*l.* provided by sect. 2 of the Customs Consolidation Act 1876 Amendment Act 1890 was not adequate for the offence. They therefore claimed that by the statute the ship became and was liable to condemnation in a sum not exceeding 500*l.* The Attorney-General accordingly prayed that the ship be condemned in the sum of 500*l.* or in such lesser sum as to the court might seem meet.

The defendant, by his plea, denied the allegations of fact contained in the information and put himself on the country. The *Cleopatra* was a ship of some 2000 tons dead weight. The spirits in question were detected concealed on board the defendant's ship in the port of Newcastle-upon-Tyne on the 29th July 1922.

The Customs Laws Consolidation Act 1876 (39 & 40 Vict. c. 36).

Sect. 42. The goods enumerated and described in the following table of prohibitions and restrictions inwards are hereby probibited to be imported or brought into the United Kingdom, save as thereby

(*a*) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

excepted, and if any goods so enumerated and described shall be imported or brought into the United Kingdom contrary to the prohibitions or restrictions contained therein, such goods shall be forfeited, and may be destroyed, or otherwise disposed of as the Commissioners of Customs may direct . . . . Spirits (not being cordials, or perfumed or medicinal spirits, unless in ships of forty tons burden at least, and in casks or other vessels capable of containing liquids each of such casks or other vessels being of the size or content of twenty gallons at the least, and duly reported, or unless in glass or stone bottles, properly packed in cases, and forming part of the cargo of the importing ship and duly reported.

Sect. 179. If any ship or boat shall be found or discovered to have been within any port . . . of the United Kingdom . . . having on board . . . any spirits . . . in packages of any size or character in which they are prohibited to be imported into the United Kingdom . . . or any spirits . . . imported contrary to the Customs Acts . . . every such ship or boat, together with any such spirit . . . shall be forfeited.

Customs Consolidation Act 1876 Amendment Act 1890 :

Sect. 1. No ship or boat shall be liable to forfeiture under the said section (*i.e.*, sect. 179 of the Act of 1876) for having or having had on board, or in any manner attached thereto, or conveying or having conveyed, any goods as therein specified, or for any unlading, throwing overboard, or destruction of goods, unless such ship or boat shall be under two hundred and fifty tons burden.

Sect. 2. With regard to any ship or boat of or exceeding two hundred and fifty tons burden which but for this Act would be liable to forfeiture as aforesaid, the following provisions shall apply : (*a*) It shall be lawful for the Commissioners of Customs . . . to have power to fine any such ship or boat in any sum not exceeding 50*l*. in any case where in their opinion a responsible officer (as hereinafter defined, of such ship or boat is implicated either actually or by neglect ; . . . (*c*) if in any case the commissioners shall consider the fine of 50*l*. aforesaid will not be an adequate penalty against any such ship or boat for the offence committed thereon it shall be lawful for them to take proceedings before the justices of the peace for condemnation of the said ship or boat in a sum not exceeding 500*l*. at the discretion of such justices, or such proceedings may be taken by the commissioners before the courts and in manner prescribed in the Customs Consolidation Act 1876 and the Acts amending the same. . . .

Sect. 3. The expression " responsible officer " in this Act shall mean and include the master, mates, and engineers of any ship, and in the case of a ship carrying a passenger certificate the purser or chief steward, and where the ship is manned by Asiatic seamen the serang or other leading Asiatic officer. The expression " neglect " in this Act shall include cases where goods unowned by any of the crew are discovered in a place or places in which they could not reasonably have been put if the responsible officer or officers having supervision of such places had exercised proper care at the time of loading of the ship or subsequently. . .

Sir *T. W. H. Inskip*, K.C. (S.-G.) and *W. Bowstead* for the informant.

Batten, K.C., *E. A. Digby*, and *B. B. Stenham*, for the defendant.

Lord Hewart, C.J.—Members of the jury, in summing up the facts of this case to you I need not detain you long.

The question is whether there has been a breach of the law, and that depends partly upon the law, and partly upon the facts. Now may I remind you in a few words what the law is ? Under sect. 42 of the Customs Consolidation Act 1876, it is provided that certain goods are prohibited to be imported or brought into the United Kingdom, except subject to certain conditions, and among those goods is spirits. What is provided about spirits is : " Unless in ships of forty tons burden at least, and in casks or other vessels capable of containing liquids, each of such casks or other vessels being of the size or content of nine gallons at the least and duly reported, or unless in glass or stone bottles properly packed in cases and forming part of the cargo of the importing ship and duly reported." With regard to the spirits which were, after some search, detected upon the *Cleopatra* in the Tyne at Newcastle, upon the 29th July last year, it is not so much as suggested that these conditions were fulfilled. That being so, what follows ? If one turns to sect. 179, it is provided, among other things, that if any ship or boat shall be found, or discovered to have been, within any port having on board certain things, then an offence is committed. What is said on the part of the Attorney-General here is that this ship was found having on board spirits not declared, not reported, illicit spirits therefore, and that an offence was committed.

[His Lordship summed up the evidence and concluded.]

I ask you, therefore, two questions : (1) Was there an illicit importation of spirits by the defendant's ship ? (2) Was there a responsible officer of the ship implicated, either actually or by neglect ? If you find that a responsible officer—and " responsible officer " includes an engineer—was implicated actually the question whether somebody was implicated by neglect becomes of merely academic interest.

The special jury answered the first question " Yes." They answered the second question by saying that a responsible officer of the ship was implicated actually.

Lord Hewart, C.J.—Looking at all the facts of the case, and the quantity of spirit involved, and by way of warning to others in like case offending or attempting to offend, I condemn this ship, the *Cleopatra*, in the sum of 500*l*. and order the defendant to pay the costs.

Solicitors : *The Solicitor for Customs and Excise ; Thomas Cooper* and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

July 9 *and* 16, 1923.

(Before HILL, J.)

THE SYLVAN ARROW (No. 2). (*a*)

Collision — Maritime lien—Negligence—Vessel chartered to foreign Government—Requisition—" Bare Boat " form—Charter of demise —No requisition order—Intention to requisition amounting to effective compulsion—Authority of master and crew derived from the foreign Government and not from the owners.

The plaintiffs had suffered damage by reason of a collision between their steamship and the defendants' oil tanker S. A. *The collision took place on the* 1st *Dec.* 1918, *and at that time the* S. A. *was in the service of the United States Government, by whom her master and crew were appointed and paid. The* S. A. *was said to have been requisitioned in December* 1917 *by a form described as a Requisition Charter Party, under which control and management of the vessel was left in the owners who operated the vessel on behalf of the Government, but the Government retained the right, upon giving due notice, to requisition the vessel under a form known as the " Bare Boat " form, by which the control and management of the vessel were entirely taken out of the hands of her owners. It appeared that in July* 1918 *this right was exercised and the vessel came into the hands of the Navy Department, by whom she was operated and by whom her master and crew were appointed. No requisition order other than the Requisition Charter Party was produced, and it was alleged by the plaintiffs that no order had in fact been made in December* 1917. *It was further contended that, although by the laws of the United States relating to requisition the President had power to fix compensation, &c., such powers had not in fact been exercised, but the Government had elected to enter into a charter-party whereby hire and other rights and liabilities were mutually agreed upon.*

Held, that having regard to the value of an unrequisitioned tank steamer in 1917-1918, *and to all the circumstances, it was certain that underlying the transaction was the threat of compulsion. It did not matter whether or not that compulsion was in fact put in operation according to the due forms of law, or that the Government had not agreed terms of hire by the charter-party, assuming that to have been the case. The charter-party was entered into, not as a voluntary act on the part of the owners, but with the knowledge that the Government could and would exercise their powers of compulsion. Nor would it make any difference if the Government had exercised compulsion illegally. The master and crew could not therefore be said to derive authority from the owners by reason of the voluntary chartering of the vessel to the Government.*

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

Held, therefore, that assuming the collision was due to the negligence of those in charge of the S. A., *no maritime lien attached, and the defendants could not be proceeded against by writ* in rem *against the ship.*

The Ticonderoga (1857, *Swa.* 215), The Tasmania (6 *Asp. Mar. Law Cas.* 305 ; 59 *L. T. Rep.* 263 ; 13 *Prob. Div.* 110), The Lemington (2 *Asp. Mar. Law Cas.* 475 ; 32 *L. T. Rep.* 69), The Ripon City (8 *Asp. Mar. Law Cas.* 304 ; 77 *L. T. Rep.* 98 ; (1897) *P.* 226) *distinguished.*

MOTION by the defendants, the owners of the oil tank steamer *Sylvan Arrow*, to dismiss an action brought against them by the plaintiffs the owners of the steamship *W. I. Radcliffe* claiming for damages sustained by their vessel in collision with the *Sylvan Arrow* in New York Harbour in December 1918. At that time the *Sylvan Arrow* was alleged to be under requisition to the United States Government.

The facts and arguments of counsel fully appear from the headnote and judgment.

Dunlop, K.C. and *R. H. Balloch* for the plaintiffs.

Raeburn, K.C. and *Dumas* for the defendants.

Cur. adv. vult.

July 16, 1923.—HILL, J.—On the 1st Dec. 1918 the plaintiffs' steamship, the *W. I. Radcliffe*, and the defendants' steamship, the *Sylvan Arrow*, were in collision in New York Harbour. The *Sylvan Arrow* was then, and still is, owned by the defendants, the Standard Transportation Company, a private Corporation registered under the laws of the State of Delaware. It is admitted, and clearly appears from the affidavits put in, that at the time of the collision the master and crew of the *Sylvan Arrow* were the servants not of the defendants but of the American Government, appointed, employed, and controlled by the Navy Department.

The issue now to be determined is whether assuming the collision to have been caused by negligence of those in charge of the *Sylvan Arrow* any maritime lien attached to the *Sylvan Arrow*, and whether by reason of such lien the defendants can be proceeded against by writ *in rem* against the ship. The defendants raise this question by par. 2 of the defence : " The *Sylvan Arrow* was under requisition by and under the sole control and management of the Government of the United States and was being navigated by persons who were the servants of the said Government and for whose negligence the defendants were and are in no wise responsible." The plaintiffs argued that this did not truly represent the facts and that the facts should be stated thus : " The *Sylvan Arrow* was chartered by the defendants as owners to the Government of the United States under a charter-party operating as a demise and was therefore under the sole control and management of the Government of the United States and was being navigated by persons who were servants of the said Government and for whose negligence the defendants

were and are in no wise personally responsible." The plaintiffs contend that upon these facts the ship became subject to a maritime lien, and that an action can be maintained to enforce it. They rely, of course, upon *The Lemington* (2 Asp. Mar. Law Cas. 475; 32 L. T. Rep. 69)—a decision of Sir Robert Phillimore in 1874—and the dicta, in *The Ticonderoga* (1857, Swa. 215), Dr. Lushington, and *The Tasmania* (6 Asp. Mar. Law Cas. 305; 59 L. T. Rep. 263; 13 Prob. Div. 110), Sir James Hannen, and *The Ripon City* (8 Asp. Mar. Law Cas. 304; 77 L. T. Rep. 98; (1897) P. 226), Barnes, J. Some day, and probably by a higher court, *The Lemington*, and those dicta and the contrary dictum of Dr. Lushington in *The Druid* (1842) Wm. Rob. 391, will have to be considered in the light of the principles so clearly laid down by the Court of Appeal in *The Parlement Belge* (5 Asp. Mar. Law Cas. 83, 234; 42 L. T. Rep. 273; 5 Prob. Div. 218), the House of Lords in *The Castlegate* (7 Asp. Mar. Law Cas. 284; 68 L. T. Rep. 99; (1893) A. C. 52), and the Privy Council in *The Utopia* (7 Asp. Mar. Law Cas. 408; 70 L. T. Rep. 47; (1893) A. C., at pp. 497, 499).

The general principle is thus stated in *The Utopia*: "The foundation of the lien is the negligence of the owners or their servants at the time of the collision, and if that be not proved no lien comes into existence. In the recent case of *The Castlegate* (*sup.*) language used by the Master of the Rolls in *The Parlement Belge* (*sup.*) which expresses the above view was quoted with an approval which their Lordships desired to repeat." What Lord Esher said was: "Though the ship had been in collision and has caused injury by reason of the negligence or want of skill of those in charge of her, yet she cannot be made the means of compensation if those in charge of her were not the servants of her then owner, as if she was in charge of a compulsory pilot." In *The Castlegate* (7 Asp. Mar. Law Cas. 284, at p. 288; 68 L. T. Rep. 99, at p. 103; (1893) A. C. 52) Lord Watson stated the principle of the maritime law to be that inasmuch as every proceeding *in rem* is in substance a proceeding against the owner of the ship, a proper maritime lien must have its root in his personal liability. He then refers to damage actions (*The Lemington* (*sup.*) and *The Ticonderoga* (*sup.*), had been cited) and says: "It was argued that the case of lien for damages by collision furnishes another exception to the general rule, and there are decisions and dicta which point in that direction; but these authorities are hardly reconcilable with the judgment of Dr. Lushington in *The Druid* (*sup.*), or with the law laid down by the Court of Appeal in *The Parlement Belge* (*sup.*), and he then quotes Lord Esher. But it may be that for me, *The Lemington* (*sup.*), which is a direct decision, is the governing authority. Let us see what it and the dicta in the other cases come to. If they are law, they make an exception to the general rule. What precisely is the exception? In *The Ticonderoga* (*sup*) the observations of Dr. Lushington appear to me to be clearly *obiter*. In that case it does not appear that the Master and crew were appointed or paid by the charterers, the French Government, but only that the ship was under the orders of the charterers "in the service of the French Government." In the course of his judgment he said: "I am not aware, where there has been any proceeding *in rem*, and the vessel so proceeded against has been clearly guilty of damage, that any attempt has been made in this court to deprive the party complaining of the right he has by the maritime law of the world of proceeding against the property itself. Supposing a vessel is chartered so that the owners have divested themselves, for a pecuniary consideration, of all power, right and authority over the vessel for a given time, and have left to the charterers the appointment of the master and crew, and suppose in that case the vessel had done damage, and was proceeded against in this court—I will admit for the purposes of argument that the charterers and not the owners would be responsible elsewhere, although I give no opinion upon that point, but still I should here say to the parties who had received the damage, that they had, by the maritime law of nations, a remedy against the ship itself." Then he goes on to contrast the case of a pilot by compulsion. The next case is the case of *The Lemington* (*sup.*), in which Sir Robert Phillimore said: "I think the law was correctly laid down by Dr. Lushington in *The Ticonderoga* (*sup.*) and *The Druid* (*sup.*) and he went on: "A vessel, placed by its real owners wholly in the control of charterers or hirers, and employed by the latter for the lawful purposes of the hiring, is held by the charterers as *pro hac vice* owners. Damage wrongfully done by the *res*, whilst in possession of the charterers, is, therefore, damage done by the 'owners' or their servants, although those owners may be only temporary. Vessels suffering damage from a chartered ship are entitled *primâ facie* to a maritime lien upon the ship and look to the *res* as security for the restitution. I cannot see how the owners of the *res* can take away that security by having temporarily transferred the possession to third parties. A maritime lien attaches to a ship for damage done, through the negligence of those in charge of her in whosesoever's possession she may be, if that damage is inflicted by her whilst in the course of her ordinary and lawful employment, authorised by her owners, whether the damage is done through the default of the servants of the actual owners, or of the servants of the chartering owners, the *res* is equally responsible, provided that the servant making default is not acting unlawfully or out of the scope of his authority." It will be observed that in both those cases—I am not quite sure that it does not cover much of the earlier judgments in this matter—the ship is spoken of as being "the guilty party."

The next case is *The Tasmania* (*sup.*), in which Sir James Hannen reviewed the cases in *The Ripon City* (8 Asp. Mar. Law Cas. 304; 77 L. T. Rep. 98; (1897) P. 226), and expressed the

opinion that *The Lemington* (*sup.*) was rightly decided. Speaking of *The Parlement Belge* (*sup.*) and the dicta I have referred to, he said: "I am convinced that the judges did not intend to decide that in no circumstances can a maritime lien be obtained unless the owners of the *res* are personally liable in respect of the claim. It will be found, in accordance with modern principles and authorities, that there are certain cases in which a maritime lien may exist and be enforced against the property of persons not personally liable for a claim and who are not the persons who, or whose servants, have acquired the service or done the damage." A little later, speaking of a maritime lien, he says: "This right must, therefore, in some way have been derived from the owner either directly or through the acts of persons deriving their authority from the owner." Then at p. 244 he considers the case of a chartered ship: "The principle upon which owners who have handed over the possession and control of a vessel to charterers and upon which mortgagees and others interested in her who have allowed the owners to remain in possession are liable to have their property taken to satisfy claims in respect of matters which give rise to maritime liens, may, in my opinion, be deduced from the general principles I have above stated and thus expressed. As maritime liens are recognised by law, persons who are allowed by those interested in a vessel to have possession of her for the purpose of using or employing in the ordinary manner, must be deemed to have received authority from those interested in her to subject the vessel to claims in respect of which maritime liens may attach to her arising out of matters occurring in the ordinary course of her use or employment, unless the parties have so acted towards each other that the party asserting the lien is not entitled to rely on such presumed authority. In my opinion, it is right in principle, and only reasonable in order to secure prudent navigation, that third persons whose property is damaged by negligence in the navigation of a vessel by those in charge of her should not be deprived of the security of the vessel by arrangements between the persons interested in her and those in possession of her. . . . . The persons interested in a vessel, in placing her in the possession and control of other persons, to be used or employed in the ordinary way, must contemplate that claims may arise agsinst her in respect of rights given by the maritime law, and may be taken to have authorised those persons to subject the vessel to those claims." In these cases it will be seen that the liability of the ship and of the owner through the ship, is based upon the fact that the negligent persons "derived their authority from the owner, and that the owner placed the ship in the possession and control of other persons to be used and employed in the ordinary way"; and that the "charterers in whom the control of the ship has been vested by the owners are deemed to have derived their authority from the owners so as to make the ship liable for the negligence of the charterers, who are *pro hac vice* owners."

Let us see whether the United States Navy men in charge of the *Sylvan Arrow* derived their authority from the defendants; whether the defendants placed the *Sylvan Arrow* in the possession and control of the United States Government; whether the control of the ship was vested by the defendants in the United States Government. According to the affidavit of Mr. Ali, sworn on the 12th Oct. 1922, par. 3, the *Sylvan Arrow* was requisioned by the United States Government in Dec. 1917, and handed over under such requisition to the Navy Department on the 15th July 1918, and remained under such requisition until the 21st Jan. 1919. To the affidavit of Mr. Morse (sworn on the 2nd March 1923) are exhibited the requisition charter-party, and it is sworn that from the 15th July 1918 to the 21st Jan. 1919 the *Sylvan Arrow* was under that portion of the exhibit which is designated the Bare Boat Form. By an affidavit sworn in this action on the 25th July 1922, Mr. D. Radcliffe. for the plaintiffs, stated that the plaintiffs were advised that the *Sylvan Arrow* had been requisitioned by the United States Government in Dec. 1917, and in the following July had been taken over by the Navy Department, and was released by the Navy Department early in 1919. It was upon the strength of that affidavit that the plaintiffs obtained leave to maintain the action notwithstanding that two years had elapsed from the date of the collision. The requisition charter-party exhibited is executed by the defendants and by the Director of Operations for the United States Shipping Board. It is headed: "Requisition charter-party," and begins: "This requisition charter made and concluded upon in the District of Columbia the 29th day of Dec. 1917." It recites: "Whereas, by requisition order, dated the 29th Dec. 1917, pursuant to the Urgent Deficiency Act of the 15th June 1917, and the President's Executive Order of the 11th July 1917, the United States has requsitioned the use of the steamship *Sylvan Arrow*, and whereas it is desired . . . to fix the compensation which the United States shall pay to the owner for the use of the ship so requisitioned, and to define by agreement the rights and duties of the United States and of the owner with respect to the operation of the vessel under the requisition, it is agreed: First, the terms and conditions under which the vessel is to be operated shall be those contained in the Time Form hereto annexed; provided, however, that at the time of the requisition or at any time thereafter, on five days' written notice, the United States may operate the vessel under the terms and conditions contained in the 'Bare Boat Form' hereto annexed." The time form contemplates that the Government has taken possession of the ship and delivers possession back to the owners for the owners to operate the ship for the Government; under it the master and crew are the servants of the owner. The Bare Boat Form contemplates that the ship shall remain in the service of the United States under the requisition order, and provides that the United

States shall man and operate the vessel. It is not quite clear, but I was told that in Dec. 1917 the ship was still in the builder's hands. From correspondence exhibited it appears that by direction of the United States Shipping Control Committee, she was handed over to the Navy Department on the 15th July 1918, and in the same month notice was given that the Government would operate the vessel under the Bare Boat form of charter. The precise status of the Shipping Control Committee does not appear, but, if it was not a branch of the United States Shipping Board or of the United States Shipping Board Emergency Fleet Corporation, the correspondence shows that its acts were ratified by the Corporation.

From all this I draw the conclusion that the ship was, in fact, compulsorily surrendered by the owners to the United States Government. I am the more certain of this conclusion because the ship was an oil tanker. In 1917–18 any shipowner who had a tanker free from Government control could have become rich beyond the dreams of avarice. I see no reason why I should doubt the affidavits or the documents which state that the ship was requisitioned. It is said for the plaintiffs that no requisition order has been produced or disclosed, and it is suggested that, in fact, there was no order on the 29th Dec. 1917. Whether an order was actually made or not, does not seem to me to matter much. If the intention to make an order were intimated to the owner, it would be as effective a compulsion as if it were actually drawn up. The essential fact is that the owner entered into the charter-party because the United States Government had power to compel him to give possession of the ship to the Government. It was also said that the method adopted by the Government was not in strict compliance with the Urgent Deficiency Act 1917. By sect. 1 (*e*) the President is given power *inter alia* to requisition, or take over, the possession of . . . any ship now constructed or in the process of construction. By sect. 2 the President was given power to take into possession, if his orders were not obeyed. By sect. 3 just compensation was to be paid, to be determined by the President, with a power to sue to persons dissatisfied with the amount. By sect. 4 the President may exercise the powers through such agency or agencies as he shall determine. By Executive Order the President delegated his powers to the United States Shipping Board and the Emergency Shipping Corporation. It is said that because the Government, instead of fixing the just compensation for the *Sylvan Arrow*, proceeded to enter into a charter-party with the owner defining the hire and the other mutual obligations of the Government and the owners, the element of compulsion disappeared, and the owner must be treated as one who had voluntarily chartered his ship to the Government. I cannot agree. Underlying the whole transaction was the compulsion, the fact that the Government had and would have exercised the power to take possession of the ship whether the owner consented or not, and also had power to operate the ship by its own servants if it so chose. I am not in the least suggesting that in fact the Government did not proceed in the precise way intended by the Act; but, supposing it did not, the plaintiff's case is no better, because if the Government exercised a compulsion illegally it exercised compulsion; if it exercised it legally it exercised compulsion. If it was illegal the position would be analagous to that of a ship which had been seized by pirates, in which case it could not possibly be suggested that the owner of the ship should, in form of procedure, be responsible for the negligent navigation by the pirates. Such being the position, it cannot in any sense be said that the master and crew of the *Sylvan Arrow*, who were the servants of the United States Navy Department, derived their authority from the defendants, or that the defendants placed the ship in the possession and control of the Navy Department, or that the control of the ship was vested by the defendants in the Navy Department. Accepting *The Lemington* (*sup.*) and the dicta in *The Ticonderoga* (*sup.*), *The Tasmania* (*sup.*) and *The Ripon City* (*sup.*) as sound law, the facts of the present case do not come within them. Upon those facts I hold that no maritime lien attached by the collision and that the defendants are not, either through their vessel, or otherwise, responsible to the plaintiffs, and there will be judgment for the defendants, with costs.

Solicitors: *Parker, Garrett,* and *Co.*; *Thomas Cooper* and *Co.*

Oct. 18 *and* 31, 1923.

(Before HILL, J.)

THE AUSTRALMEAD. (*a*)

Collision—Vessel turning in the river Humber —Local rules—Whistle signal—Duty of other vessels to keep out of the way of the turning vessel—Humber Rules 1910, *art.* 14.

Art 14 *of the Humber Rules* 1910 *requires a vessel commencing to turn round in the river Humber to blow a prescribed whistle signal, upon which the duty is imposed upon approaching vessels to keep out of her way.*

The defendants' vessel, whilst waiting to enter the Alexandra Dock at Hull, duly gave the prescribed signal and commenced to turn on the flood tide, head to tide. In these circumstances those in charge of the tug towing the plaintiff's vessel, which had just left the lock pit of the Alexandra Dock, bound up river, took an up-river course to pass the defendants' vessel, and could have passed her in safety had she continued her turning movement. The defendants' vessel, however, came ahead, and a collision ensued.

Held, that art. 14 *imposed upon the tug the duty to keep out of the way of the defendants' vessel*

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

while she was turning round; but it imported a correlative duty upon the defendants' vessel to turn round, not merely put herself athwart the stream and so continue, and to turn in a proper way, using no more water than was reasonably necessary for the purpose. The other vessel was only bound to give such room as was reasonably necessary.

The defendants' vessel held alone to blame.

ACTION for damage by collision.

The plaintiffs were the owners of the keel *Pioneer*, and the defendants were the Commonwealth Government Line, the owners of the steamship *Australmead*, of 4151 tons gross, and 2475 tons net register, 370.1ft. long, 51.1ft. beam.

The facts fully appear in the judgment of the learned judge.

The defendants blamed the *Salvage* and the *Pioneer* for (amongst other alleged acts of negligence) failing to comply with art. 14 of the Humber Rules 1910.

Art. 14 of the Humber Rules 1910, provides:

When a vessel is commencing to turn round or for any reason is not under command and cannot get out of the way of any approaching vessel, she shall signify the same by four short blasts of the steam whistle in rapid succession, and it shall thereupon be the duty of the approaching vessel to keep out of the way of the steam vessel so situated. A steam vessel, before commencing to turn round, shall immediately before giving the signal referred to in this rule, indicate the direction in which she proposes to turn by sounding the one short blast or two short blasts signals prescribed by art. 28 of the General Regulations. . . ."

Stephens, K.C. and *Sinclair Johnston* for the plaintiffs.

Bateson, K.C. and *Dumas* for the defendants.

The arguments of counsel fully appear from the judgment. *Cur. adv. vult.*

Oct. 31, 1923.—HILL, J.—In this case the collision happened at about 8.50 a.m. on the 25th Jan. 1923, in the river Humber. Plaintiffs are the owners of the keel *Pioneer* and her cargo of wheat and maize, and her master and mate. The defendants are the owners of the steamship *Australmead*.

The *Pioneer*, a keel of 160 tons capacity and 61ft. long, was one of eight keels in tow of the screw tug *Salvage*, which was 80ft. in length. The keels were in four ranks, the *Pioneer* being the first keel in the port rank. The whole flotilla was about 470ft. in length. The *Salvage*, with her tows, had shortly before left the lock pit of the Alexandra Dock, and was bound up-river for Goole. Another tug, with tows, had left a few minutes earlier and passed up-river. A third tug, the *Krooman*, with tows, left about the same time as the *Salvage* and was a little abaft her on the *Salvage's* starboard side.

The *Australmead*, a steamship of 4151 tons gross, 370ft. long, part laden, and drawing 15ft. aft, was in charge of a pilot and had a head tug. She was bound for Alexandra Dock, but she had some time to wait before she could enter. She had come up-river and when abreast of No. 12 buoy and being south of mid-river, she gave the port helm turning signal and began to turn, intending to get head to tide and wait.

The *Australmead* and the *Pioneer* were in collision, the stem of the *Australmead* with the port side of the *Pioneer* forward of amidships. It is agreed that the blow was at about a right angle, the *Pioneer* heading about west and the *Australmead* about N. or N. by E. The *Australmead* carried the *Pioneer* on her bow a little way, and the *Pioneer* then fell off and sank. The position of the wreck is agreed, as fixed by the Notice to Mariners, "about 100ft. off the S.E. course of the Hull and Barnsley River Side Quay in 21ft. of water." The witnesses spoke of that knuckle as the west knuckle of the jetty. It is agreed that the place of collision was south of that knuckle; the distance away from the knuckle is not agreed. At this point the channel between the knuckle and the line of buoys on the south side of the river is about 2000ft. wide. The tide was flood, two knots; the weather fine with some haze, and it was smoky over the land. The wind was W.N.W. off the town of Hull.

There are some discrepancies in the evidence on each side: but the main facts are pretty clear. The *Australmead*, having come up-river at various speeds, and, being substantially on the south side of the channel when abreast of No. 12 buoy (some of her witnesses say as near No. 12 buoy as 100ft.), she gave her turning signal and began to turn by putting the engines full ahead and the helm hard-a-port, and with her tug on the starboard bow. According to her logged times, this was about three minutes before the collision. She had got heading about athwart (*i.e.*, N. or N. by E.) when the *Salvage* and her tows were seen. At the time of the collision she was on about the same heading and had not succeeded in getting more than athwart. The *Salvage* and her tows came away from the lock pit and out into the river and turned under hard-a-port helm, and had got heading up-river by the time of the collision.

The plaintiffs' case is that there was plenty of room for the *Australmead* to turn head to tide, as her signal indicated, and for the *Salvage* and keels at the same time to pass into the river and turn up-river, but that the *Australmead* did not turn in a proper manner, that is, she swung too slowly and came too far to the north and at too great a speed.

The defendants' case is that the *Australmead* turned in a proper manner and that the *Salvage* ought to have passed the *Australmead* starboard to starboard and then turned up-river, but instead ported across the bows of the *Australmead*.

I will at once get rid of the charge against the *Salvage* that she ought to have passed on the starboard side of the *Australmead*, that is, further down-river. Whether the *Salvage* and the *Australmead* were starboard to starboard when the *Salvage* started on the starboard side of the *Australmead* to the port side of the *Salvage*, or whether they were end on, it seems to me, and I am so advised by the Elder Brethren,

that it would have been wrong for the *Salvage* to attempt to pass to the eastward of the *Australmead*. The argument for the defendants treated these two ships as two ships which were on courses and sighting one another starboard to starboard. That is to ignore altogether the fact that the *Australmead* had given her turning signal. She had given her turning signal, and, though the master of the *Salvage* had not heard it, he saw and knew that the *Australmead* was turning. She could be doing nothing else; the dock signals were against her and she could not be intending to enter the dock. The master of the *Salvage* was bound to suppose that the *Australmead* would continue to turn, and if he attempted to pass the *Australmead* on his starboard side and the *Australmead* continued to turn and head down-river as the master of the *Salvage* was entitled and bound to assume would be the case, he would be taking his line of keels across the bows of the *Australmead* on the flood tide. If anything had gone wrong the defendants would have been the first to say: "You knew the *Australmead* was turning and was already athwart and would shortly be heading down-river, and yet you foolishly tried to pass on the down-river side." I should add that I do not believe that the *Australmead* and the *Salvage* ever were starboard to starboard. The defendants' case on this seems to me impossible. The pilot says that, the *Australmead* being in line with the lock pit, he saw the *Salvage* two points on the starboard bow and that he saw the starboard bow of the *Salvage*. Two points are absolutely impossible; and even very fine on the starboard bow is only possible if the *Salvage* and tows came out in some quite unusual way. The only point in any doubt as to them is when they began to port and get to the westward, but no one suggests that they were ever to the eastward of the line of the lock pit.

This is not the only point in which I doubt the defendants' evidence. I find it difficult to reconcile their story with either the master's letter of the 25th Jan. or the third officer's report of the 13th Feb.

If the *Salvage* was not wrong in not passing starboard to starboard, in what was she wrong? It must either be that she ought not to have started out at all or ought to have held back until the *Australmead* had turned or ought to have kept closer to the north side.

That brings me to rule 14 of the Humber Rules upon which the defendants rely. So far as it is applicable (it deals both with steam vessels turning and with vessels not under command), it is as follows: "When a steam vessel is commencing to turn round . . . she shall signify the same by four short blasts of the steam whistle in rapid succession; and it shall thereupon be the duty of the approaching vessel to keep out of the way of the steam vessel so situated. A steam vessel commencing to turn round shall, immediately before giving the signal referred to in this rule, indicate the direction in which she proposes to turn by sounding the one short blast or two short blasts signals prescribed by art. 28 of the General Regulations."

That does not mean that by giving the signal the *Australmead* is entitled to hold up all the traffic. It is a notice that the *Australmead* is about to turn round; it imposes on the *Salvage* the duty to keep out of the *Australmead's* way while the *Australmead* is turning round: but it imports a correlative duty upon the *Australmead* to turn round—not merely to put herself athwart the stream and so continue—and to turn in a proper way, using no more water than is reasonably necessary for the purpose. At least, if she does use more water than is reasonably necessary she cannot complain that another ship has not given her more room if that ship has given her all the room that was reasonably necessary. If there was ample space for the *Australmead* to turn round and, at the same time, for the *Salvage* and keels to come into the river and turn up-river, the *Salvage* and keels were entitled to do so. They were equally entitled to assume that the *Australmead*, which had indicated that she intended to turn round, would turn round and get heading to the tide. The Elder Brethren advise me, and I think it is obvious, that there was ample room for the *Australmead* to turn round, and at the same time, for the *Salvage* and keels to come out and turn up-river, if those manœuvres were properly carried out.

The *Salvage* was, therefore, not wrong to start from the lock pit and to proceed into the river. So proceeding, and it being wrong for her to attempt to pass down-river of the *Australmead*, she was bound to turn up-river.

Did she do so sufficiently close to the north side? Where in regard to the north side did the collision happen? The plaintiffs pleaded 50ft. from the West Knuckle. That is obviously wrong. The defendants pleaded 300ft., and that was their evidence. The master of the *Salvage* said 300ft. Other estimates by the plaintiffs' witnesses varied from 100ft. to 160ft.

I must test it by ascertained facts: The *Pioner* sank 100ft. from the West Knuckle. Before it fell off the stem of the *Australmead* the *Pioneer* had been carried a little way. How much? The defendants say 200ft. The dock gateman, called by the plaintiffs, said 20ft. I have some material for testing it. The *Krooman* had the keel *Mizpah* lashed on her port side; in her first rank the *Audrey* was on the port side and the *Firefly* was on her starboard side. The *Pioneer* was forced against the *Mizpah* and damaged it, and afterwards forced against the *Audrey*, which was forced against the *Firefly* and the *Firefly* struck the jetty. This does not agree with a distance of anything like 300ft. between the stem of the *Australmead* and the jetty at the moment of collision. And, unless the *Australmead* had very considerable way, it is not probable that the *Pioneer* should be carried 200ft. before she fell off. I cannot fix the distance exactly, but I find that the place of collision was substantially less than 300ft. from the West Knuckle. I am not prepared to find that the

Salvage proceeded further out into the river than was safe and proper, having regard to the fact that the *Australmead* had intimated that she was turning round.

I find that the *Australmead* did not act properly. She began to turn and got athwart, and then, instead of continuing to turn, she came on athwart, and came too far over to the north side. I hold her to blame.

There is only one other point I need deal with. It was said that the *Salvage* was to blame for not whistling. Even if I found this as a fact (and the evidence is conflicting) it had nothing to do with the collision. Those on the *Australmead* knew that the *Salvage* was coming out and ought to have expected that she would do what she did.

I pronounce the *Australmead* alone to blame.

Solicitors, *Pritchard* and *Co.*, agents for *Andrew Jackson* and *Co.*, Hull ; *Botterell* and *Roche*, agents for *Hearfields* and *Lambert*, Hull.

House of Lords.

Nov. 20 *and* 23, 1923.

(Before Lords Cave, L.C., Haldane, Finlay, Sumner, and Parmoor.)

Moss Steamship Company v. Board of Trade. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Indemnity Act — Charter-party — Voyage directed by Government—Voyage to be for charterers' account — Loss to charterers — Compensation—Interference with business— "Regulation of general application"—Indemnity Act 1920 (10 *&* 11 *Geo.* 5, *c.* 48), *s.* 2, *sub-ss.* 1 (b), 2 (*iii.*) (b) ; *Schedule, Part II.*

By sect. 2, *sub-sect.* 1 (b), *of the Indemnity Act* 1920, *any person who has, otherwise than by requisition of a ship, "sustained any direct loss or damage by reason of interference with his . . . business . . . through the exercise . . . during the war of any power under any enactment relating to the defence of the realm . . . shall be entitled to payment of compensation in respect of such loss or damage." By sub-sect.* 2 (*iii.*) (b), *if the claimant would apart from the Act have no legal right to compensation, the compensation is to be assessed according to the principles set forth in Part II. of the Schedule to the Act ; by which "The compensation to be awarded shall be assessed by taking into account only the direct loss and damage suffered by the claimant by reason of direct and particular interference with his property or business, and nothing shall be included in respect of any loss or damage due to or arising through the enforcement of any order or regulation of general or local application, or in respect of any loss or damage due simply and solely to the existence of a state of war." The claimants, a shipping company chartered a ship for the purpose of their ordinary business, namely, running a line of steamers to the Mediterranean. Clause* 32 *of the charter-party provided that if the ship was directed by the Government for some voyage the direction was to be for the charterers' account. The Government directed the ship to Cuba to load a cargo of sugar. The voyage was not profitable to the charterers, nor did they earn the profits which they would have made if the ship had been employed in the Mediterranean trade. In consequence of the rise of shipping rates owing to the War it was impracticable for the charterers to charter another ship in substitution. They claimed compensation, under the Indemnity Act* 1920, *for the loss sustained by the Government's interference with their business.*

Held (*Lords Finlay and Parmoor dissenting*), *that there being no direct and particular interference with the claimants' property or business they had failed to show direct loss and damage suffered by them, so as to entitle them to compensation. The loss over the voyage to Cuba did not result from the direction given by the Shipping Controller to the owner of the vessel but from the express contract of the appellants contained in clause* 32 *of the charter-party to take the risk of any directed voyage.*

Decision of the Court of Appeal (ante, *p.* 141 ; 128 *L. T. Rep.* 715 ; (1923) 1 *K. B.* 447) *affirmed.*

Appeal from a decision of the Court of Appeal reported *ante*, p. 141, 128 L. T. Rep. 715 ; (1923) 1 K. B. 447.

The claimants owned a line of steamers engaged in the Mediterranean, Black Sea, and Egyptian trade. On the 16th July 1919 they chartered from the Adam Steamship Company the steamship *Aberlour* on time charter for fifteen months. The charter-party fixed the trade within the limits "United Kingdom, Continent, Black Sea, Mediterranean Trades, including Egypt to United States of America and United Kingdom, and (or) other trades as per owners' warranties attached." The charter provided by clause 32 that : "If during the currency of this charter steamer is directed by the British Government . . . for some voyage or voyages this direction is to be for charterers' account and this charter-party with all its conditions to remain in force between the charterers and owners. Should steamer be requisitioned by the British Government this charter to be null and void." By a reg. 39bbb, made in July 1917, under the powers conferred by the Defence of the Realm Act, the Shipping Controller was empowered to make orders restricting or giving directions with respect to the nature of the trades in which ships were to be employed, including directions requiring ships to proceed to specified ports ; and, by reg. 39dd. made in Feb. 1919, British ships were

(a) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

prohibited from proceeding to sea without a licence of the Shipping Controller. The Shipping Controller, on the 3rd Jan. 1920, refused a licence to the *Aberlour* to proceed to the Mediterranean and directed the Adam Steamship Company to send her to Cuba to load a cargo of sugar. As the *Aberlour* was not requisitioned no hire became payable by the Government to the claimants, who had to pay the full charter hire to the owners, and lost thereby the sum of 14,758*l.* They also lost the profit, amounting to 6198*l.*, which they would have made if the ship had been allowed to make the proposed voyage to the Mediterranean.

The claimants could not minimise that loss by hiring another ship in the place of the *Aberlour*, owing to the high rate of hire ruling at the time. The claimants sought to recover the above two sums as compensation under sect. 2, sub-sect. 1 (*b*), of the Indemnity Act 1920. The majority of the Compensation Court found that: "The charterers' business was that of a carrier of goods by their line of steamers to the Mediterranean, Black Sea and Egypt, and the *Aberlour* was chartered as a vehicle for carrying on that business and no other," and they awarded to the claimants the two sums claimed. The Court of Appeal held that they were not entitled to compensation.

By Bankes, L.J.: On the ground that the loss was due to the "enforcement of a regulation of general application." By Warrington and Scrutton, L.JJ.: On the ground that the loss was occasioned by the fact that the charterers' own contract with the shipowners bound them to carry out the direction of the Government on their own account, and that consequently there was no direct interference with their business. By Scrutton, L.J.: Also, on the ground that the loss resulted from the fact that it was not profitable to employ a substituted ship in the charterers' business because of the high rates charged for ships owing to the existence of a state of war. The shipping company appealed.

Sir *Leslie Scott*, K.C. and *Le Quesne* for the appellants.

Sir *Douglas Hogg* (A.-G.), *MacKinnon*, K.C. and *Darby* for the respondents.

The following cases were referred to:

Re Arbitration between F. A. Tamplin Steamship Company Limited and Anglo-Mexican Petroleum Products Company Limited, 13 Asp. Mar. Law Cas. 467; 115 L. T. Rep. 315; (1916) 2 A. C. 397;
Elliott Steam Tug Company Limited v. *Shipping Controller*, 15 Asp. Mar. Law Cas. 406, 126 L. T. Rep. 158; (1922) 1 K. B. 127;
Bank Line Limited v. *Arthur Capel and Co.*, 14 Asp. Mar. Law Cas. 370; 120 L. T. Rep. 129; (1919) 1 A. C. 435;
Wilson v. *United Counties Bank Limited*, 122 L. T. Rep. 76; (1920) A. C. 102;
Attorney-General of the Commonwealth of Australia v. *Adelaide Steamship Company Limited and others*, 12 Asp. Mar. Law Cas. 361; 109 L. T. Rep. 258; (1913) A. C. 781;
Allen v. *Flood*, 77 L. T. Rep. 717; (1898) A. C. 1;
A. and B. Taxis Limited v. *Secretary of State for Air*, 127 L. T. Rep. 478; (1922) 2 K. B. 328;
River Wear Commissioners v. *Adamson and others*, 2 Asp. Mar. Law Cas. 145; 37 L. T. Rep. 543; L. Rep. 2 H. of L. 743.

The House took time for consideration.

Lord Cave, L.C.—This appeal, the first to be brought to this House under the Indemnity Act 1920, raises important questions as to the meaning and effect of that Act.

The appellants, the Moss Steamship Company Limited, are a British steamship company whose business it is to carry goods to and from the Mediterranean and the Black Sea. They have a number of vessels of their own, but in the summer of 1919 their fleet had been reduced by circumstances connected with the War; and on the 16th July 1919 they chartered from the Adam Steamship Company Limited the steamship *Aberlour* on a time charter for fifteen months, the trading limits being defined as "United Kingdom, Continent, Black Sea, Mediterranean' trades, including Egypt to United States of America and United Kingdom, and (or) other trades as per owner's warranties attached." At that time the Shipping Controller had power under reg. 39bbb, of the Defence of the Realm Regulations either to requisition a ship or to give directions as to her use in trade; and under reg. 39dd no British ship could proceed to sea except under a licence granted by the Shipping Controller. It was no doubt in consequence of these regulations that the following clause was inserted at the request of the owners in the charter party:

32. This charter-party is subject to first voyage licence being obtained, but, if during the currency of this charter steamer is directed by the British Government, or in the event of licence being refused for voyages nominated by charterers from time to time for some voyage or voyages, this direction is to be for charterers' account and this charter-party with all its conditions to remain in force between the charterers and owners. Should steamer be requisitioned by British Government this charter to be null and void.

The "owner's warranties" to which reference was made in connection with the trading limits included a warranty that the ship should comply so far as possible with the orders of His Majesty's Government as to sailings, routes, and otherwise.

Licences for the first voyage and for a second voyage to the Mediterranean were duly granted, and the vessel made these two voyages under the charter; but on the 15th Dec. 1919 the Shipping Controller, by a letter addressed to the owners of the *Aberlour* directed them to offer her to the Royal Commission on Sugar Supplies for the carriage of a cargo of sugar from Cuba to the United Kingdom. The appellants on being informed of this direction protested, stating that they had booked a full outward cargo for a third voyage to Egypt and expected

to have a full return cargo from that country to the United Kingdom; but the Shipping Controller declined to alter his decision, and refused a licence for the projected third voyage. Ultimately, under arrangements made by the owners of the vessel, she carried a general cargo from Liverpool to the West Indies and brought back from Cuba a cargo of sugar. This voyage occupied 120 days and resulted in a net loss after debiting the charter hire of 14,758*l.* 16*s.* 10*d.*; and the owners under clause 32 of the charter-party claimed and received this sum from the appellants. The profit which the appellants would have made if they had been allowed to use the ship in their Mediterranean trade during the 120 days has been found to be 6198*l.*

The appellants claimed payment of the above sums of 14,758*l.* and 6198*l.* under the Indemnity Act of 1920, on the ground that they were losses resulting from a direct interference by the Shipping Controller with their business, and on the claim being disputed took proceedings against the Shipping Controller in the War Compensation court. That court, by a majority (Sir Francis Taylor K.C., and Mr. W. F. Hamilton, K.C.), found that there was interference with the charterers' business by the direction given to the owners of the ship; and being of opinion that the case was covered by the decision of the Court of Appeal in *Elliott Steam Tug Company* v. *Shipping Controller* (15 Asp. Mar. Law Cas. 406; 126 L. T. Rep. 158; (1922) 1 K. B. 127), they awarded to the appellants the full amount claimed. The third member of the court Sir Dunbar Barton, K.C.) dissented on the ground that there was no evidence of such direct and particular interference with the appellants' business as is required to found a claim under the Act. An appeal having been brought to the Court of Appeal on points of law, that court set aside the decision of the War Compensation court and dismissed the appellants' claim but gave leave to appeal to this House.

I think it plain that, if the appellants have any claim to compensation, their claim falls under sect. 2 (1) (*b*) of the Act and is on the ground that they have sustained direct loss or damage by reason of interference with their property or business in the United Kingdom through the exercise of the powers of the Shipping Controller under the Defence of the Realm Acts. I think it equally clear that the appellants have no legal right to compensation apart from the Indemnity Act, and accordingly that if they are entitled to compensation it must under sect. 2 (2) (iii.) (*b*) of that Act be assessed in accordance with the principles set forth in Part II. of the Schedule to the Act. Part II. is in the following terms:—

The compensation to be awarded shall be assessed by taking into account only the direct loss and damage suffered by the claimant by reason of direct and particular interference with his property or business, and nothing shall be included in respect of any loss or damage due to or arising through the enforcement of any order or regulation of general or local application, or in respect of any loss or damage due simply and solely to the existence of a state of war, or to the general conditions prevailing in the locality, or to action taken upon grounds arising out of the conduct of the claimant himself rendering it necessary for public security that his legal rights should be infringed, or in respect of loss of mere pleasure or amenity.

In these circumstances it follows that in order to succeed in their claim the appellants must show direct loss and damage suffered by them by reason of direct and particular interference with their property or business; and the main questions to be considered are: (1) Was there direct and particular interference with the claimants' property or business? (2) If so, did direct loss or damage result from that interference?

A further question has been raised in the course of the proceedings, namely, whether the loss was due to the enforcement of an order or regulation of general application, or to the existence of a state of war, so as to be excluded by the latter part of Part II. of the Schedule.

Upon the first point, it is plain that there was no interference with any property of the claimants. The charter-party did not create a demise of the vessel, which remained the exclusive property of the owners, and the charterers had no more than a right by contract to have their goods carried by the vessel during the period of the charter. If, therefore, the claimants are to be successful, it must be on the ground that the direction given by the Shipping Controller to the owners to offer the vessel for a voyage to and from the West Indies was a direct and particular interference with the charterers' business. In my opinion it was not such an interference. The direction was not given to the appellants and did not prevent them from carrying goods to the Mediterranean if they had or could obtain the shipping necessary for that purpose. No doubt it prevented the owners from performing their contractual obligation under the charter-party to carry goods for the appellants in this ship to the Mediterranean, and so made it more difficult for the appellants to get the goods so carried; but if this was an interference with the appellants' business, the interference was not a direct but a secondary and indirect result of the direction. As Sir Dunbar Barton pointed out in his judgment in his case, an interference by requisition or otherwise with the property or business of an hotel, garage, factory or shop, may involve as a consequence loss or damage to a number of persons who have contracted with the owner of the property or business for the supply of goods or material, the execution of works, or the future hiring or use of rooms, or of cars, or of the property itself; but in such cases the loss suffered by the contractors is not due to direct interference with their business, but is an indirect consequcnce of the interference by the Crown with the business of the owner with whom they have contracted. Such persons have no claim to compensation under the Indemnity Act, their claim being excluded by the word "direct;" and, in my opinion, the

same consideration applies to the claim of the appellants in the present case.

There is a further consideration which is relevant to a part of the appellants' claim, viz., their claim for repayment of the 14,758*l.* loss on the voyage to the West Indies. That loss did not result from the direction given by the Shipping Controller to the owner of the vessel, but from the express contract of the appellants contained in clause 32 of the charter-party to take the risk of any directed voyage. If the Shipping Controller by his direction created a condition of things which brought that clause into operation, it cannot (I think) be said that by so doing he directly interfered with the appellants' business. At most he did that which by reason of the appellants' contract resulted in their undertaking the directed voyage, but that venture was the consequence not of the direction but of the contract.

The above considerations also provide an answer to the question whether, if (contrary to my opinion) there was direct interference with the appellants' business, direct loss or damage resulted from such interference. I understand the expression in the statute "direct loss or damage suffered by the claimant by reason of direct and particular interference" to mean loss or damage directly caused by such interference, and to exclude loss due to the intervention of other factors such as the appellants' contract in clause 32 of the charter. If so, this would exclude any claim for the 14,758*l.* even if otherwise capable of being sustained, though not (I think) the claim for 6198*l.* But it is unnecessary for me to deal with this point, as in my view the claim wholly fails for the reasons above stated.

For the same reason it is unnecessary to deal at length with the point upon which Bankes, L.J. relied, namely, that the latter part of Part II. of the Schedule to the Act prevents any award in respect of loss or damage arising through enforcement of an order of general application. The point was not clearly raised in the notice of appeal; and I think it sufficient to say that it does not appear to me that the direction given to the owners in this case can be described as the enforcement of an order of general application. It was a particular direction given under a general order. On the other hand reg. 39DD, which rendered it illegal for a British ship to sail without a licence, was (I think) an order of general application; but the finding of the War Compensation Court that the direction and not the refusal of the licence was the effective cause of the *Aberlour* not proceeding to the Mediterranean is a sufficient answer to the argument of the respondents based on the regulation last mentioned. I do not think that the loss was due "simply and solely" to the existence of a state of war.

Upon the whole, I am of opinion that the appellants' claim fails on the ground that there was no evidence of direct and particular interference with their property or business, and also, as regards the 14,758*l.*, on the ground that the loss of that sum was not direct loss within the meaning of the Act; and, accordingly, I move your Lordships that the appeal be dismissed with costs.

Lord Haldane.—I think it is a crucial fact in this case that by clause 32 of the appellants' charter-party they had contracted with the owners of the ship that should the Government during the currency of the charter direct the ship for any voyage, the direction was to be for the charterers' account. The charterers need not have made this stipulation. Possibly they accepted it in the hope that the Government rate of freight would prove to be high. Possibly they were pressed into it by the owners. But, for whatever reason, they did make the bargain, with the result that the hire of the ship at a fixed rate for the purposes of voyages directed by the Government became part of the business covered by the charter-party, and it was this fixed rate which was the main factor in determining between profit and loss. For the business so established the *Aberlour* was chartered by the appellants by time for fifteen months. The charter-party did not operate by way of demise, but was simply a contract by which her owners undertook during the agreed time to render to the appellants the service of providing their ship for voyages which the charterers were to designate. The rights of the charterers were thus merely contractual, and their business consisted in enterprises in which these contractual rights could be exercised. Even if they were exercised for voyages under the direction of the Government, that, as between the owners and themselves, was by special stipulation, to be their own account, and the service directed was therefore to be like any other part of the business on which the ship was to be employed by them.

The Shipping Controller had at the time powers under a general regulation to direct ships to proceed to various ports and there to take up cargoes. The *Aberlour*, the steamer in question, was, when a Government direction was given to her through her owners, about to make a voyage for the appellants to the Mediterranean. Had she done so we are to assume that she would have made a profit of 6198*l.* The Government did not make a requisition of the ship, but simply directed her owners that the *Aberlour* was, instead of going to the Mediterranean, to proceed to Cuba, and there load a cargo of sugar at a standard rate of freight. The owners passed this direction on to the appellants. The latter made the voyage to Cuba as directed. They lost 14,758*l.* on balance thereby, and they claim that they have also lost the profit of 6198*l.* on the Mediterranean voyage which had been in prospect. The question is whether they can claim against the Government both or either of these sums. Against the owners no such claim can be made by them, for it is evident that the latter have provided just the service they contracted to render and that the appellants contracted to pay them at an agreed rate.

By the common law no such claim could be made against the Crown, and it is only under

the Indemnity Act of 1920 that it can lie here, if it does lie. That Act enables a claim to be made even where the claimant has no legal right. But in such a case as this the compensation is to be assessed exclusively on the principles set forth in Part II. of the Schedule to the Act. This part of the Schedule provides that account is to be taken only of the "direct loss and damage suffered by the claimant by reason of direct and particular interference with his property or business, and nothing shall be included in respect of any loss or damage due to or arising through the enforcement of any order of general or local application, or in respect of any loss or damage due simply and solely to the existence of a state of war." The claim can accordingly only be one for loss directly flowing from a particular act of interference by the Government. But here the loss had as its direct cause the amount which the charterers had to pay to the owners for hire of the ship. If this had been less there would have been no loss, and on it and also on the high rate of freight in the market at that time depended the prospective profit.

In the case of *Elliott Steam Tug Company* v. *Shipping Controller* (*sup.*) there had been a complete requisition of a tug by the Admiralty, and the majority in the Court of Appeal held that this was an interference which caused direct loss or damage to the business of the charterers, who were, therefore, under the Act, entitled to compensation. This loss or damage was treated as being the direct result of the requisition, although Scrutton, L.J. dissented on the ground that the charterer could not recover at common law for damages for loss of rights which arose wholly out of the contract between him and the owners. Which of these views was correct, it is not necessary to consider in the present case, where there was no such requisition. By clause 32 of the charter-party the charterers undertook that if there were a Government direction it was not to take the hiring outside the charter-party, but that the directed voyage was to be treated as being within the contract, and for the charterers' account. The members of the Court of Appeal in the present case agreed in thinking that the real reason of the loss was this contract under which the charterers undertook that they would pay the scale of hire stipulated for by the owners and would carry out any Government direction on the footing that it related to a service falling within the provisions of the charter-party.

I think that this conclusion was the true one. Under the statute the loss or damage has to be direct and suffered by reason of direct and particular interference by the Government with the property or business. To make clear the restriction as regards causation it is declared that no loss or damage is to be included which is merely due to or arises out of the enforcement of regulations of general application. What the Legislature appears to me to have intended to provide for are cases in which, there being no remedy under the ordinary law, loss or damage has been the immediate outcome of a particular interference by the Government with property or business and which has not been the result of some intervening act done by the claimant himself or by some other person, such as an agreement to pay a special rate of hire. For what was in this sense the direct and immediate cause of loss in the restricted contemplation? No doubt in one aspect the direction given by the Government included it as an element. For we must take it that without this direction the appellants would have earned the 6198*l.* and would not have lost the 14,758*l.* But the aspect in which that is so is not the only or the dominant aspect presented by what happened. If the charter-party had not bound the appellants to the owners to carry out the directed voyage as being one falling within a business which the contract covered in detail, the voyage might not have taken place or might have taken place on terms which would have resulted either in no loss or less loss. The direct cause of the loss was, in other words, dependent directly upon another element or factor—the onerous character of the payments which the appellants had to make to the shipowners. The possible outcome of this feature of their bargain the charterers had probably not foreseen. Had they foreseen the pecuniary consequences to themselves, it is not likely that they would have accepted a clause which extended in an obligatory fashion the scope of possible voyages for which they were to pay the owners. But perhaps they thought that freights, even for Government carriage, would go higher. Anyhow they had to pay the owners on the scale on which they had agreed to pay, and it is this which appears to me to have been the direct cause of the loss of the 14,758*l.* No doubt when the cause of anything has to be defined it is impossible to pick out any one fact and to say that taken in isolation it is the exclusive and self-contained cause of the effect. Every effect implies for its complete explanation the whole of the circumstances of the universe, past as well as present. But it is not complete explanation, such as omniscience alone could take in, that is sought after either in law courts or in laboratories. What is sought after is only such circumstances as are decisive for a problem which is defined by the particular aspect of the object world which is under consideration. Now here we have that aspect prescribed for us by Part II. of the Schedule to the Indemnity Act.

The effect, the loss for which we have to find a cause, in the sense in which we are directed to search, is not to be anything such as the enforcement of some general regulation under which voyages may be compulsorily directed. Such a general regulation may well be an important factor if it has made possible the infliction of loss such that the loss has flowed directly from special interference. Now here I think it flowed directly from the rash bargain which the appellants had made, for excepting as the outcome of that bargain it does not appear that the 14,758*l.* would have been lost. From the

voyage account of the sailing across the Atlantic it appears that the charterers received over 33,000*l.* That they had to pay hire in excess of this amount was the result of their own stipulation in clause 32. For analogous reasons I think that the profit of 6198*l.* had its direct cause or reason in the particular terms of the charter-party, and that its absence was therefore not the direct outcome of the direction. It was dependent on the terms of the contract whether there was to be either profit or loss. For some purposes, and in a particular aspect, the direction might have been treated as occasioning these, but not, as it seems to me, for the purpose and in the aspect to which Part II. of the Schedule limits a claimant who has no enforceable rights at common law, and who is restricted to what the words of the Second Schedule give him. What the direction did was to bring the restrictive scale of a general regulation into operation. It was clause 32 that was the immediate and particular casual factor as regards both loss and profit during during this part of the charter period.

I therefore agree with the decision arrived at by the Court of Appeal.

Lord Finlay.—This case raises an important question upon the Indemnity Act 1920 (10 & 11 Geo. 5, c. 48).

The facts of the case are very simple. The owners of the *Aberlour* were the Adam Steamship Company Limited, and by charter-party dated the 16th July 1919 they let the vessel to the Moss Steamship Company Limited, as charterers for fifteen months. Clause 9 made the usual provision that the captain, though appointed by the owners, should be under the orders and direction of the charterers as regards employment agency or other arrangements. Clause 32 was in the following terms:

32. This charter-party is subject to first voyage licence being obtained, but, if during the currency of this charter, steamer is directed by the British Government, or in the event of licence being refused for voyages nominated by charterers from time to time for some voyage or voyages, this direction is to be for charterers' account and this charter-party with all its conditions to remain in force between the charterers and owners. Should steamer be requisitioned by British Government this charter to be null and void.

This clause was a very usual one. It will be observed that it deals with the case of the vessel being directed by the British Government or the licence being refused for voyages nominated by charterers from time to time for some voyage or voyages; in such cases "this direction is to be for charterers' account," but if the steamer should be requisitioned by the British Government, the charter is to be null and void.

The vessel was employed by the charterers in the Mediterranean trade. On the 15th Dec. 1919 the Ministry of Shipping sent a letter to the owners of the *Aberlour*, in which they stated that at the conclusion of the voyage on which the *Aberlour* was then engaged the owners were directed to offer the steamship to the Royal Commission on Sugar Supplies for the carriage of a cargo of sugar to the United Kingdom. Protests were made on behalf of the appellants but the Ministry of Shipping insisted on the direction and refused on the 3rd Jan. 1920 the licence for the voyage to the Mediterranean, and the *Aberlour* proceeded to Cuba accordingly under a charter made between the owners and the Royal Commission on Sugar Supplies, which provided that the vessel should proceed to Cuba and there load a cargo of sugar from the factors of the charterers and carry it to a port in the United Kingdom as ordered. The sugar was shipped accordingly in Cuba and carried to Liverpool, and during the whole of the time so occupied the *Aberlour* was compulsorily engaged in Government service under the order.

I turn to the Indemnity Act 1920. The first section prevents any proceedings, whether civil or criminal, in respect of acts done in good faith during the War in the public interest by any person under the authority of the Crown.

The second section provides for compensation in respect of acts done in pursuance of prerogative or other powers of the Crown. The first sub-section of this clause makes provision with regard to ships which, or any cargo space or passenger accommodation thereon, have been requisitioned on behalf of the Crown during the War, and provides that the owner shall be entitled to payment or compensation for the use made of the vessel and for services rendered, and to compensation for loss or damage thereby occasioned. The amount is to be assessed by the tribunals mentioned in sect. 2 (4). The compensation is, apart from any special provisions, to be assessed according to the principles acted on by the Board of Arbitration constituted under the Proclamation issued on the 3rd Aug. 1914 (sect. 2 (i) and (ii) as set forth in Part I. of the Schedule to the Act. These principles provide that the compensation for the use of the vessel in whole or in part shall be based on what are known as the Blue Book Reports providing for rates of payment wherever applicable, together with a sum by way of compensation for any loss or damage caused to the ship and directly due to the use made of it; so, however, that nothing shall be awarded for any other damage or loss incidentally caused to the owner or to other persons.

Under these provisions the owner gets payment only for the use made of the vessel at the prescribed rates and compensation for any damage to the ship directly due to such use.

It will be seen that no claim for loss or profits is admissible and that the compensation is given only to the owner. There is no provision for compensation to persons who have suffered by the requisition in respect of contractual rights with regard to the ship. No claim by a charterer under the ordinary form of charter, could be entertained under the provisions to which I have just adverted; the charterer has merely contractual rights to have the services of the vessel and crew and no compensation is given in respect of such rights.

The principle on which the Act proceeds in cases where a ship has been requisitioned in whole or in part is that only the owner can claim and that he can get nothing except payment for the use made of his vessel at the prescribed rates plus the amount of actual damage to the ship from such use, and sect. 2 (1) (*a*) with the subsidiary provisions is the only part of the Act which makes provision for compensation for the use of a ship which has been requisitioned in whole or in part.

Having dealt under head (*a*) with ships requisitioned, the Act goes on in the same sub-section to deal under head (*b*) with the case of any person "who has otherwise incurred or sustained any direct loss or damage by reason of interference with his property or business in the United Kingdom through the exercise or purported exercise, during the war, of any prerogative right of His Majesty" or similar power.

I think that the word "otherwise" under head (*b*) denotes that the damage must have been sustained otherwise than by the fact that a ship or cargo space or passenger accommodation in it has been requisitioned. The Legislature had just dealt with that case under (*a*) and had limited the right of claim to the owner of the ship, to the exclusion of all other persons and of all claim for damages in respect of loss of profits. There was, of course, a vast number of cases in which the prerogative of the Crown had been used for the general good, but with damage to particular persons, in matters which had nothing to do with the requisitioning of ships. It is to such other cases that the Legislature turns when under head (*b*) it makes provision for damage otherwise occasioned.

Under head (*b*) are included all cases of the exercise of the rights of the Crown, prerogative or statutory, with regard to property other than ships, and also cases affecting ships otherwise than by the requisitioning of the vessel or part of it. In such cases the compensation is to be ascertained on the principles set out in Part II. of the Schedule, as those on which the Defence of the Realm Losses Commission had hitherto acted. Head (*b*) reads as follows:

> (any person) . . .
> (*b*) who has otherwise incurred or sustained any direct loss or damage by reason of interference with his property or business in the United Kingdom through the exercise or purported exercise, during the war, of any prerogative right of His Majesty or of any power under any enactment relating to the defence of the realm, or any regulation or order made or purporting to be made thereunder, shall be entitled to payment or compensation in respect of such loss or damage;

And Part II. of the Schedule is as follows:

> The compensation to be awarded shall be assessed by taking into account only the direct loss and damage suffered by the claimant by reason of direct and particular interference with his property or business, and nothing shall be included in respect of any loss or damage due to or arising through the enforcement of any order or regulation of general or local application, or in respect of any loss or damage due simply and solely to the existence of a state of war, or to the general conditions prevailing in the locality, or to action taken upon grounds arising out of the conduct of the claimant himself rendering it necessary for public security that his legal rights should be infringed, or in respect of loss of mere pleasure or amenity.

The precise sense in which the word "requisition" whether noun or verb, is used, may vary according to the context. It means a request or demand for something and is generally used in cases where there is some authority or power of enforcement behind the request or demand. It is as applicable to the demand of a ship for one particular service as to the demand of a ship for a long period or to taking it altogether out of the hands of the owner—it is as applicable to requiring the services of the ship and crew, as it is to requiring the delivery up of the ship alone.

In the charter-party, clause 32, which I have already set out, it is used in contradistinction to cases in which the vessel gets a direction for some particular service or is prevented by refusal of a licence from going on some particular voyage—in either of these cases the charter continues to operate—while if the vessel is "requisitioned" the charter is to be null and void. In clause 32 it clearly refers to the case in which the Government themselves take over the vessel, whether they work it or not, and whether they work it with the old captain and crew or with others. But in sect. 2 (1) (*a*) of the Act, it is used not merely with reference to taking over the ship, but is also applied to cases in which only cargo space or passenger accommodation has been taken and to cases in which the use of the ship has been required with its captain and crew, for whatever period or occasion.

Light is thrown on the difference between directions and requisitions by the Defence of the Realm Regulations, 39BBB. The first clause of that regulation provides that the Shipping Controller may make orders regulating, restricting, or giving directions with respect to the nature of the trades in which ships are to be employed, the traffic to be carried therein, terms and conditions, ports, rates, bills of lading, building, repairing, use of docks, and many other matters relating to shipping. This is a power of directing the manner in which the business of shipowners and others is to be carried on with reference to ships.

The third clause gives the power of requisition. It is as follows:

> (3) The Shipping Controller may by order requisition or require to be placed at his disposal in order that they may be used in the manner best suited for the needs of the country, any ships, or any cargo space, or passenger accommodation in any ships, or any rights under any charter, freight, engagement, or similar contract affecting any ship, and require ships so requisitioned to be delivered to the Controller or any person or persons named by him at such times and at such places as the Controller may require, where it appears to the Controller necessary or expedient to make any such order for the purpose of making shipping available for the needs of the country in such manner as to

make the best use thereof, having regard to the circumstances of the time.

Such compensation shall be paid in respect of the use of a ship or cargo space or passenger accommodation requisitioned under this regulation, and for services rendered during the use thereof, and for loss or damage thereby occasioned as in default of agreement may be determined by the Board of Arbitration constituted under the proclamation of the third day of August, nineteen hundred and fourteen, respecting the requisitioning of ships by the Admiralty.

The provisions as to compensation in this the last paragraph of clause 3 of this regulation have been embodied in the provisions made in the Indemnity Act 1920 as to compensation under sect. 2 (1) (*a*) which relates to requisition.

It would therefore appear that the requisitions dealt with by sect. 2 (1) (*a*) are those dealt with by the third clause of reg. 39BBB, while the cases of damage "otherwise" incurred, for which sect. 2 (1) (*b*) of the Act makes provision, would include any orders made by the Shipping Controller under the first clause of the regulation.

The fourth clause of the regulation provides for the services of notices :

(4) Any order made under this regulation affecting any ship may be served on the owner of the ship, and shall be deemed to be sufficiently served if sent by registered post addressed to the managing owner or other person to whom the management of the ship is entrusted by or on behalf of the owner at his registered address.

I think that this provision is one merely for convenience of service. It does not require service on the owner. It merely provides that it may be served on him and that it shall be deemed to be sufficiently served if sent by registered post to the managing owner or other person entrusted with the management. Persons other than the owner may be affected by the order, but there might be great difficulty and delay if it were necessary to serve them all. The regulation proceeded on the view that for practical purposes it was enough to send the notice to the owner, who would in all probability be in communication with such persons.

This provision (clause 4) does not appear to me to affect the construction to be put on clauses 1 and 3 of the regulation.

Upon the facts of this case and the documents to which I referred, it might have been contended, on behalf of the Crown, that this case falls under sect. 2 (1) (*a*) of the Act as being a case in which in terms of that clause a vessel was requisitioned during the War, and that the only claim that could be made is one by the owner, while sect. 2 (1) (*b*) relates only to loss or damage otherwise incurred. If this contention were well founded, it would afford a complete answer to the claim inasmuch as a charterer has no *locus standi* to claim under sect. 2 (1) (*a*). This point, however, was not taken on behalf of the Crown and the case was throughout treated as falling under head (*b*). It follows that it is impossible on this appeal to support the judgment of the Court of Appeal upon the ground that this was a case of requisition, since that ground was not taken for the Crown, and the appellants have, consequently, never been heard upon it. We must deal with the case on the basis on which it has been treated by all parties, and by the courts below, as falling under head (*b*) of sect. 2 (1). If the question whether such a claim as the present can be properly so treated is to be considered it must be in some other case.

The Court of Appeal were of opinion that the claimants' case failed on the ground that it does not satisfy the conditions prescribed by Part II. of the Schedule as applying to cases under (*b*).

Three grounds of objection are enumerated in the judgment of Bankes, L.J. (*ante*, p. 142 ; 128 L. T. Rep. 715, at p. 717 ; (1923) 1 K. B. 447, at p. 453).

The first was that there was no interference with the property or business of the claimants, the charterers.

The vessel, of course, was not the property of the charterers. Was there an interference with their business ? It was argued that there was none, on account of the terms of clause 32 of the charter-party, by which in case of a "direction" by the British Government this "direction" is to be for the charterers' account and the charter-party, with all its conditions, is to remain in force between the charterers and owners. It was said that on the direction to proceed to Cuba being given the Cuban voyage became, by force of this clause, part of the charterers' business, and that the voyage of the *Aberlour* to Cuba and back was brought about by their own contract. Bankes, L.J. intimated that he thought there was great force in this argument, but did not rest his judgment upon it.

In my opinion this argument fails. The question is whether there was an interference by the order with the business of the charterers. The charterers had the right to determine, subject to licence, to what part of their business the services of the *Aberlour* should be appropriated. Even if it were assumed that the Cuban voyage became part of their business the order compelled them to devote their vessel to it to the exclusion of the employment in the Mediterranean, to which it would otherwise have been assigned. A man's business is interfered with if he is not allowed to conduct it according to his own judgment and if he is compelled to send his vessel on an errand other than that which he had in view, even if the new errand falls within the ambit of his business. Even if the direction of the Government through the Shipping Controller had been to do something within the scope of the charterers' business in the strictest sense, as if it had been a direction to go, say, to the Black Sea instead of to Eygpt, such an order would have been an interference with the charterers' business, and if loss of profit was thereby occasioned owing to the diversion of the vessel from a more lucrative adventure, it might have given ground for a claim to compensation.

There can be no more direct and palpable interference with a business of this description than a direction to proceed to a destination other than that which the person having control of the vessel had selected, whether the new destination be within or without the ambit of his business. The charterer in the ordinary course of his business, has determined to send his vessel to Port A.; the Government make an order that he should send her to Port B.; if this is not interfering with the business, what can be?

It was the order of the Controller that made it necessary that the *Aberlour* should go to Cuba, and the necessity of making that voyage interfered with the business of the company. Clause 32 merely provides the most convenient way of carrying out such a direction, which, of course, must be obeyed. Clause 32 did not make the Cuban voyage part of the business of the charterers. It provides that the charter-party is to remain in force and that the vessel is to be used on its compulsory errand for the job imposed upon it by the Government. It is merely a provision for carrying out a direction from the Government in such a way that it shall not be treated as a frustration of the charter-party so as to put an end to it. It is for the purpose of carrying out in the manner most convenient for all parties the order made by Government that the charterers undertake with the owner, for the purpose of keeping the charter-party alive, to do under it something which was outside their business in any reasonable sense of the term.

The second ground mentioned by Bankes, L.J. was that even if there was interference it was not "direct and particular interference with the business." This point appears to me not to be arguable. A direction that a vessel shall go to a port other than that to which the charterer wanted to send her is as direct and particular an interference with the business as can be imagined. None of the Lords Justices expressed any opinion on this point; Bankes, L.J. said that it might arise in some other case and that he would not decide it in this.

The third ground urged in the Court of Appeal was that if there was an interference and if that interference was "particular" it was due to the enforcement of an order of general application and therefore could not form the subject of a claim under Part II. of the Schedule.

It was on this ground that Bankes, L.J. based his judgment against the claimants. He said "I think that it was" (due to a general regulation) "and it is on that conclusion that I prefer to found my judgment. Those words appear to me to cover this case completely, whether it be looked at from the point of view of the charterers having anticipated its application by the manner in which they conducted their business or from the point of view of its actual application to their particular case. In either view the loss was due to the enforcement of a regulation of general application" (*ante*, 144; 128 L. T. Rep., at p. 718; (1923) 1 K. B., at p. 455).

In my opinion this proposition cannot be supported. Under a regulation of general application, namely, Defence of the Realm Reg. 39BBB, the Shipping Controller had power by order to requisition or require to be placed at his disposal any ship. It was under this general regulation that the particular order was made that the *Aberlour* should proceed to Cuba and take on board a cargo of sugar for the United Kingdom. It was this particular order that caused the loss. The provision in Part II. of the Schedule that nothing shall be included in respect of "the enforcement of any order or regulation of general or local application" relates to general orders or regulations which *proprio vigore* require that those in control of shipping shall do or not do certain things. It has no reference to general rules or regulations which merely give power to make particular orders, and which until such particular order is made have no effect whatever upon those in control of any ship. General orders which prescribe a certain course of conduct of ships under certain circumstances or in certain localities do not give rise to any claim for compensation even if the particular shipowner may sustain some loss in consequence of his enforced obedience to such orders. The damage in the present case was entirely due to the particular order made under a general power.

Warrington and Scrutton, L.JJ. did not express any opinion on this point.

Warrington, L.J. rested his judgment in favour of the Crown entirely upon the 32nd clause of the charter. In his opinion the effect of this clause was that when the order to proceed to Cuba was given it became part of the charterers' business to comply with it and that for this reason the order did not interfere with the business. Such a construction seems to me untenable. The business of the charterers was, as found by the War Compensation Court, that of a carrier of goods by their line of steamers to the Mediterranean, Black Sea, or Egypt, and I do not see how the finding of the War Compensation Court that this business was interfered with by the order can be successfully attacked.

Scrutton, L.J., in his judgment, stated that he adhered to the views expressed by him in his dissentient judgment in the *Elliott Steam Tug* case (*sup.*). He said that the judgment of the majority in that case precluded him from acting on his own view. The view taken by Scrutton, L.J. in the *Elliott Steam Tug* case (*sup.*), is on the same lines as that to which I referred as not being open upon this appeal, namely, that the case was one of requisition and fell under sect. 2 (1) (*a*). Scrutton, L.J. rested his concurrence in the judgment in the present case upon two other grounds. The first was clause 32 of the charter with which I have already dealt. The second was that "the loss results from the fact that it was not profitable to employ a substituted ship in the business because of the high rates charged for ships owing to the existence of a state of war." With regard to this I will only point out that

the provisions of Part II. of the Schedule that nothing shall be included in respect of any loss or damage due simply and solely to the existence of a state of war, cannot, in the circumstances of the present case, have the effect which the Lord Justice ascribes to it. The damage was not caused simply and solely by the existence of war; it was caused by the order "Proceed to Cuba," and the existence of war only prevented the charterers from getting another vessel to take the place of the *Aberlour*. It was certainly not caused simply and solely by the existence of war; the existence of war merely interfered with their getting another vessel to prevent the damage which resulted from the order.

In the argument for the Crown at your Lordships' Bar, the first point urged upon the House was one which does not appear in the reports of the case in the court below, and would appear to be entirely novel. It was that the real cause of the voyage was not the order to proceed to Cuba, but the refusal of a licence to proceed to Egypt, and that no action can be brought for the refusal of a licence. This contention overlooks the fact that the refusal of the licence to proceed to Egypt was itself merely a consequence of the direction to proceed to Cuba. It would have been absurd to give a licence for the *Aberlour* to proceed to Egypt when the Controller had just directed that she should go to Cuba. The War Compensation Court found that this direction was the effective cause of the *Aberlour's* not proceeding to the Mediterranean, and that the refusal of the licence followed as a consequence of the direction. It appears to me to be impossible seriously to contest the correctness of this finding. This argument for the Crown proceeds on the assumption that what was a mere consequence of the direction to proceed to Cuba is to be treated as the real cause of what ensued.

In dealing with the contention for the Crown that the loss was the result of the claimants' own act in agreeing to clause 32 it is necessary to distinguish between the two items of damage claimed. As regards the 14,758*l.* claimed in respect of the Cuban voyage, clause 32 affords a complete answer. That sum represents the loss sustained on the voyage to Cuba and thence to the United Kingdom with the sugar cargo, being the excess of the disbursements over the receipts thereon. That loss fell upon the claimants entirely because they had taken that voyage upon themselves by clause 32. It was not a result of the requisition at all. On the other hand the 6758*l.* claimed was lost as the direct result of the order directing that the vessel should proceed to Cuba; that order withdrew the vessel from the Mediterranean voyage for which she was booked and on which she would have made a profit to that amount. The loss of that profit had nothing to do with clause 32 or with the fact that it was the charterers who took the vessel to Cuba and back with the sugar; it resulted purely from the order directing the vessel to go to Cuba which prevented the Mediterranean voyage.

In my opinion the damage caused by the loss of the 6758*l.* profit was the direct result of the order which withdrew the *Aberlour* from the business of the charterers as found by the War Compensation Court.

The War Compensation Court awarded the claimants 20,956*l.*, made up of two sums, 14,758*l.* for the voyage and the further sum of 6198*l.* for loss of the profit which would have been made on the Mediterranean voyage. Sir D. P. Barton, one member of the court dissented; the judgment was given by the chairman, Sir Francis Taylor, on behalf of himself and Mr. W. F. Hamilton. On appeal to the Court of Appeal this decision was set aside, the Court of Appeal being of opinion that the claim should be disallowed altogether.

It appears to me that the award of the court must be modified by elimination from it of the 14,758*l.* awarded in respect of the Cuban voyage. The question is, what damage was done to the business of the appellant company? This business was treated, and correctly treated, by the War Compensation Court as being the Mediterranean and Black Sea business carried on by them, and the whole damage done to that business was 6198*l.*, the amount of the profit which would have been earned on the Mediterranean voyage which was prevented by the order to proceed to Cuba. I cannot regard the compulsory Cuban voyage as part of the business of the company. The 14,758*l.* was loss upon the Cuban venture which the charterers undertook in compliance with the obligation that they had entered into by clause 32 of the charter-party, and I do not see how it can be brought within the terms of Part II. of the Schedule. The claim for loss of profit which would have been made by the Mediterranean voyage stands on a totally different footing. That was a loss in the business carried on by the charterers, and it was incurred directly in consequence of the order to proceed to Cuba.

That award should, in my opinion, stand, but for 6198*l.* only.

Lord Sumner concurred with the judgment of the Lord Chancellor.

Lord Parmoor.—The Indemnity Act 1920 places a restriction on the taking of legal proceedings against certain persons acting in good faith, and provides a right to compensation under certain limited conditions. The appellants were charterers of the steamship *Aberlour*, on a time charter, for fifteen months. During the time covered by the charter, the Ministry of Shipping, by a direction to the owners, directed that the ship should proceed to Cuba, and bring a cargo from there to the United Kingdom for account of the Sugar Commission.

The tribunal of the War Compensation Court, by a majority, decided that the appellants did bring themselves within the provisions of the Act and of Part II. of the Schedule, and awarded to them two sums, namely, 6198*l.*, loss of profits and 14,758*l.* 16*s.* 10*d.*, which is described as loss of hire. So far as the amount is concerned,

these figures are agreed between the parties. The decision of the tribunal is final, subject to the right of either party, if it feels aggrieved by any direction or determination of the tribunal on any point of law, to appeal to the Court of Appeal. By leave of that court, but not otherwise, there is an appeal to this House.

In the notice of appeal the respondents asked that the claim, both in respect of loss by hire and loss of profit, be dismissed with costs, and set out the points of law by the direction or determination of which they were aggrieved :

(1) That the direction given to the owners was a direct and particular interference with the property of the charterers.

(2) That there was a direct or particular interference with the property or business of the charterers.

(3) That the charterers have suffered a particular interference with the charterers' property or business.

I do not understand that there has been any application to enlarge these points of law, and the argument of the Attorney-General was within these limits.

Sect. 2 of the Act divides the right to claim compensation under two heads : (*a*) is limited to the case of an owner of a ship or vessel which, or any cargo space or passenger accommodation in which, is requisitioned at any time during the war. It is clear that the appellants, who had no interest as owners in the *Aberlour*, could not recover any sum in the nature of compensation under this head. The true effect or meaning of (*a*) was not argued before your Lordships, and I desire to give no opinion on this point. The appellants based their claim on (*b*), and if, on other grounds, they can substantiate their claim to compensation, I can see no valid argument for saying that they are not within the category of persons, who have otherwise incurred or sustained loss or damage by reason of interference with their business in the United Kingdom. Certainly the case has throughout proceeded on the inquiry, whether the claim made by the appellants is a direct loss or damage, capable of assessment under the provisions of Part II. of the Schedule.

Part II. of the Schedule enacts that the loss for which compensation is to be assessed shall be only a direct loss by reason of direct and particular interference with the property or business of the claimant. In this case the allegation is of interference, not with the property of the appellants, but with their business.

Part II. of the Schedule further enacts that "nothing shall be included in respect of any loss or damage due to or arising through the enforcement of any order or regulation of general or local application, or in respect of any loss or damage due simply and solely to the existence of a state of war, or to the general conditions prevailing in the locality, or to action taken upon grounds arising out of the conduct of the claimant himself rendering it necessary for public security that his legal rights should be infringed, or in respect of loss of mere pleasure or amenity."

In the Court of Appeal, Bankes, L.J. founds his judgment on the application of the words, "due to or arising through the enforcement of any regulation of general or local application." I do not think that the interpretation of these words adopted by the Lord Justice can be supported. The order, on which the claim of the appellants is based, is the special direction given to the owner of the vessel, and this is not an order or regulation of general or local application, operating after it has been promulgated, without the necessity of further notice to the person or persons who will be affected. The efficacy of the order depends on the special notice served on the owners of the vessel. Warrington and Scrutton, L.JJ. do not express an opinion on this point. Warrington, L.J. rested his judgment in favour of the Crown on the contractual position created by the charter, and particularly on sect. 32. Scrutton, L.J. refers to his judgment in the *Elliott* case, and states that charterers cannot recover direct loss in their business under the Second Part of the Schedule (1) by the fact of his own contract binding him to carry out the directions on his own responsibility, and (2) by the fact that his loss also results from the fact that it was not profitable to employ another ship in his business, because of high rates charged for ships owing to the War.

It will be convenient to deal with the points raised in the judgments of Warrington and Scrutton L.JJ. in connection with the argument which the learned Attorney-General addressed to your Lordships.

The Attorney-General stated his argument under four heads. He urged, in the first place, that the loss, of which the appellants are complaining, was due not to the order to proceed to Cuba but to the refusal of a licence to proceed to Egypt, and that no compensation is payable for the refusal of a licence. It does not appear that this point was urged in the court below, and it does not appear to me to be raised in the reasons attached to the appellants' case ; but in any case, the matter is determined by the finding of the majority of the tribunal. "We find that such direction was the effective cause of the *Aberlour* not proceeding to the Mediterranean, and that the refusal of the licence followed as a consequence of the direction." I see no reason for differing from this finding. The effect is that the refusal of the licence was a consequence of the direction to proceed to Cuba, and not the cause of interference with the voyage on which, but for the direction, the *Aberlour* would have proceeded. It further appears there was never any difficulty in obtaining a licence, except in the period covered by the direction, and that the licence was given so soon as the voyage to Cuba had been carried out.

In the second place the Attorney-General raised the question what was the business of the appellants ? This is a question of fact. The test is what trade was in fact being carried on at the material date, and not what trade might have been carried on, within the ambit of the trading limits defined by the charter-party. The

majority of the tribunal state "we find the charterers' business was that of a carrier of goods by their line of steamers in the Mediterranean, Black Sea, and Egypt." They further find, "that the *Aberlour* was chartered as a vehicle for carrying on this business and no other."

The third question propounded by the Attorney-General is whether there was interference with the business as above defined? The majority found that the business of the appellants was interfered with by the direction of the Shipping Controller. This, again, is a question of fact, and no point of law is involved. It is, however, hardly possible to suggest that a direction, which withdrew the *Aberlour* from the business of the appellants for 120 days, was not an interference with their business. Assuming that it was found that the voyage to Cuba was within the business of the appellants, there is, in my opinion, interference with the business of the appellants in diverting a vessel against the protest of the appellants, from a voyage which for the purposes of their business they had intended to undertake, and from which they would have derived profit.

The fourth question raised by the Attorney-General is directly in accord with the notice of appeal. Was the direction to the owners a direct and particular interference with the business of the charterers? Further, was there any direct and particular interference with the business of the charterers? At the time when the direction was given to the owners the *Aberlour* was, in fact, being employed as part of the fleet used in the carrying on of the business of the claimants, and, but for the direction to the owners, would have continued to be so used. The vessel was part of the equipment provided to carry on the business of the appellants, and contributed to the business profits. To withdraw a portion of the equipment by which a business is being carried on is, I think, a direct interference with the business. The interference was particular, in that it was not an act which affected the business of carriers generally, or the business of the carriers engaged in the same business or the same locality as the appellants, but only their own special business. The word "particular" provides against a claim for loss, where such loss results from a common inconvenience, which affects all His Majesty's subjects, or some class of them, including persons other than the particular claimant. It is not enough, however, that there should be direct and particular interference with the business of the appellants, unless it can be shown that the appellants have suffered direct loss or damage by reason of such direct and particular interference with their business.

Were the sums of 6198*l.* or 14,758*l.* 16*s.* 10*d.* or either of them a direct loss attributable to the direction of the Shipping Controller? The sum of 6198*l.*, which is an agreed figure, is the loss of profit in fact suffered through the withdrawal for a period of 120 days, of a vessel actually in use in the business of the appellants at the time of withdrawal, or alternatively through the diversion of such vessel from the Mediterranean trade, against the protest of the appellants. This withdrawal was brought about by the direction of the Shipping Controller. It appears to me that the consequent loss of 6198*l.* was directly attributable to the directions which he gave. Except so far as it might affect the quantum of loss or damage, it is immaterial whether the *Aberlour* was hired or owned by the appellants, so long as the vessel was in fact being used as part of the equipment of the business of the appellants, and such use would have continued but for the direction to the owner. Machinery *in situ*, and being operated for business purposes, is not the less a part of the business stock or equipment that it has been found more convenient to hire it than to purchase it. It was urged on behalf of the respondents that the interference on which the appellants based their claims for loss of profit, was not an interference with business, but only with contractual rights, and that to award compensation for interference with contractual rights would be to misconstrue the terms of the Indemnity Act. This may be so, but the appellants were not dependent on the enforcement of contractual rights against the owner of the *Aberlour*, they had the use of the vessel and were using it for the purposes of their business, when it was withdrawn under the direction of the Shipping Controller. No doubt the question of remoteness of loss is a question of law, but I cannot come to any other conclusion than that the withdrawal of a vessel actually engaged in a trade cannot be regarded as a too remote cause of the loss of profit which the appellants suffered, and that there is no ground for rejecting the finding of the tribunal under this head. The further point raised in the judgment of Scrutton, L.J., that the loss resulted from the fact that it was not profitable to employ another ship in the business because of high rates charged for ships owing to the War, does not appear to have been raised before the tribunal and was not pressed in this House. I doubt whether it could have been raised after the 6198*l.* had been accepted as an agreed amount.

The sum of 14,758*l.* 16*s.* 10*d.*, loss of hire, stands on a different footing. It is not a direct loss for a direct and particular interference with the business of the appellants, but a loss incurred in the voyage to Cuba, a voyage outside the business of the appellants. The loss falls upon the appellants as a consequence of par. 32 of the terms of the charter-party, in which they undertook to bear this loss as between themselves and the owners. In truth the total loss attributable to interference with the business of the appellants is included in the sum of 6198*l.*, and no further claim is maintainable.

The result is that the appeal should be allowed, and that the award should stand for 6198*l.* and be dismissed as regards the sum of 14,758*l.* 16*s.* 10*d.*

Appeal dismissed.

Solicitors: for the appellants, *Thomas Cooper and Co.*; for the respondents, *The Treasury Solicitor.*

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 16 *and* 19, 1923.

(Before BANKES, SCRUTTON, and ATKIN, L.JJ.)

BRANDT AND OTHERS *v.* LIVERPOOL, BRAZIL, AND RIVER PLATE STEAM NAVIGATION COMPANY LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Bill of lading — Part of the goods shipped in damaged condition—Delay in delivery of goods—Estoppel—Claim by indorsee of clean bill of lading—Expenses of reconditioning goods—Fall in market value—Prolongation of voyage—Deviation.

Goods were shipped on behalf of the plaintiffs on board a ship belonging to the defendants for carriage from Buenos Aires to London under a bill of lading given by the defendants in which the goods were described as having been received "in apparent good order and condition." After the goods had been put on board, a portion was ascertained upon examination to be in a defective condition. The damaged portion of the goods was thereupon taken out of the ship for the purpose of being reconditioned. After reconditioning, the goods were reshipped to Liverpool, where they arrived about three months after the time when they should have arrived, and there had by then been a fall in market values. The plaintiffs, who were the indorsees of the bill of lading but to whom the property in the goods had not passed by indorsement, and who could not therefore sue under the Bills of Lading Act 1855, claimed the goods upon their arrival at Liverpool, but had to pay to the defendants the amount expended upon reconditioning the goods at Buenos Aires. The plaintiffs thereupon brought an action against the defendants claiming to recover the cost of the reconditioning of the goods, an amount which they had paid under protest, and also claiming damages for the delay in delivery of the goods.

Held, that the delivery of the goods by the defendants was an acceptance of the offer by the plaintiffs to accept the goods upon the terms of the bill of lading. The defendants were estopped from saying that the goods were damaged before they were placed on board, because of the fact that a clean bill of lading was given.

Held, further, that the plaintiffs had a right of action arising out of the contract for damages due to the delay in the delivery of the goods.

And further, that the taking of the goods out of the ship and retaining them on shore for a considerable time until they were reconditioned could not reasonably be considered to come within the expression "prolongation of the voyage." The delay was such as to bring about a voyage entirely different from the voyage contemplated by the bill of lading; it amounted, in fact, to a deviation.

Decision of Greer, J. affirmed.

THE action was brought by Messrs. Brandt and Co., a firm of merchants carrying on business in London, for damages for delay in delivery of the goods specified in a bill of lading dated the 23rd March 1920 and for the return of the 748*l.* 10*s.* paid under protest against the defendants, the owners of the steamship *Bernini*, and, in the alternative, there was a similar claim by Messrs. F. W. Vogel and Co., of Buenos Aires, the shippers of the goods.

The plaintiffs alleged that the defendants, having received from the shippers on board the *Bernini*, at Buenos Aires, in March 1920, about 6000 bags of zinc ash, for carriage from Buenos Aires to Liverpool, wrongfully discharged some 5600 of the bags at that port and only forwarded the same after unreasonable delay in the steamship *Cavour*, which left Buenos Aires on the 15th July 1920, and that the plaintiffs were compelled, in order to get delivery, to pay the sum of 748*l.* 10*s.*, the amount of alleged expenses for reconditioning the bags at Buenos Aires between the time of their discharge and the time of their reshipment on the *Cavour*, in respect of which the defendants claimed a lien.

The defence was that the defendants were justified in discharging the 5600 bags at Buenos Aires because they had been damaged by water before being put on board; that the bags heated in the hold, and that it was therefore necessary for their own preservation and for the protection of the other cargo on board, that they should be put ashore, warehoused, and reconditioned; that they were guilty of no unreasonable delay in dealing with the goods after their discharge, and that they were, therefore, not liable for the consequences of any delay in the carriage of the goods to Liverpool, the port of discharge. And they counterclaimed for 167*l.* 3*s.* 2*d.*, being the difference between 915*l.* 13*s.* 2*d.*, the actual cost of reconditioning and for 748*l.* 10*s.* which had been paid to them in discharge of their lien. By their reply the plaintiffs said that the defendants were estopped from contending that the goods were or became dangerous by reason of a defect which could have been observed on shipment as the bill of lading of which they were the indorsees, stated that the goods were shipped "in apparent good order and condition." Greer, J. gave judgment for the plaintiffs, Messrs. Brandt and Co., upon their claim and counterclaim.

Raeburn, K.C., *Singleton*, K.C., and *Mac-Iver* for the appellants.

Wright, K.C. and *James Dickinson* for the respondents.

The following cases were referred to:

Stindt v. *Roberts and another*, 5 D. & L. 460;
Sanders v. *Vanzeller*, 4 Q. B. 260;
Compania Naviera Vascongada v. *Churchill and Sim*; *Same* v. *Burton and Co.*, 10 Asp. Mar. Law Cas. 177; 94 L. T. Rep. 59; (1906) 1 K. B. 237;

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

Sewell v. *Burdick*, 5 Asp. Mar. Law Cas. 376; 52 L. T. Rep. 445; 10 App. Cas. 74;
Cock v. *Taylor*, 13 East 399;
Young v. *Moeller*, 5 E. & B. 755;
Martineaus Limited v. *Royal Mail Steam Packet Company Limited*, 12 Asp. Mar. Law Cas. 190; 106 L. T. Rep. 638;
Allen and others v. *Coltart and Co. and others*, 5 Asp. Mar. Law Cas. 104; 48 L. T. Rep. 944; 11 Q. B. Div. 782.

Bankes, L.J.—This is an appeal from a judgment of Greer, J., in an action which raised an interesting and important question, and which the learned judge dealt with in his judgment in a very clear and exhaustive manner, and, in my opinion, quite correctly. Indeed, if it were not in deference to the very clear arguments which have been addressed to us I should be quite content to say that I agree with the judgment delivered by the learned judge.

The facts out of which the action arose were these: A firm of Vogel and Co., trading at Buenos Aires, were the shippers of a large number of bags of zinc ash. They proposed to ship these goods on a vessel of the defendants called the *Bernini*. The other plaintiffs, Messrs. Brandt, were the London correspondents of Messrs. Vogel and Co.; they had acted as such for many years, selling goods on behalf of Messrs. Vogel and Co. in return for a commission, and financing the transactions by accepting bills of exchange for 90 per cent. of the invoice price of the goods. After the ash had been shipped on board the *Bernini* it was ascertained that a number of the bags had heated, and apprehension was felt lest they should prove dangerous, not only to the other goods on board, but possibly to the vessel. Lloyd's agent was called in; he examined the goods and reported that he found the top layers of bags very seriously heated, and in his report he stated that from the condition of those bags it was apparent to him that the bags below must be heated probably to a much more dangerous extent than those he was able to examine. As the result of that examination and report the bags were taken out of the vessel, and after a time they were reconditioned —or some of them were— and those bags were not re-shipped until after the lapse of a very considerable time. There was a small number of bags, 385 bags, which were a separate lot put into a different hold; they were undamaged, and were taken by the *Bernini* upon the contemplated voyage from Buenos Aires to Liverpool. On their arrival at Liverpool the plaintiffs, Messrs. Brandt, on presentation of the documents to them paid the bills—they had resold the goods—and took delivery of the 385 bags. The remainder of the bags which had been taken off the vessel at Buenos Aires and reconditioned did not arrive in this country till August, when Messrs. Brandt took delivery of them. The defendants, the shipowners, claimed a sum of 700*l.* odd for the reconditioning of these goods, and Messrs. Brandt had to pay that in order to obtain delivery. The action was brought by Messrs. Vogel and Co., and Messrs. Brandt claiming damages for the delay in the delivery of these goods and for a return of the amount which they had had to pay for reconditioning. The main question in the action tried in the court below was whether Messrs. Brandt had a cause of action against the shipowners arising from the fact that they were the bill of lading holders and had presented the bills of lading. They claimed to have a right of action on one or both of two grounds. One was that in the circumstances of the case the general property in the goods had passed to them; and the other was that in the circumstances of the case there was an implied contract arising from their taking delivery of the goods, an implied contract upon the terms of the bill of lading so far as they were applicable to the circumstances at the time they took delivery. Greer, J. decided against Messrs. Brandt's contention, founded upon the general property in the goods having passed to them. I agree with that view, and it is unnecessary to express any opinion about it, or to go into the facts in relation to it.

The argument in this case has been mainly directed to the question as to whether there was a contract between Messrs. Brandt and the shipowners which entitled Messrs. Brandt to sue for damages for the delay in delivery of these goods and for the return of the money they had had to pay for reconditioning them. Now, it is quite true that there is no authority expressly covering the question as to how far the contract, which has been held to arise from the offer to take delivery of the goods, made by the holder of a bill of lading and accepted by the shipowner, binds the shipowner. To what extent does it bind him? Does it bind him only to the extent of an obligation to deliver the goods, or does it bind him to the extent of the contract as contained in the bill of lading so far as the terms of that bill of lading are applicable to the circumstances of the case? We have been referred to three authorities, *Stindt* v. *Roberts* (*sup.*), *Young* v. *Moeller* (*sup.*), and *Allen* v. *Coltart* (*sup.*). By these authorities it has been clearly established that where the holder of a bill of lading presents it and offers to accept delivery, if that offer is accepted by the shipowner, the bill of lading holder does come under an obligation to pay the freight and to pay the demurrage, if any; and there are general expressions in all those three cases, I think, in which the learned judges have said that the contract so made by that offer and acceptance covers so as to include the terms of the bill of lading. In my opinion, in this particular case the contract must include the terms and conditions of the bill of lading, and for this reason. The bill of lading holder offered the freight before the goods were delivered, and in fact paid it, and under those circumstances it seems to me that the subsequent delivery by the shipowner is an acceptance of an offer to accept the goods as described upon the terms of the bill of lading. I think

from the shipowner's point of view it must necessarily include the whole of the terms of the bill of lading, because, in accepting such an offer, the shipowner must desire that he should be covered by the exceptions in the bill of lading in respect of which the offer of the bill of lading holder is made. I think, therefore, that the learned judge is right when he states, as he does, his conclusion that on the facts in this case it is sufficient to say that it was a promise—that is, a promise by the shipowners—to deliver the goods to Messrs. Brandt in the condition in which they ought to be delivered under the bill of lading. So much, therefore, for the contract point. I entirely agree with the learned judge's conclusion in reference to that very important matter.

The next point that arises is this. Assuming that that is the correct conclusion in law, are the shipowners in the circumstances of this case entitled to rely upon the exceptions in the bill of lading? Now the facts in relation to that are these, that the damage to these goods was in fact caused by rain whilst they were waiting for shipment, and although they had been damaged by rain while waiting for shipment the shipowners in fact issued a clean bill of lading under which they admitted that the goods were received in good order and condition. The case for Messrs. Brandt was that in those circumstances the shipowners were estopped from alleging that the damage to these goods was caused before the goods were put on board, and that as a consequence they could not rely upon the conditions in the bill of lading which otherwise would have covered the facts. The learned judge went into that question, which after all is a question of fact, and he found, and in this I agree with him, that Messrs. Brandt materially altered their position to their detriment by acting on the assumption that they had a clean bill of lading. I have stated the facts which, in my opinion, support that finding of the learned judge. The result, therefore, so far is that Messrs. Brandt have a right of action arising out of the contract for damages due to the delay in the delivery of these goods.

I should add this. Upon that point Mr. Raeburn complained of the learned judge's judgment in one or two particulars. He said that the shipowner ought not to be held responsible for the delay that occurred whilst these goods were being reconditioned or before they were reconditioned, because it was putting too high a duty upon the captain to hold that he was negligent in taking these goods out of the ship under the circumstances in which he was placed. Now it is quite true that he was in a difficult position; because he had had this report from Lloyd's agent, which indicated that the lower tiers of bags were, in his opinion, in a much more dangerous condition than those which he was able to inspect; but this fact remains, that the lower tiers of bags were apparently in a perfectly satisfactory condition, undamaged and dry, and any examination of the bags during the time that they were being unloaded, or any examination of the bags after they had been placed on shore, would have disclosed the fact that the surveyor had been under a misapprehension in coming to the conclusion at which he arrived. In those circumstances it seems to me that the learned judge was quite justified in coming to to the conclusion that the delay was the fault of the shipowners, and that Messrs. Brandt, being entitled, in his view, to sue upon the contract, had proved that they had suffered damage by reason of breach of contract.

The other point in the case was in reference to the claim to recover the amount which Messrs. Brandt had been forced to pay in order to obtain possession of the goods, and that was the amount which the shipowners paid for reconditioning the goods. I think there is something to be said for the view that, the whole amount being claimed, at any rate as against Messrs. Vogel, the shipowners have a right to say that the whole amount should not be recoverable, because, at any rate, the cost of reconditioning the portion that was damaged ought to be allowed; but Mr. Raeburn admits that that matter was not specifically raised upon the pleadings, and I do not think that we ought at this date to allow an amendment in reference to it. He admits that it ought not to affect the costs, and I do not think that in the circumstances we ought to allow an amendment in order to raise that comparatively small point in this very important case.

I think that disposes of all the matters that were raised, except one, and that is this. It was said: Well, assuming that Messrs. Brandt have a right of action in contract, and assuming that the shipowners are estopped from saying that the goods were damaged by rain before they were placed on board because of the fact that a clean bill of lading was given, still, upon the assumption that the contract between Messrs. Brandt and the shipowners includes all the relevant clauses and conditions of the bill of lading, there is a condition contained in clause 1 which excludes the liability of the shipowners. That clause contains, amongst other things, the conditions upon which the ship could not be liable for delay. It is a very long and rather confused clause, and owing to the fact that it is so long and is not split up it is not very easy at first sight to see the construction which one ought to place upon it; but after the discussion which has taken place I am satisfied that the only condition upon which the ship is entitled to rely is the condition which provides for non-liability in the event of a prolongation of the voyage owing to any of the matters which are set out in the clause. That raises a question of construction and a question whether, in the events which have happened here, it can be said that the taking of these goods out of the *Bernini* before she started and retaining them on shore for a very considerable time until they were reconditioned can, with any reasonable meaning of the expression "prolongation of the voyage" in this clause, be considered to be a prolongation

of the voyage. In my opinion the facts do not bring this case within the exception, because I do not think, in the events proved, it can reasonably be said that there was here any prolongation of this voyage at all. What happened was that the voyage that was referred to in the bill of lading did not commence.

In these circumstances, in my opinion, the view taken by the learned judge was on all points correct, and I think his judgment must be affirmed, and the appeal dismissed with costs.

SCRUTTON, L.J.—I substantially agree with the judgment of Greer, J., which is marked by his usual carefulness and accuracy, and I only give some reasons in my own words for that judgment because some of the matters involved are matters of considerable commercial importance. We have listened to a very helpful argument from Mr. Raeburn for the appellants. The dispute arises in this way. Messrs. Vogel, in South America, were going to ship a parcel of zinc ash in bags, and through carelessness they shipped them wet. Zinc ash is a material in which if it gets wet a certain amount of heat is produced. While Messrs. Vogel were careless in shipping these goods wet, the ship was careless in that it gave a bill of lading stating they were shipped "in apparent good order and condition" when they were not, because they were externally wet, which could be seen. The result was that the shipowners put into circulation a document which they knew might be passed on to other persons for value, and on which other persons might act, which contained an untrue and material statement "in apparent good order and condition." The result of that, according to a well-known decision which has been repeatedly followed, was this, that persons taking such a bill with a statement in it of that character could, in any complaint against the shipowner who had issued it, rely on that statement and prevent the ship from proving the true fact which had not been correctly stated in the bill. That was the decision in *Compania Naviera Vascongada* v. *Churchill and Sim* (*sup.*), and one of the many cases in which that has been followed is *Martineaus Limited* v. *Royal Mail Steam Packet Company* (*sup.*). What happened was that after this bill of lading had been given the zinc ash, being on board the ship in the port in South America, heated. The bags containing them were stowed in a hold with cotton. The captain called in Lloyd's agent, and Lloyd's agent took the correct view that the heat might damage the cotton and the incorrect view that it might damage the ship, and recommended that the whole of the zinc ash should be discharged. As a matter of fact, the learned judge finds that only the top third of the zinc ashes were heated and wet, and that the remaining two-thirds might quite safely have been allowed to remain in the ship. Anyhow, the whole of the ash was taken out, and someone was very careless, the captain, and probably Lloyd's agent, in not inspecting the goods while they were being discharged. If they had done so, on the facts found by the learned judge, they would have found out that the bottom two-thirds were not heated and might just as well stay in the ship. But this large parcel was taken out of the ship, and a warehouse was found for it. It was spread out; and it was some three months or more before it got back into a Lamport and Holt steamer to go to the United Kingdom; and when it got there there was of course a considerable sum that had been spent on reconditioning it. Some few hundred bags had got on the original ship, the *Bernini*, and the balance did not come on until some three months later. Messrs. Brandt were the consignees of the goods in England and they advanced nine-tenths of their value; and when the bill of lading was presented to them they had heard that there was some difficulty after shipment. They looked critically at the bill of lading to see what it stated about the condition of the goods, and found that the goods were stated to be "in apparent good order and condition," and on the faith of that untrue statement they presented the bill of lading and received the goods. In order to get the goods they had to pay the £700 odd expenses of reconditioning; they had to pay under duress. They then claimed upon the shipowners, first of all for damages for delay in that the goods ought to have got to England in May, and did not get there until August, by which time the market had fallen; secondly they claimed to recover back the sum that they had paid under duress—the £700 odd for reconditioning the goods.

The first line of defence made was: "You, Messrs. Brandt, are not in any way parties to the bill of lading so as to be able to rely on the estoppel contained in it." That raises a somewhat novel position which has not in terms got into the authorities, as far as I know. Before the Bills of Lading Act was passed in 1855, while by the custom of merchants the indorsement of the bill of lading passed the property in the goods contained in it, the indorsement had no effect itself on the contract contained in the bill of lading; and therefore the person who owned the goods could not merely by reason of the indorsement sue the shipowners upon the contract that the shipowner had made which was evidenced in the bill of lading. Before 1855 a long series of decisions had been given—of which two of the leading cases were *Sanders* v. *Vanzeller* (*sup.*), and *Cock* v. *Taylor* (*sup.*)—the general lines of which were, that while you could not as a matter of law say that the presenting of the bill of lading made the person who presented it liable to the terms of the bill of lading, you might find as a matter of fact a contract from taking the bill of lading; and I believe in every case that is reported the question which was discussed was, Was the person who presented the bill of lading and took the goods bound to comply with the conditions which had to be performed by the owner of the goods; was he bound to pay freight; was he bound to pay demurrage;

was he bound to pay any other specific matter mentioned in the bill of lading? The question of what were his rights against the shipowner, as far as I know, was never expressly raised in the cases, and I think there is a reason why it should not be so. If he had property in the goods—any property, not merely the whole property, but any property—he could sue the shipowner in tort, and it was obviously to the interest of the shipowner to say that the person who took the goods was bound by the whole bill of lading, including those terms which had to be performed by the shipowner and those exemptions from liability which were contained for the benefit of the shipowner.

Probably that is the reason why there is no express authority. But when one comes to consider what the contract implied was, a contract by the person who took delivery to perform the terms of the bill of lading, and asks oneself what was the consideration moving from the shipowner for that promise, one sees it was to deliver the goods on the terms of the bill of lading. The bill of lading was the document which contained the terms on both sides which were implied from presenting the bill of lading and taking delivery under it. When the Bills of Lading Act was passed in 1855 this part of the difficulty was remedied in that when the property—the whole property—passed by the endorsement to the endorsee, the contract also passed. That left untouched the question where the whole of the property did not pass to the endorsee, but some property which would enable him to sue in tort for damage to his goods, or conversion of his goods, or non-delivery of his goods. In *Burdick* v. *Sewell* (*sup.*) the question was raised: What is the position of a bank which has taken a bill of lading as a pledge, as security for an advance, and which never presents the bill of lading because its advance is small, and the presenting of the bill of lading would render it liable for a much larger amount, and the House of Lords decided that a bank pledgee not having the whole property and not presenting the bill of lading, and not taking delivery under it, was not liable to perform the conditions of the contract in the bill of lading. Lord Selborne expressed the view that if the bank did present the bill of lading it might then be liable on the contract contained in the bill of lading. It seems to me that such a case is to be governed by the old law which existed before the passing of the Bills of Lading Act. Can you, by presenting the bill of lading when you have some property in the goods, imply a contract on each side to perform the terms of the bill of lading? The view that Greer, J. has taken is that you can and ought to in this case; and I take the same view. It follows, therefore, that Messrs. Brandt are entitled on the bill of lading to the benefit of the estoppel which is contained in the statement: "In apparent good order and condition."

Then comes the question what is the effect of that estoppel on the claims in this case. Messrs. Brandt claim, first of all, damages for delay, that is to say, damages in that the goods should have arrived at a particular date and did not arrive till much later, by which time the market had fallen. There might be an answer to that, because the shipowner could say: "I am protected by an exception." But when the shipowner tries to protect himself by the exception he is in this difficulty, that he cannot prove what has caused the delay; he cannot prove that it was caused by damage to the goods before he shipped the goods, because he has stated that they were shipped "in apparent good order and condition" and is estopped from disproving it. He has proved, as the learned judge finds, that it was not caused by anything that happened to the goods, any fresh cause acting on the goods, after they were shipped, and, therefore, he is in the unfortunate position that he cannot prove that any matter which caused the delay comes within any of the exceptions which protect him. He might be able to say this, and this is the matter which has given me most difficulty in the case: there is a clause in the bill of lading that the ship shall not be liable for any delay, loss, or damage caused by prolongation of the voyage, whether or not it arises from negligence, or errors in judgment of agents, masters or surveyors. I myself am inclined to think—I am not quite sure that I agree with my Lord in this—that prolongation of the voyage might apply to facts like this. The bill of lading contract is to ship by the *Bernini* or to tranship the goods into any other ship before the commencement of any period of the voyage; and I think that prolongation of the voyage might very well relate to the voyage by the *Bernini* or by a ship into which the goods were transhipped; and it might be said that the prolongation by transhipment, or the taking of the goods out of the *Bernini*, was due to the negligence, error of judgment, or wrong decision of the agent, master, or surveyor. But the ship is in this difficulty in this case, that not only was there a taking out of the ship through negligence and error of judgment, but that after the goods were taken out there was an unreasonable delay in putting them back again, and it appears to me that the result of those two unreasonable acts is that there is sufficient delay to amount to a deviation, and once a deviation takes place the shipowner cannot rely on any of the exceptions. From that point of view, therefore, I find it unnecessary to decide positively whether prolongation of the voyage does or does not cover this taking out of one ship and transhipping into another. The result, therefore, is that the shipowner who has delayed and who does bring the goods at a later date than he ought to have done is unable, owing to the estoppel, to prove the true facts; he is unable to show any cause of delay which brings him within the exceptions, and, consequently, is liable for the damages for delay because he cannot excuse himself under the terms of the bill of lading. The same reasoning shows that Messrs. Brandt can recover back the sum which they had to pay under duress for reconditioning the goods, because the shipowner is unable to prove that he is

protected by any of the exceptions in the circumstances which gave rise to the reconditioning of the goods. He cannot prove that the necessity for reconditioning arose from the condition in which the goods were brought to the ship by the shipper, because the estoppel prevents him. He has proved that the circumstances which required the taking of the goods out of the ship did not result from anything which happened to them after they got into the ship, and, consequently, he is unable to prove any circumstances which give rise to the necessity for expenditure in reconditioning, and in relation to which he is protected. Those two matters cover the whole claim put forward in this case; and, in my view, for the reasons which I have endeavoured to state shortly and which I think are substantially the same as those of Greer, J., the learned judge came to the right conclusion.

This appeal therefore must be dismissed.

Atkin, L.J.—I agree. I assume for this purpose that Messrs. Brandt are not in a position to sue the ship under the Bills of Lading Act; that is to say, they cannot prove that the property in the goods passed to them as indorsees of the bill of lading. Then the question arises whether any and what contract arises between them and the ship in the circumstances under which Messrs. Brandt did in fact take delivery. I am inclined to agree with the criticism addressed by Greer, J. to the dictum of Lord Selborne in *Burdick* v. *Sewell* (*sup.*); and for my part I have great difficulty in seeing how a pledgee of the goods who, under the decision in *Burdick* v. *Sewell* (*sup.*), does not get a title under, or the right to sue on the contract under, the Bills of Lading Act, can improve his position by doing that which it was necessary he should do as pledgee of the bill of lading—namely, taking delivery of the goods when the ship arrives. That seems to me to be merely asserting his limited right of possession in order to continue to act as pledgee, but his position may for all that be very much strengthened by the circumstances under which he takes delivery.

Before the Bills of Lading Act it had been held in a series of decisions that the indorsee of the bill of lading, who came to the shipowner and claimed delivery under the bill of lading, was liable to the shipowner in respect of liabilities, which, I think, on the decisions, gradually increased. The first class of decision, I think, arose by reason of the terms of the bill of lading which stipulated for delivery to order and referred to assignees, he or they paying freight; and it was said that if a person came to the shipowner and said to him: "I am assignee of the bill of lading, deliver me the goods," then the shipowner was entitled to infer a contract by him that he would, in the terms of the bill of lading, as such assignee pay the freight. He was, therefore, held bound to pay the freight on an *indebitatus assumpsit* on the delivery of the goods. Later on, that obligation was extended to paying charges other than freight in cases where those charges were not expressed in the contract expressly as being payable by an assignee, as, for instance, to payment of demurrage or other charges, and there the contract obviously becomes a contract to be implied from the cricumstances of the delivery being taken by the assignee of the bill of lading. Now, is there any corresponding obligation on the part of the shipowner in that contract? It appears to me that just as plainly as the assignee is bound by an implied contract, so is the shipowner, and the shipowner's obligation, it appears to me, in the case where freight has in fact been paid by the holder of the bill of lading, is that he will deliver the goods. What other contract could be inferred from the fact that an assignee of a bill of lading goes to the shipowner's representative and offers him the bill of lading freight, which is accepted by the shipowner. It appears to me the necessary implication is that the shipowner says: "Yes, I will take the bill of lading freight, and in consideration of that I will deliver to you the goods which I have on board under the bill of lading." Is it a contract to deliver the goods on the terms of the bill of lading? Well, if you were to ask a shipowner and to suggest to him that possibly he has come under an absolute obligation to deliver the goods and not an obligation qualified by the exceptions in the bill of lading I have no doubt you would administer to him a very severe shock; because shipowners are entirely unaccustomed to having a burden put upon them in reference to the carriage of goods except accompanied by the qualification of exceptions, and no other contract, I think, could properly be inferred. After all, the bill of lading freight is the freight which has been assessed and calculated upon the footing of a contract of carriage qualified by the exceptions; and I cannot imagine that a greater hardship could be put upon a shipowner than to say: "You have received the bill of lading freight which is based upon an obligation to carry qualified by all the exceptions, and, having taken it, you must accept an obligation to deliver the goods not qualified by any of the exceptions." I myself have no doubt at all that the obligation on the shipowner is an obligation to deliver on the terms of the bill of lading. I think it follows that the implied contract that arises in cases such as this is that the holder of the bill of lading and the shipowner make a contract for the delivery and acceptance of the goods on the terms of the bill of lading, so far, of course, as they are applicable to discharge at the port of discharge. In those circumstances it appears to me that the indorsee of the bill of lading is substantially in precisely the same position as though in fact he came under the Bills of Lading Act, and I see no reason why he should not have the benefit of the estoppel which is created by the representation of the shipowner in the bill of lading that the goods have been received "in apparent good order and condition." That is the representation which, as the learned judge says, the shipowner must contemplate will be made and repeated to every successive holder of the

bill of lading, and which the shipowner must know will be acted upon by each successive holder of the bill of lading and each indorsee who does in fact take delivery under the bill of lading. In this case Messrs. Brandt have acted upon it, in the first place by taking the bill of lading and accepting the draft, and, in the second place, by paying the freight and getting the promise of the shipowner to deliver the goods, I think that all the conditions for creating an estoppel exist. The result is, therefore, that the normal conditions applicable to such an estoppel apply and the shipowners are precluded from saying that the goods were not in apparent good order and condition when they were shipped. The result of that is, I think, to establish an obligation upon the shipowners; that is to say, that they commit a breach of their implied contract by not delivering the goods in the same condition as they must be taken to have been in when they arrived on board of ship.

Then the question further arises whether or not the shipowners are protected, in the circumstances which have arisen, from the claim by reason of delay. I have dealt with this case as though it were a case of goods being delivered in a damaged condition because I think the contractual rights of the parties are in fact precisely as though that was what had actually happened, but the actual damage arose because the goods were taken out of the ship and reconditioned, and put some two or three months after upon another ship and so brought to this country. Now, are the shipowners entitled to rely upon any of the exceptions in respect of that delay? When the matter is ventilated it appears that the only condition upon which they can rely is delay caused by prolongation of the voyage. I agree with Scrutton, L.J., that it is not necessary to determine that matter, therefore I do not propose to determine it; but I think I ought to say in reference to it, inasmuch as the matter has been mentioned in argument and, I think, before the learned judge, that my own view at present would be that this is not a case of prolongation of the voyage but rather of postponement of the voyage. I for my part have considerable difficulty in seeing that in the month of June, when these goods were certainly not on the *Bernini* and certainly not on the *Cavour*, but were lying in the warehouse, or were in the course of being reconditioned, they were on any voyage at all. I do not think they started on their voyage in fact until they got on the *Cavour*, and, therefore, what really happened was that the voyage was postponed rather than prolonged. But even if it was prolonged, I think here there was a plain deviation. The delay was such as to cause, to my mind, a voyage entirely different from the bill of lading voyage. What I think was contemplated was a voyage by the *Bernini*, or by some other ship which might be substituted for the *Bernini* at or about the time of the voyage contemplated; and I think, therefore, in view of there being a deviation that the shipowner could not rely upon the exception. I think that that deviation is applicable and effective in the case of any implied contract as much as it would be in the original contract under the bill of lading.

I do not propose to deal with the issues of fact that have been decided by the learned judge because it appears to me that it is impossible to say that his decision is wrong in these matters. They have been very carefully considered by him and they have been very carefully put before us by Mr. Raeburn. I am content to say that I see no reason for differing from the conclusion of fact at which the learned judge arrived. The result of that is that his judgment must stand. I am not quite sure whether he dealt with the question of deviation—but apart from that I entirely agree with the reasons he has given for his decision. I think, therefore, this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants, *Stokes* and *Stokes*, agents for *Cameron* and *Mac-Iver*, Liverpool.

Solicitors for the respondents, *William A. Crump* and *Son.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Nov. 2, 6 *and* 19, 1923.

(Before HILL, J.)

THE DEVON. (*a*)

Dockowners — Negligence — Wires and ropes picked up in dock by propeller — Implied warranty of fitness of dock—Duty of dockowner to exercise reasonable care.

No absolute warranty that a dock is fit for the vessels which are invited to use it is implied in the duty of a dockowner. The decision in Mersey Docks and Harbour Board *v.* Gibbs (2 *Asp. Mar. Law Cas.* (*O. S.*) 353; 14 *L. T. Rep.* 677; (1866) *L. Rep.* 1 *H. L.* 93), *and subsequent authorities establish that the duty of a dockowner is to use reasonable care that the docks and berths are reasonably fit for the ships they invite to use them.*

Thus, where a vessel picked up with her propeller a quantity of wires and ropes from the bottom of a dock, and it appeared that they might have been discovered and removed by efficient dredging, the owners of the dock were held liable for the damage sustained by the vessel.

THIS was an action by the Federal Steam Navigation Company Limited, the owners of the steamship *Devon*, against the Mersey Docks and Harbour Board, claiming damages for

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

injuries sustained by the *Devon* by reason of her picking up with her propeller a quantity of wires and rope from the bottom of the Brocklebank Dock at Liverpool on the 5th Sept. 1922.

A. T. Miller, K.C. and *Noad* for the plaintiffs.

Bateson, K.C. and *Stewart Brown* for the defendants.

The facts and arguments of counsel fully appear from the judgment.

Nov. 19, 1923.—HILL, J.—The plaintiffs are the owners of the steamship *Devon*. The defendants, the dock authority of the Mersey, own the Brocklebank Branch Dock, one of a group of docks communicating with the river at Sandon Half Tide entrance. The plaintiffs have appropriated berths in the Brocklebank Branch Dock, one of these is the eastern half of the south side—spoken of as the south-east berth. It had been appropriated to the plaintiffs since Jan. 1922. On the 5th Sept. 1922, in the morning, the *Devon* was berthed. In the berth the same day a diver examined her propellers and external shafting and found all in order. That was done in the ordinary course after the ship had come down the Manchester Ship Canal. On arrival she drew 27ft. forward and 27ft. 1in. aft. Her loading was completed and she then drew 31ft. forward and 30ft. 7in. aft, or 30ft. 7in. or 8in. aft. She was a vessel of 9661 tons gross, 471ft. long between perpendiculars and 60ft. beam. On the morning of the 9th Sept. she left for sea, having two tugs astern and two ahead. She was hauled off the berth and taken down the Branch and the Brocklebank and Canada and Huskisson Docks into Sandon Half Tide Dock and moored alongside the steamship *Samaria* waiting for tide. Between the berth and Sandon her engines were worked to some extent and difficulty was experienced with the port engine. While alongside the *Samaria* it was opened up and nothing found wrong with it. After two attempts to pass from alongside the *Samaria* to the entrance it was concluded that something must be wrong with the propeller. A diver was sent down. It was found that the shaft and boss and blades of the port propeller had wrapped round them a great quantity of portions of wire and manilla ropes. They were removed by divers after some days work. They included wires and manillas of several dimensions —some nine or ten different sizes in all—old and worn and the wires rusted in different degrees. The amount is gauged by the fact that the total length of all the measured pieces of wire brought up by the divers was 2500 ft., and of the manilla 120ft., apart from a further confused mass.

For the mischief so caused the plaintiffs say the defendants are liable. They suggest that there was an absolute warranty that the dock was safe for the *Devon*. They further contend that, in any case, there was an obligation to use reasonable care, and that, with reasonable care, that which did the mischief would have been discovered and removed. I do not think that there is an absolute warranty. A whole series of cases from *Gibbs* v. *The Mersey Docks and Harbour Board* (2 Asp. Mar. Law Cas. (O. S.) 353; 14 L. T. Rep. 677; L. Rep. 1 H. L. 93) to the present day has, in my opinion, established that the duty of the dockowner is to use reasonable care that the docks and berths are reasonably fit for the ships they invite to use them. It is obvious that a dock in which the *Devon*, being manœuvred in the ordinary way, could pick up and wrap round her propeller a great quantity of old wire and rope was not reasonably fit for the *Devon*. The question is whether that unfitness was due to a failure by the defendants to use reasonable care either in the detection or the removal of the cause of mischief.

It is, I think, the proper deduction from the evidence that the bulk of the mischief was done as the *Devon* was leaving her berth, She cast off about 9.35. As the stern tugs were hauling her off from the quay, she fell back, and her engines were moved ahead. At 10.1 the port engine pulled up. I accept that as a fact upon the evidence of the chief engineer who was in the engine room. It appears also in the fourth engineer's scrap note book, but it is obvious that the engine orders there recorded are not a complete or perhaps an accurate record. The fourth engineer said that he was engaged upon other duties besides noting the times. But the chief engineer's evidence was not challenged by putting in the engineer's log. I accept his evidence. There can be no doubt that the port engine pulled up because so much wire and rope was already wrapped round the propeller and shaft that it could not revolve. It is, of course, possible that the entanglement then existing picked up other wires at a later stage, and it may be that subsequent attempts to turn the propeller ahead or astern increased the entanglement; but the bulk of the mischief was caused before the ship left the Brocklebank Branch Dock. That of itself, in my judgment, raises a *primâ facie* case against the defendants. Such accumulations of old wire and rope ought to be discovered and removed. In effect, the defendants say that they do all that is possible. They have suffered for a long time, and of late years to an increasing extent, from the wilful misconduct of persons who throw old material into the docks. As appears by the correspondence they have frequently called the attention of shipowners and others to the mischief. Their anxiety appears to have been chiefly on account of the difficulties caused to their dredgers, and they say that this is the first accident of the kind which has happened to a ship in the docks. But if wires are at the bottom of the dock and the ship sufficiently deep draughted, there must always be the possibility of a wire getting into a bight, perhaps in the very operation of grab dredging and of a propeller catching it. It is not a risk which cannot reasonably be foreseen, or, if foreseen provided against. The defendants say they use the most effective machinery for dealing with the mischief, namely, periodic soundings and dredging with grab dredgers. I

will assume that such is the case. But I then have to ask myself why was there this accumulation in the Brocklebank Branch Dock on the 9th Sept.? There are two possible explanations: (1) that it was not discovered and removed because the dredging was not properly carried out; (2) that it was put there between the time of the preceding dredging and the 9th Sept. The evidence is that soundings were taken over the whole area of the Brocklebank Branch Dock on the 4th Sept. and that on the 4th Sept. and early morning of the 5th Sept. two dredgers —No. 9 and No. 22—dredged over the berth and the middle of the dock outside it and found nothing. And yet on the 9th Sept. the *Devon* picks up the bulk, if not the whole, of what she gleaned. And on the 22nd Sept. No. 15 picks up several pieces of wire on ground which had been dredged by No. 22 on the 4th and 5th Sept. and on the 25th Sept. No. 22 picks up in the berth "a large quantity of old wire rope," which was described as a bunch of about twelve pieces, the longest 40 fathoms, of various sizes, picked up in sect. 9b, as it was on the plan, about 30ft. from the wall. The *Devon*, while in berth lay over sect. 9b, and on the 26th Sept. No. 14 picked up a small quantity of wire on the berth, and a witness for the plaintiffs with a grapple in some places afterwards picked up two pieces about 4 fathoms long. Is it possible that all this rubbish should have been thrown into the dock after the early morning of the 5th Sept. I do not believe it. I accept the evidence from the *Devon* that none was put out from the *Devon*. After the *Devon* the berth was occupied by two other large steamers of the line—the *Middlesex* from the 10th to the 15th Sept., and the *Howrah* from the 17th to the 23rd. Supposing that they put any out, it will not account for what the *Devon* picked up. And it is hardly credible that they should put out in the immediate neighbourhood of their propellers what was found on the 25th Sept. in sect. 9b. There is the further difficulty that any of these steamers, or any one person, could have put into the dock all the variety, in size and age, of wire and rope which was found by the *Devon*. I have not thought it necessary to determine the question whether the bulk of the wire was galvanised and such as ships use or not. I find that what the *Devon* gathered up was there when the *Devon* was berthed, and ought to have been discovered and removed had the defendants' servants used reasonable care in dredging.

There was a further point made by the defendants which affects the question of damage. It was only raised by amendment of the pleadings at the hearing. The defendants say that the mischief was largely caused by the *Devon's* engine being worked after it ought to have been apprehended that the propeller might be foul. I have already said that the bulk of the mischief was done by 10.1. Before the engines then pulled up there is no reason why anything should have been apprehended. After that the engineers supposed that the mischief was in the engine. I cannot think, nor do the Elder Brethren think, that the engineers ought thereupon to have assumed that the trouble might be external. The ship was in a dock which those in charge of her were entitled to assume was free of obstructions. Nor was it negligent to try to get a turn ahead or astern out of the engine while they were examining it or after they had opened it up and found the valves in order. After it was clear that the mischief was not internal, the engines were not moved, and, therefore, those on board the ship did not contribute by their negligence to the amount of the damage.

In these circumstances, there will be judgment for the plaintiffs.

Solicitors: *Hill, Dickinson, and Co.*, Liverpool; *W. C. Thorne.*

Judicial Committee of the Privy Council.

Oct. 23, 25, *and Nov.* 16, 1923.

(Before Lords ATKINSON, SHAW, WRENBURY, and CARSON, and Sir ROBERT YOUNGER.)

EASTERN SHIPPING COMPANY LIMITED v. QUAH BENG KEE. (a)

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS.

Straits Settlements—Indemnity—Third party—Company—Managing director—Fiduciary relationship to company—Abuse of powers as director—Damage caused to third persons—Liability of director.

A right to indemnity exists where the relationship between the parties is such that either in law or in equity there is an obligation on the one party to indemnify the other.

K., the managing director of a company, in breach of his duty to the company, directed a ship in which he was, and the company was not, interested, to berth and unload at a wharf belonging to third persons, at which the company had a contractual right to berth and unload on certain terms. Damage was thereby done to the wharf, for which the owners sued the company and recovered damages. The company had brought in K. as third party.

Held, that the company were entitled to recover from K. the damages which they had been found liable to pay to the owners of the wharf.

Decision of the Supreme Court reversed.

APPEAL by the defendants in an action in which the Peninsular and Oriental Steam Navigation Company were plaintiffs, from an order of the Court of Appeal (Penang) (Sproule, Acting C.J., and Brown, J.; Barratt-Lennard, J. dissenting) dismissing an appeal from an order of Whitley, J., made on the trial of the issues raised by a third-party notice. The decisions were that the third-party procedure was inapplicable to the relief sought by the defendants.

(a) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

The defendants were a Penang shipping company. The plaintiff company owned a wharf at Belawan (the port of Medan) in Sumatra. By letters and telegrams in May and June 1918 the defendants acquired a right to berth their ships at the wharf, and also an exclusive right to use a go-down adjacent thereto, there being a term of the contract that all damages which might be brought about by the berthing of their steamers at the wharf or by their use of the go-down should be made good by them. Quah Beng Kee was the general managing director of the defendant company, and as such (and under an agreement dated the 22nd Sept. 1911) was in control of the defendants' business and entrusted with very extensive powers. Though at liberty under par. 5 of the said agreement to carry on an independent business on his own account, such business was not to be of a similar nature to any of the businesses carried on by the defendants. On the 22nd May 1918 he became the charterer of a Japanese steamship called the *Kumakata Maru*, which was to proceed on a series of voyages from Rangoon to Penang or Deli (Belawan). He was also agent at Penang of the Yamashita Kishen Kaisha Limited, the owners of the *Kumakata Maru*. A firm named G. H. Slot and Co. Limited were the defendant company's agents at Medan and Belawan. At an interview which took place on the 4th July 1918 at the office of G. H. Slot and Co. of Penang (a private partnership closely associated with H. M. Slot and Co.), Kee appointed H. M. Slot and Co. to act as his agent at Belawan, as charterer of the *Kumakata Maru*, and at the same time gave them instructions to berth the vessel at the plaintiffs' wharf there. The defendants were at this time ignorant of the relations between the Slot Companies and Kee. The defendants had no interest whatever in the *Kumakata Maru*, nor did any of their directors (except Kee himself) know that Kee was interested therein until long after the plaintiffs' claim herein had arisen. The instructions given by Kee to H. M. Slot and Co. to berth the vessel alongside the plaintiffs' wharf were entirely unauthorised by the defendants. The *Kumakata Maru* was berthed by H. M. Slot and Co. on Kee's instructions alongside the plaintiffs' wharf, and thereon proceeded to unload her cargo. Owing to unskilfulness in the unloading or otherwise, the wharf sank and the plaintiffs thereby suffered damage, for the recovery whereof they brought their action against the defendants. In the action the plaintiffs claimed damages caused to their wharf by breach of agreement and negligence of the defendants in stacking thereon or permitting to be stacked thereon an excessive weight of rice ex steamship *Kumakata Maru*. The defendants obtained leave to issue a third-party notice to Kee, and served a notice on him, alleging generally that Kee was liable to indemnify the defendants against any sum which the plaintiffs might recover against them, on the ground that he had committed a breach of duty towards the defendants in causing or allowing the wharf to be used for a steamer in which he was personally interested, but in which the defendants, his employers, were not interested, and on the alternative ground that, in view of the fiduciary relationship existing between them, any liability incurred by the defendants must be presumed to have been incurred by them at the request of Kee.

The rules relating to third-party procedure in the courts of the Straits Settlements are contained in par. 158-165 of Ordinance No. 102 of the Civil Procedure Code, and are practically identical with the provisions (rules 48-45 of Order 16) of the Rules of the Supreme Court in this country, except that rule 54a, of Order XVI. does not in terms find a place in the ordinance.

On the 6th Jan. 1919, upon a summons for third-party directions an order was made that the third party should be at liberty to defend the action and to appear at the trial and take such part as the judge should direct and that they should be bound by the judgment, and it was further ordered that if they or either of them intended to rely on any point not raised by the defendants' defence they or he should deliver a statement of such points, and it was further ordered that the third parties should deliver to the defendants their defences to the claim for indemnity raised by the third-party notices, and it was further ordered that the question of the liability of the third parties to indemnify the defendants should be tried at or immediately after the trial of the action.

As against the defendants, Kee alleged, *inter alia*, that he had acted within the scope of his authority as their managing director, and for their benefit, and denied any breach of his duties as such. He also denied that there was any fiduciary relationship between himself and the defendants, and alleged that his acts were subsequently ratified by them.

Whitley, J. gave judgment for the plaintiffs against the defendants for $79,860, but held that the defendants had no right of indemnity against Kee. The Court of Appeal dismissed an appeal, on the ground that the third-party procedure had been wrongly invoked, and that the defendants' remedy was by independent action.

Upjohn, K.C. and *Simey* for the appellants.

Sir *M. Macnaghten*, K.C. and *Giveen* for the respondent.

The following cases were cited :

Birmingham and District Land Company v. *London and North-Western Railway*, 1886, 55 L. T. Rep. 699 ; 34 Ch. Div. 261 ;

Hardoon v. *Belilios*, 83 L. T. Rep. 573 ; (1901) A. C. 118 ;

Johnson v. *Salvage Association*, 6 Asp. Mar. Law Cas. 167 ; 1887, 57 L. T. Rep. 218 ; 19 Q. B. Div. 458 ;

Speller v. *Bristol Steam Navigation Company*, 1884, 50 L. T. Rep. 419 ; 13 Q. B. Div. 96 ;

Waring v. *Ward*, 1802, 7 Ves. 332;
Wolveridge v. *Steward*, 1833, 1 Cr. & M. 644.

Their Lordships took time to consider their judgment.

Nov. 16, 1923.—Lord WRENBURY.—The facts in this case are simple and before their Lordships neither are, nor can be, disputed.

The Peninsular and Oriental Steam Navigation Company were owners of a wharf at Belawan in Sumatra. They granted to the Eastern Shipping Company a right to berth their ships at the wharf upon terms which included terms that the latter should pay 100 guilders a day for every day of twenty-four hours, and that all damages which might be brought about by the berthing of their steamers at the wharf should be made good by them. Quah Beng Kee was managing director of the Eastern Shipping Company. Slot and Co. were the shipping agents of that company. Beng Kee, who had control of the business of the Eastern Shipping Company and was entitled, as managing director, to berth at the wharf ships of the Eastern Shipping Company, appointed Slot and Co. as his own agents at Belawan as charterer of a ship called the *Kamakata Maru*, and instructed them to berth that ship at the wharf in question. The *Kamakata Maru* was a ship in which Beng Kee was, and the Eastern Shipping Company were not, in any way interested. Beng Kee's instructions to berth this ship at the wharf were wholly unauthorised, and were in breach of his duty to the Eastern Shipping Company. Owing to unskilful unloading, excessive weight was put upon the wharf, and it collapsed. Damage was thus occasioned which the P. & O. Company were, under their grant to the Eastern Shipping Company, entitled to recover. They brought their action against the Eastern Shipping Company; the latter brought in Beng Kee under third-party procedure, and obtained an order on the 6th Jan. 1919, to the effect that Beng Kee should be at liberty to defend and to appear at the trial, and should be bound by the judgment, and that he might raise points of defence not raised by the Eastern Shipping Company, and that he should deliver his defence to the claim for indemnity raised by the Eastern Shipping Company, and that the question of his liability to indemnify should be tried at or immediately after the trial of the action.

Beng Kee appeared and pleaded, and appeared at the trial of the action, and in his presence the P. & O. Company established their case and recovered damages to the extent of $79,860. The trial judge found that the acts of Beng Kee were within the apparent scope of his authority, and upon that ground held the Eastern Shipping Company to be liable, and he reached the same conclusion upon another ground, namely, that by a letter of the 28th Aug. 1918 the Eastern Shipping Company had ratified and accepted responsibility for the acts of Beng Kee in the matter. This was a letter signed "H. Oxenham, Manager." The trial judge found, as a fact, that this was in reality Beng Kee's letter written and sent by H. Oxenham by his instructions. The result of that letter was that Beng Kee thereby raised an additional ground for throwing upon his principals a burden which he ought himself to have discharged.

After trial of the action, the trial judge proceeded to try the third-party issues, and upon the evidence arrived at findings which are summarised in the appellants' case as follows: (7) That instructions to use the wharf purported to be given by Quah Beng Kee as managing director of the defendant company; (8) that the instructions for the berthing were given by Quah Beng Kee in his own interest, and not in the interest of the defendant company; (9) that Quah Beng Kee stood in a fiduciary relationship to the defendant company; and (10) that he unjustifiably used his position in the defendant company for his own benefit, and so was guilty of a clear breach of duty towards them. These findings were justified by the evidence, and are binding upon the parties. The trial judge, however, found that the defendants, the Eastern Shipping Company, had no right of indemnity against Quah Beng Kee, and, inasmuch as, under third-party procedure, relief can be given against a third party only in cases where the defendant has against the third party a direct right of indemnity, the proceedings against Quah Beng Kee failed. An appeal from this order was dismissed with costs.

It was not disputed before their Lordships that, in proceedings otherwise constituted, Quah Beng Kee, on the above findings, would have been liable. The present appeal by the Eastern Shipping Company is of the greater importance to the parties by reason of the fact that an action by the Eastern Shipping Company against Beng Kee for damages is now barred by the Statute of Limitations, and unless he can be made liable in these proceedings, his liability cannot be enforced at all. The question for discussion is, therefore, whether upon the facts stated, the appellants have as against Beng Kee a right of indemnity. There is no other question.

A right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that, either in law or in equity, there is an obligation upon the one party to indemnify the other. There are, for instance, cases in which the state of circumstances is such that the law attaches a legal or equitable duty to indemnify arising from an assumed promise by a person to do that which, under the circumstances, he ought to do. The right to indemnify need not arise by contract, it may, to give other instances, arise by statute; it may arise upon the notion of a request made under circumstances from which the law implies that the common intention is that the party requested shall be indemnified by the party requesting

him; it may arise—to use Lord Eldon's words in *Waring* v. *Ward* (7 Ves., at p. 336), a case of vendor and purchaser, in cases in which the court will "independent of contract raise upon his (the purchaser's) conscience an obligation to indemnify the vendor against the personal obligation" of the vendor. These considerations were all dealt with in *Birmingham District Land Company* v. *London and North-Western Railway* (55 L. T. Rep. 699; 34 Ch. Div. 261).

The question of indemnity commonly arises in the case in which a trustee claims to be indemnified by his *cestui que trust*. This class of case was particularly discussed by Lord Lindley in *Hardoon* v. *Belilios* (83 L. T. Rep. 573; (1901) A. C. 118). The present case is the converse. The *cestui que trust* is here claiming to be indemnified by the trustee. Beng Kee has been found to stand in fiduciary relation to the Eastern Shipping Company, and the latter claim indemnity from him in respect of liability imposed upon them by his abuse of powers, in the exercise of which he owed them a duty, and was responsible as a trustee of those powers. He was not a trustee in the full sense of that word. No property was vested in him. But he was a trustee of his powers, in the sense that they were vested in him in such manner that he stood in a fiduciary relation to the company in respect of his exercise of those powers. The nearest simile which was put in argument was that of a trustee, in the fullest sense of the word, who abuses his powers, say, the trustee of real estate with power to mortgage, who mortgages for his own benefit, and in breach of his duty as trustee, and puts the mortgage money into his own pocket. In such a case, an action would lie in the Chancery Division for a declaration that the defendant was guilty of breach of trust and was liable to indemnify the *cestui que trust* against the mortgage, and for an order that he do redeem the mortgaged property, and indemnify the *cestui que trust* against the mortgage debt.

In the present case, suppose that it would have taken, say, a month to discharge the *Kamakata Maru* at the wharf, and that the Eastern Shipping Company had learned, say, three days after the ship was berthed, that the breach of duty had been committed, an action would have lain to restrain the defendant from continuing the ship at the berth, and for an order that he do indemnify the plaintiffs against the three days' rental which had been incurred.

In their Lordships' opinion, these results follow from the following considerations. If Beng Kee, as managing director, had been granting to a third party the right to berth a ship at the wharf, it would have been his duty to his principals to stipulate that the third party should accept the burden which would be cast upon his principals by the user of the wharf. What happened was that Beng Kee, as managing director gave to himself, as charterer of the ship, the user of the wharf. He cannot be heard to say that, in so doing, he did not, as managing director, require from himself, as charterer of the ship, the same promise as that which it would have been his duty to require from a third party, namely, a promise that he would indemnify his principals against the consequences of his act. In other words, the relation between the parties was such that the law applies the promise which it was his duty to make, and from this arises a right of indemnity. Upon these grounds their Lordships are of opinion that this appeal succeeds.

There should be a declaration that Quah Beng Kee is liable to indemnify the Eastern Shipping Company against, or to repay to them, the damages awarded to the P. & O. Company by the order made in the action, as well as all costs ordered to be paid by them in the several orders for costs made in the action and in the third-party proceedings, and is liable to pay to the Eastern Shipping Company the costs incurred by them in the action and in the third-party proceedings, the costs incurred by them in the action to be taxed as between solicitor and client, but having regard to the fact that they are payable by the third party, and an order to give effect to that declaration. The respondent must pay the costs of this appeal.

Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors for the appellants, *Nisbet, Drew*, and *Loughborough*.

Solicitors for the respondents, *Cardew, Smith*, and *Ross*.

House of Lords.

July 24, 25, 26, *and Nov.* 23, 1923.

(Before Lords BIRKENHEAD, HALDANE, ATKINSON, and PARMOOR.)

STANDARD OIL COMPANY OF NEW YORK v. CLAN LINE STEAMERS (a)

ON APPEAL FROM THE FIRST DIVISION OF THE COURT OF SESSION IN SCOTLAND.

Charter-party — Bill of Lading — Contract of carriage — Seaworthiness — Exception of liability for master's errors in navigation— Harter Act—Builders' instructions not communicated to master—Loss of cargo—Liability of owners—Limitation of liability—" Actual fault or privity"—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 503.

The appellants were a company carrying on business in New York as oil merchants. The respondents were owners of the C. G., *a turret steamer, built of steel in* 1900, *and of the burden of* 2292.45 *tons register. The* C. G. *loaded at New York a cargo of motor spirit and refined petroleum in cases and of refined wax in bags, to be delivered at Dalny. She left New York on the* 28*th July* 1919. *On the*

(a) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

80th July she listed to port, turned turtle in a calm sea, and was totally lost with her whole cargo. The appellants sued for loss and damage, pleading that the respondents, having failed to carry and deliver the appellants' cargo in terms of their contract, were liable in damages. It was alleged that the C. G. *had been sent to sea in an unseaworthy condition, and that the defendants had failed to exercise due diligence to make her in all respects seaworthy. The question was whether the respondents committed a breach of duty for which they were liable in not communicating to the captain certain information which they possessed, relating to turret vessels of the* C. G. *type. The master was competent as regards skill in seamanship; but the appellants maintained that the ship was not well manned on the voyage, in that he was not furnished with, and had not had brought to his notice (as was the fact), a document of general instructions as to loading of turret ships, issued by the builders of the ship. The first instruction was that the vessel was not intended to load down to her marks with a homogeneous cargo without water ballast. It was found that the cargo was in substance a homogeneous cargo. When the* C. G. *was loaded, two of her ballast water tanks were filled, holding an aggregate quantity of* 290 *tons. After leaving New York, the captain gradually pumped out the water ballast from both tanks, and the* C. G. *listed, subsequently falling right over and sinking in the open sea. By the contract of carriage, which also incorporated the Harter Act of the United States, it was agreed that the respondents should not be liable for "loss or damage caused by causes beyond their control by perils of the sea . . . collisions, stranding, or other accidents of navigation, not resulting from want of diligence by the owners."*

Held, (1) *that the ship was inherently unseaworthy in certain not improbable conditions, unless special precautions (which had not been taken) were taken, which it was the duty of the owners to enjoin, as being required by the structure of the ship, and that the owners were therefore liable for the loss of the cargo;* (2) *that the owners were not entitled to have their liability limited under sect.* 503 *of the Merchant Shipping Act* 1894, *as they had not proved that the loss occurred without their actual fault or privity.*

Decision of the First Division (1923) *S. C.* 245; 60 *S. C. L. Rep.* 166) *reversed.*

Appeal from a decision of the First Division of the Court of Session (The Lord President (Lord Clyde), Lords Skerrington and Cullen; Lord Sands dissenting), recalling an interlocutor of the Lord Ordinary (Lord Hunter).

The appellants sued the respondents for damages for failure to deliver a cargo of motor spirit, refined petroleum and paraffin wax shipped on the respondents' turret-built steamship *Clan Gordon*, under the terms of a charterparty, dated the 2nd April 1919, and lost at sea through the sinking of the said vessel, in calm weather, on the 30th July 1919 when she was two days out from New York—the port of loading.

The vessel carried a full cargo of 12,500 cases of Pratt's motor spirit; 79,512 cases of refined petroleum and 12,534 bags of paraffin wax. Loading commenced on the 12th July and finished on the 28th July. The total weight of the cargo so loaded was 4435 tons, of which 1925 tons were loaded in the 'tween deck cargo spaces and 2510 tons in the lower holds. There were also shipped 770 tons of bunker coal. Of these, all but 246 tons were in the vessel's permanent bunkers and the said 246 tons were carried in the cargo space, No. 3 'tween decks. When the vessel was loaded, her cargo spaces were practically full, but one of them contained coal instead of cargo. When loading commenced the ballast tanks were full, but as loading progressed tanks were emptied, so that when the vessel sailed ballast tanks Nos. 1 and 2, which contained respectively 95 tons and 195 tons of water were alone filled, and the vessel was then down to her marks. The master had intended to empty these tanks also before sailing and only failed to have that done because he wished to spare the engineers the labour of pumping. The vessel sailed at 5 p.m. on the 28th July, and all went well till the 30th July. On that day, the pumping out of No. 1 ballast tank was begun at 8 a.m. by the master's orders. At noon, No. 1 tank was empty and the pumping out of No. 2 tank commenced. At 4 p.m., No. 2 tank contained only six inches of water on the port side. By that time, the vessel had taken a slight list to port and the quantity of water in No. 2 tank, represented by six inches of water in the listed condition of the ship, was eight tons. At 4.30 p.m., the master ordered the helm to be put over first slowly and then hard-a-port. When the hard-a-port order was executed, the vessel listed first about fourteen degrees to port and then, in spite of the master's endeavour to right her by ordering the helm hard-a-starboard, she fell over to 60 or 70 degrees and soon afterwards sank. The vessel and her whole cargo were thus lost.

It was not disputed that the emptying of the ballast tanks deprived the vessel of all stability so that the putting hard over of the helm was sufficient to upset her. The master explained the objects which he wished to attain by emptying the ballast tanks. These were, to increase the speed of the vessel by ridding her of a weight which he thought was useless; and to increase her freeboard, because it was the hurricane season on the coast of Mexico and he wanted all the freeboard he could get, in case he encountered a hurricane. The master was a skilled seaman, with experience of all classes of vessels. He held an extra master's certificate. He has been in the respondents' service for twenty years. His records were good and he had commanded the *Clan Gordon* for fourteen months before her loss. The voyage in question was the first one on which he had carried a full cargo of oil and wax, and he had considered the question of the vessel's stability for the

voyage before loading, having in view that she was to carry a full homogeneous cargo.

The *Clan Gordon* was one of seven sister ships constructed in 1900 by Messrs. William Doxford and Sons Limited, Sunderland, for the respondents. The vessels were " turret " ships. They were then a comparatively new type. They differ from the ordinary, or " wall-sided," ship mainly in this respect, that whereas the ordinary ship has sides which are nearly perpendicular from the bottom upwards, the sides of the turret ship are cut away at what is known as the " harbour deck," upon which there is erected a structure not extending to the whole width of the harbour deck and covered by the turret deck. In or about 1910 Messrs. Doxford were asked by the respondents to give certain information about the stability of ships of the *Clan Gordon* type. They accordingly made experiments and calculations with results which impelled them to prepare general instructions for loading not only for each of the remaining sister ships of the *Clan Gordon* but for all turret ships built by them. These instructions were filled up for each of such vessels and sent to her owners. They contained a definite warning against loading these vessels with a full homogeneous cargo, such as that carried by the *Clan Gordon*, without retaining water ballast. The appellants submitted that the loss resulted from the respondents' failure to make the instructions available to the master of the *Clan Gordon*, because no competent seaman, and in particular the master of the *Clan Gordon*, would have pumped out the tanks of the *Clan Gordon* on the occasion in question had he had the instructions before him, and they contended that the respondents were liable because (1) on a sound construction of the contract, they had failed to prove that the loss was occasioned by an excepted cause ; and (2) the vessel was unseaworthy at the time of sailing from New York as her master was not instructed competently to command her.

The bills of lading issued under the charter-party provided that " the carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea . . . collisions, stranding or other accidents of navigation of whatsoever kind (even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner, not resulting however, in any case from want of due diligence by the owners, or the ship, or any of them, only the ship's husband or manager)."

The Harter Act of the United States Congress provides : " That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of the said vessel . . ."

The Lord Ordinary (Lord Hunter) decerned against the respondents for payment to the appellants of 97,892*l.*, but the First Division recalled the interlocutor. The pursuers appealed.

Condie Sandeman, D.F., and *Normand* (of the Scottish Bar) for the appellants.

Macmillan, K.C. (of the Scottish Bar), *Mackinnon*, K.C. (of the English Bar) (with them *Douglas Jamieson* (of the Scottish Bar) for the respondents.

The following cases were referred to :

Anglo - African Oil Company Limited v. *Lamzed*, 2 Mar. Law Cas. (O.S.) 309 ; 1866, 13 L. T. Rep. 796 ; L. Rep. 1 C. P. 226 ;

The Carib Prince, 1897, 170 U. S. 655 ;

The Glendarroch, 7 Asp. Mar. Law Cas. 420 ; 70 L. T. Rep. 344 ; (1894) P. 226 ;

Gunford Ship Company v. *Thames and Mersey Marine Insurance Company*, (1910) S. C. 1072 ; 47 Sc. L. Rep. 860 ;

Hayn v. *Culliford*, 4 Asp. Mar. Law Cas. 128 ; 1878, 39 L. T. Rep. 288 ; 40 L. T. Rep. 536 ; 3 C. P. Div. 410 ; 4 C. P. Div. 182 ;

International Navigation Company v. *Farr Manufacturing Company* (1900) 181 U.S. 218 ;

Lennard's Carrying Company v. *Asiatic Petroleum Company*, 13 Asp. Mar. Law Cas. 81 ; 113 L. T. Rep. 195 ; (1915) A. C. 705 ;

Lyon v. *Mills*, 1804, 5 East 428 ;

Macfadden v. *Blue Star Line*, 10 Asp. Mar. Law Cas. 55 ; 93 L. T. Rep. 52 ; (1905) 1 K. B. 697 ;

Moes, Mohere, and Tromp v. *Leith Shipping Company*, 1867, 5 M. 988 ;

Moore v. *Lunn*, 1922, 38 Times L. Rep. 649 ;

Nitrate Producers Steamship Company v. *Short Brothers*, 1922, 127 L. T. Rep. 726 ; 91 L. J. K. B. 871 ;

Royal Exchange Assurance v. *Kingsley Navigation Company*, 16 Asp. Mar. Law Cas. 44 ; 128 L. T. Rep. 673 ; (1923) A. C. 235 ;

The Schwan, 11 Asp. Mar. Law Cas. 286 ; 101 L. T. Rep. 289 ; (1909) A. C. 450 ;

Smitton v. *Orient Steamship Company*, 10 Asp. Mar. Law. Cas. 459 ; 1907, 96 L. T. Rep. 848 ;

Tait v. *Lerr*, 1811, 14 East 481 ;

The Wildcroft, (1905) 201 U. S. 235.

Their Lordships took time to consider their judgment.

Nov. 23, 1923.—Lord Haldane.—The mixed question of fact and law which is raised in this appeal is one which necessitates close examination. Only after modifying my own views from time to time as the arguments at the Bar proceeded, and after subsequently re-studying the whole of the evidence and the judgments in the courts below, have I arrived at the conclusion

that the Lord Ordinary and Lord Sands were right, and that the judgment of the majority in the First Division cannot stand.

Having regard to the concurrence of findings in what is an issue of fact, I think that we are bound to hold that it was established by the respondents that when the *Clan Gordon* left New York she was physically seaworthy. But it appears to me to be not less clearly shown that she was thus seaworthy only to the footing of having two out of six of her ballast tanks filled, to the extent of containing 290 tons of water. Without this amount of water in the tanks, she was not, having regard to her loading, seaworthy and the master in charge of her had to know this and observe the requirement through his voyage. He did not know it ; he pumped out the water, and the ship heeled over and was lost two days after the commencement of her voyage. I think that the requirement as to this ballasting was due to the construction of this steamer as a turret vessel. Only scientific calculation could show the absolute character of a requirement which, if not observed, would render the ship unseaworthy. The master had not been instructed as to its special significance in the case of a turret ship like the *Clan Gordon*. He could not divine it, nor could the ordinary experience of a master not informed of the special peril due to abnormal construction be relied on to disclose it. The master did not know the unusual risk which he was called on to undertake. The fault of this absence of knowledge lay not with him but with the owners, whose duty it was to have instructed him that while the vessel was seaworthy, it was only conditionally seaworthy. The breach of the condition was therefore an occurrence for which they were personally in fault.

In the light of what has been proved, the two tanks held just enough water to give the vessel the stability indicated in the builders' instructions. But it is significant that the master was not shown to have been specially warned that the presence of the water ballast was essential to the ship as loaded, if its stability was to be preserved. The instructions of the builders rendered such ballasting essential, and the master was not told of it. In his evidence Captain McLean says that it was the first cargo of the kind which he had actually loaded himself, and that before he sailed he had intended to sail with his ballast tanks empty. This makes it not surprising that two days later he directed that the tanks should be pumped empty. He hoped to obtain thus more freeboard for his vessel. He says that he had got no instructions from his owners that, with a homogeneous cargo, he was on no account to pump out the ballast tanks. All that he knew was that those in charge of turret ships were to be careful of them. But he knew nothing of the builders' instructions. Had he been informed of them, he says that he would have obeyed them. But the reason of the necessity for what they prescribed was not known to him. He had been in command of the *Clan Gordon* for some time previously, and had been employed on other turret ships, and had found no difficulty. The case with which he had to deal of a ship loaded just as this one was, however, was new to him, and he appears to have somewhat over-estimated the proportion between the cargo in the lower holds and that between the decks. If he had known that there was not so much weight in the lower holds, it may be that he would not have emptied the tanks. Captain McLean was admittedly a competent and experienced officer, and there had been no difficulty with turret ships excepting in the case of the *Clan Ranald*, when the disaster was due to the carelessness of another master. Captain McLean simply did not imagine that he could be running a serious risk when he began to pump out the tanks at sea, and nothing in his experience of turret ships had pointed to there being such a risk as there actually was.

No doubt the primary and immediate cause of the disaster which occurred to the *Clan Gordon* must be taken to be, not defect in the initial loading, but the pumping out of the tanks at sea just before the disaster happened. But then, if the builders' instructions meant anything, they meant that such pumping must not take place. Whether its effect would be to destroy general stability, or to enable the free water to cause a dangerous disturbance of stabliity by the rush to the sides of the half empty tanks, does not matter. The instructions obviously implied not only that water must be kept in tanks which were filled, but that it must not be withdrawn. On this point at least the instructions do not seem to me to be ambiguous, and if they had been given to Captain McLean, we must take it that he would have interpreted them properly and carried them out. There is no doubt that the builders sent them round as being suggested by their investigation of the circumstances which led to the overturning of the *Clan Ranald*. It may be that ordinary ships might have proved to be subject to some analogous peril, but not, so far as we can gather the views of the builders, to the same extent. Their assistant chief draughtsman says in his evidence that the document, a copy of which was sent out for each turret ship, was meant to prescribe what was to be provided when loading. It is difficult to draw any other conclusion than that the builders thought there were risks in the case of turret ships, as to which special guidance for masters was required. It is true that the instructions were prepared and sent out by the builders, not only long after the ship was built, but many years before the accident, and that they are open to some criticism of the calculations on which they are founded, but the substance which underlies what they prescribe remains. They suggest to instructed persons that, as in the case of a turret ship there is danger of righting force diminishing more rapidly than in the case of a wall-sided ship, it is necessary to provide an appropriate amount of special ballast. This seems to follow from the proposition that the ship is not to be loaded down to her marks with a

homogeneous cargo without water or other adequate ballast. In so far as this is scientifically true, no amount of fortunate experience in the course of which the peril happens not to have matured can properly be set against it.

Under these circumstances, and with the builders' warning in their hands, was it the duty of the owners to inform the masters of their turret ships of the special risk to which the turret form gave rise? I think that it was. On the mere experience and skill of the individual master, they could not safely rely. He might never have given thought to any unusual critical point as possible in the stability of his ship, or have been in circumstances from which he could derive the necessary experience. The deduction of the critical point was, as I have said, the outcome of scientific calculation, rather than of practice. But that circumstance did not render it the less important, or justify people in thinking that it was of such a nature that it could be left to be divined by those who had not been specially instructed.

I think that the true conclusion as to this case is that expressed in a passage near the end of Lord Sands' dissenting judgment in the First Division. "The broad view of the matter appears to me to be this: A vessel of a peculiar type was lost under circumstances not satisfactorily explained. This led the builders to issue certain instructions in regard to the loading of such vessels. If these instructions had been observed the *Clan Gordon* would not have been lost. The defenders took no steps to bring these instructions to the knowledge of the master of the *Clan Gordon*." I see no sufficient answer to the reasoning either of Lord Hunter, the Lord Ordinary, or of Lord Sands. Not the less it is hardly admissible to come to this result easily without careful consideration of the judgments of the majority in the First Division, for I have rarely read judicial opinions on a technical question which impressed me more by their care in expression than those of the majority as well as of the minority in the courts below. The Lord President holds that the builders' instructions were fallacious in that, even if the cargo was so far from being homogeneous that the ratio of the density of what was between decks to what was in the lower holds was only 83 per cent., somewhere near 500 tons of water was required in the ballast tanks to give stability. This he thinks to be out of the question, inasmuch as the ship was shown to be actually stable with only 290 tons of water in the tanks. He attributes this error to defective calculation by the builders about the cargo. But he goes on to say that even if this be so, it is not wholly fatal to the pursuers' case, inasmuch as the master admitted that if the owners had communicated to him the builders' instructions he would not have pumped out the 290 tons after leaving port, whatever he might have thought about the necessity of these instructions.

I am not satisfied that all the criticisms on calculation of the cargo made by the Lord President were wholly well founded. But even if they were, I think that he has himself given the answer to them, for it is not in serious dispute that the vessel was defective in righting power and, therefore, unseaworthy when loaded unballasted down to her marks with a homogeneous cargo. The criticism of the Lord President does not affect this proposition. It may be that the wash over of the water in the half-emptied tanks contributed to and accelerated the turning over of the vessel. But if the master had been told that she was unstable without 290 tons of water ballast, he would not have begun to pump out the tanks. It is no answer to say that the *Clan Gordon* and other steamers of the same turret construction had previously made successful voyages without any water ballast. That may have been their good fortune. But it does not prove that to make such voyages without special ballast was safe. Careful scientific calculation has, in my opinion, demonstrated conclusively that it was not, having regard to the restriction on righting force in the case of a turret ship, and the tendency of the tighting force to diminish rapidly after a point has been reached which is only reached substantially later in the case of a wall-sided vessel. The Lord President thinks that the danger to the ship was one which neither arose from a latent peril in her construction, as in the case of *The Schwan* (11 Asp. Mar. Law Cas. 286; 101 L. T. Rep. 289; (1909) A. C. 450), nor from anything lying beyond the scope of competent seamanlike skill. He is, therefore, of opinion that if there was blame for the accident, it is the master and not the owners who are made responsible for it under the charter-party and the bills of lading and the Harter Act. But surely, in this case, specific danger had been established as being a special and exceptional one by the calculation by the builders. The owners ought to have known of this, and it is obvious that the master might well not have known. Even experienced navigators seem not to have come to suspect it in the course of their voyages in these turret ships. Captain McLean suspected danger so little that, if left to himself, he tells us that he would have pumped out his tanks before leaving New York. The instructions from the builders' office, of which he knew nothing, were, as the managing director of the respondents says, a surprise to the respondents themselves, who appear not to have taken them seriously, nor to have made any independent attempt at the time to see whether they were or were not well founded. Yet her righting power depends largely on the shape of a vessel, and is a matter which can only be accurately ascertained by highly technical and highly scientific study. I am, therefore, unable to agree with the Lord President when he says that it would be detrimental to security at sea to put on owners who have appointed a competent master the duty of giving him instructions even in such special circumstances. Unless this is done, the most competent master may not be aware of risks of which only exact knowledge, extending

beyond any which he can be assumed to possess, can inform him.

The reasons just given leave open, even assuming the view which I have expressed to be true, yet another point urged on their behalf by the defenders. They argue that, as the instructions from the builders were, when received, passed on to the defenders' engineer, now dead, this relieves them from responsibility, for he was their servant and as such responsible to them for all structural matters, and for giving instructions to the masters of their ships. If this be so, they contend that their liability cannot extend to the full sum of 97,892*l.* 17*s.* 7*d.* awarded to the pursuers by the Lord Ordinary, but is limited to 27,581*l.* 0*s.* 9*d.*, being the amount calculated on the footing of a liability of 8*l.* for each ton of the ship's tonnage. This contention they base on sect. 503 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) (as amended by sect. 69 of the Merchant Shipping Act 1906 (6 Edw. 7, c. 48)), which limits the liability, where the damage has been occasioned without the actual fault or privity of the owner. It is now well settled that those who plead the section as a defence must discharge the burden of proving that they come within its terms. That is to say, they must show that they were themselves in no way in fault or privy to what occurred in this case, to the failure to render the ship properly seaworthy, by taking care that the master was instructed about the special risk arising from its shape. Now, even on the assumption that the engineer was fully directed to instruct the master on this point, and that the failure to do so was his fault, the owners are surely not discharged from responsibility, for their personal duty was to provide a seaworthy ship, and the ship was not seaworthy if the master was not instructed on the special matter in question. That they left their duty to be discharged by their servant or agent, therefore, does not relieve the owners of blame. Their responsibility as regards seaworthiness was an individual one of which they could not divest themselves, and when they left its discharge to their engineer they did so at their own risk. I am well aware of the magnitude and seriousness of the consequences of this conclusion to the respondents, but I am unable to see how what they did divested their breach of duty of these consequences. I therefore think that the interlocutor of the Lord Ordinary should be restored, and that the respondents must pay the costs here and in the Inner House. As to the point made by counsel for the respondents about expenses, it is true that the pursuers failed technically in the part of their case which related to physical seaworthiness in New York Harbour. But the evidence which they led on this point was not easily severable from the evidence required on the broader issue on which they succeeded. Accordingly I do not think that we ought to interfere with the exercise made of his discretion by the Lord Ordinary in giving the pursuers the whole of their expenses.

The appeal was admirably argued on both sides, and I wish before sitting down, to state again the broad reasons which have made me finally feel myself compelled to prefer the argument of the appellants. These reasons are as follows: the vessel was unseaworthy in that she could not safely undertake a voyage with a cargo of an approximately homogeneous character, unless she had, and retained, at least 290 tons of water in her lower tanks. That this was her indisputable condition for safety is not the less true because she, and vessels resembling her in shape and construction, had successfully made a certain number of voyages with a full cargo, and without this minimum ballast required. To be put about under a rapid action of the helm is what in the case of every vessel which undertakes a long voyage may be necessary, and in the case before us, the operation is proved to have been a dangerous one for a turret ship without sufficient ballast. The inherent danger was one which a master not specially instructed might well overlook. Even a long experience might chance not to reveal it. It was a danger, however, which scientific calculation could reveal, calculation of a kind which no ordinary master, however long his experience at sea, could be reckoned on as having either made or as having been able to make. Thus it was the duty of the owners, whose business, in making their ship seaworthy, was to have the master instructed as to all defects in seaworthiness during the voyage arising from inherent causes which were not obvious, and of which his merely practical knowledge could not be relied on to inform him. This the owners in the case before us failed to do, when they did not bring to the mind of the master of a turret ship the builders' special instructions. These instructions may be open to criticism in detail, although I think that the Lord President attaches more importance than is due to the effect on their substantial validity of the points which he made. But, as the Lord President himself concedes, they show that it was unsafe to get rid of the water ballast after the ship had started. Speaking broadly, the builders' investigation had shown the reason for such unsafeness, and its direct relation to the shape of the ship. The investigation was of a technical character. The master could not himself be expected to make an investigation leading to a calculated result like this, or to learn for himself what was implied merely in the course of ordinary experience. I differ at this point from what I understand the Lord President to suggest, and I draw the inference that the ship was inherently unseaworthy in certain not improbable conditions, unless special precautions were taken which it was the duty of the owners to enjoin, as being required by the structure of their ship.

I am therefore of opinion that the appeal must be allowed.

Lord Birkenhead concurred with the judgment of Lord Haldane.

Lord Atkinson.—It having been admitted that the *Clan Gordon* was not, by reason of want of stability, unseaworthy when she left New York Harbour, the main questions for decision in this appeal are whether the neglect of her owners to communicate to the master the contents of a certain document rendered him incompetent to navigate his ship laden as she was, and therefore rendered that ship unseaworthy, and whether the owners had exercised due diligence to make the ship seaworthy. The appellants filed the following pleas in law: (1) The defenders, having failed to carry and deliver the pursuers' said cargo in terms of their contract, are liable in damages. (2) The sum sued for being the loss to the pursuers caused by the said breach of contract, decree should be pronounced in terms of the conclusion of the summons. (3) The *Clan Gordon* having been sent to sea in an unseaworthy condition, and the pursuers having thereby suffered loss and damage as condescended on, the pursuers are entitled to decree on the terms of the conclusion of the summons. (4) The *Clan Gordon* having been lost for a cause for which the defendants are liable under the contract condescended on, the pursuers are entitled to a decree in terms of the conclusion of the summons. (5) The defenders having failed to exercise due diligence to make the *Clan Gordon* seaworthy, and the pursuers having suffered loss and damage through this unseaworthiness as condescended on, the pursuers are entitled to decree in terms of the conclusion of the summons.

The first and second of these pleas rest upon the breach by the respondents of the contract contained in the bills of lading to deliver at the ports of Dalny or Taku Bar the goods shipped on the *Clan Gordon* under order of the appellants or their assigns. This breach of contract admittedly took place. The burden rests upon the respondents to show that they are not responsible for it. By the charter-party it is provided, amongst other things, that the vessel, namely, the *Clan Gordon*, was tight, staunch, strong and in every way fitted for the voyage, including proper ballast and dunnage, and should receive on board, for the voyage, a full cargo of refined petroleum in customary low top cases of ten American gallons each, which the charterers (that is, the appellants) were to provide and furnish. By the twenty-first clause of this charter-party it is expressly provided that it is subject to all the terms and provisions of, and all exemptions from liability contained in the American statute, known as the Harter Act, and that bills of lading shall be issued in conformity with that Act. Accordingly the bills of lading provided that the shipment was subject to all the terms and provisions of, and to all the exemptions from, liability contained in the Act of Congress of the United States relating to navigation approved on the 13th Feb. 1893, that is, the Harter Act.

The relevant provisions of the Harter Act are contained in its third section, which runs thus: "if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the said vessel . . ." In addition to the provisions thus imported into the bills of lading, each of the latter (three in number) contained a clause the relevant portions of which run as follows: "It is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea or other waters, by fire from any cause wheresoever occurring; by barratry of the master or crew, by enemies, pirates or robbers, by arrest and restraint of princes, rulers or people, riots, strikes, or stoppage of labour; by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, by collisions, stranding, or other accidents of navigation of whatsoever kind (even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or other servants of the shipowner, not resulting, however, in any case from want of due diligence by the owners of the ship or any of them, or by the ship's husband or manager); . . ." It will be observed that, under the Harter Act, it is the absence on the part of the owners of due diligence to make their vessel seaworthy which deprives them of protection, whereas under the clause in the bills of lading it is the omission of the owners of the ship, or any of them, or of the ship's husband, or manager of the like kind, to exercise due diligence, which deprives the owners of the named protection.

I fancied that it was suggested by counsel for the respondents in the able argument which he addressed to the House that it was the duty of the first officer of a ship exclusively to superintend the stowage of her cargo, and that the master was altogether relieved of that duty by this officer. I do not think that is quite so. In *Anglo-African Company* v. *Lamzed*, Willes, J. said (2 Mar. Law Cas. (O.S.) 309; 13 L. T. Rep. 796; L. Rep. 1 C. P. at p. 229): "The master"—that is, the master of the ship—"is by law required to be a competent stevedore himself," and in Carver on Carriage by Sea, 4th edit., it is, in par. 48, laid down on the authority of *Hayn* v. *Culliford* (4 Asp. Mar. Law Cas. 128; 40 L. T. Rep. 536; 4 C.P. Div. 181) that it is the *primâ facie* duty of the master to stow safely the goods carried in his ship. I observe that in the respondents' case it is stated that "At the time the *Clan Gordon* sailed, two of her ballast tanks, Nos. 1 and 2 containing 95 and 195 tons of water respectively were full, and that she was loaded down to her marks." It may, of course, well be that, in any given case, the responsibility for the proper stowage of the cargo of a vessel is,

by the agreement of the shipper and shipowner thrown upon some person or persons other than the master, such as stevedores. But such an arrangement, even if made, although it may relieve the master from attending to, or being responsible for, the actual operation of stowing the cargo, it by no means follows that he is relieved from the duty of ascertaining accurately what is the result of the completed work of stowage upon the stability of his ship, such as the relative weights of the portions of the cargo stowed in the hold and stowed atween decks.

It is set forth in the respondents' case that the *Clan Gordon* had a dead weight carrying capacity of 5675 tons, that she was a turret ship, a class of vessel differing from wall-side steamers in the configuration of their sides, that Messrs. Doxford and Sons, shipbuilders, of Sunderland, had built nearly 200 of these ships, that they were good sea boats, of better sea-going capacity, and rolling less heavily than wall-sided ships, due to the fact that, owing to their configuration, less weight was carried in the upper part of the ship relatively to the lower, than in wall-sided ships. But another result of their configuration was that, while up to eighteen degrees of inclination or heel, they possessed a great power of righting themselves than did the wall-sided ships, yet beyond that angle of inclination they possessed much less power of righting themselves than did the others. It is not disputed that, before leaving New York on the 28th July 1919, the goods mentioned in the bills of lading had, with a number of tons of bunker coal, been loaded on the *Clan Gordon*, and that the cargo so loaded was so stowed that the contents of the 'tween decks represented a density of ninety-five or thereabouts, as against a density of a hundred represented by the contents of the lower holds and bunkers.

The captain in his evidence says that the cargo actually loaded was the first of its kind that he had ever loaded himself, and after the pilot left him he tried on his ship the test of stability. The test consisted in this—that when going full speed (ten knots) he would have the ship's helm put hard over both ways; that if the ship should be tender she would take a list. The *Clan Gordon* showed, he says, no sign whatever of tenderness under the test; the sea was, he says, more or less calm. He then adds: "I had my 290 tons of water ballast on board. Tanks Nos. 1 and 2 were full." A not unnatural conclusion to draw from this evidence is that, if those tanks had been kept full, his ship would not have been lost as she was lost. A list of voyages made by the *Clan Gordon* and by other ships with homogeneous cargoes from March 1909 to Dec. 1915, was given in evidence, and apparently relied upon by the respondents to establish that this ship might, although heavily laden, have been safely navigated with empty ballast tanks. In the fifteen voyages mentioned in this list, only four appear to have been made with empty tanks. Besides, it is not the respondents' case that the master was acting rightly in this case in emptying his ballast tanks after leaving New York. On the contrary, in their case it is stated that it is not disputed that the immediate cause of the loss of the *Clan Gordon* was the pumping out of the water from the two ballast tanks. Neither is it disputed that the captain, in giving the order to pump those tanks, committed an error in the management of his vessel. There is not a particle of evidence to show that Captain McLean ever sailed this vessel with empty water tanks, or that he applied to his ship the test on which he so much relied when all her ballast tanks were empty. He seems to have concluded that, because the vessel showed no tenderness and was safe when her two ballast tanks named were full, she would also show no tenderness and be safe when they were empty. The sequel shows how fatal was his error in this, and it would appear to me to show, too, how much he needed instruction on this question of the stability of his ship when loaded with a homogeneous cargo, or a cargo closely approaching to a homogeneous one. His description of what happened would appear to enforce this last conclusion. He says that, after tank No. 1 had been emptied, and No. 2 emptied all but six inches, the ship took a list of about five degrees to port. He was then steering on a course south-west true, making ten knots; that about 4.30 he wanted to get bearings and ordered the quartermaster to port his helm; that the latter began to do so, a little at first; that nothing happened immediately; that he then ordered the quartermaster to put the helm hard aport; that then she began to list; at first she went over fourteen degrees and then fell right over sixty or seventy degrees; that this happened very quickly. The ship then sank; that before she sank he saw her turn with her keel up. The sea was calm.

There is nothing to show that what actually occurred would not appear to a competent seaman, properly instructed, to be the thing which would most probably occur under the circumstances. The evidence, I think, establishes that the master's handling of his ship amounted to gross and flagrant mismanagement for which there was no excuse. Although this be so, the main question still remains: Did the default of the master in this respect result from want of due, that is, reasonable, diligence on the part of the owners of this ship, or any of them, or of the ship's husband or manager, in not having the advice and instruction contained in the document brought home to the mind and knowledge of Captain McLean before they entrusted him with the navigation of this ship on her voyage from New York to the Eastern ports named in the charter-party with the cargo mentioned? It is not disputed, I think, that a ship may be rendered unseaworthy by the inefficiency of the master who commands her. Does not that principle apply where the master's inefficiency consists, whatever his general efficiency may be, in his ignorance as to how his ship may, owing to the peculiarities of her structure, behave in circumstances likely to be met with on an ordinary

ocean voyage? There cannot be any difference in principle, I think, between disabling want of skill and disabling want of knowledge. Each equally renders the master unfit and unqualified to command, and therefore makes the ship which he commands unseaworthy; and the owner who withholds from the master the necessary information should, in all reason, be as responsible for the result of the master's ignorance as if he deprived the latter of the general skill and efficiency which he presumably possessed.

The vital necessity, the appellants contend, was to get the contents of this document into the heads of the captains of turret ships. The mode or method in or by which that could be effected is quite immaterial. It is the effect of the acquired knowledge on the master's management of his ship which is the matter of importance, since the master would, by the instructions, be warned against a somewhat undiscoverable or hidden danger, which, if unknown or disregarded, might lead to lamentable results. It is essential to consider the history of this document. The tragedies from which it sprang, the disasters which it aimed at preventing, the persons by whom it it was framed, as well as those to whom it was distributed, are all important. In the year 1909 a ship named the *Clan Ranald*, a sister ship of the *Clan Gordon*, built by the same builders and belonging to the same owners, the respondents, while on a voyage from Australia to South Africa laden with flour and grain, overturned and sank in fine weather very much as did the *Clan Gordon*. Forty men were drowned, including the master, chief engineer, second, third, and fourth engineers, second mate and chief steward. A public court of inquiry was held at Adelaide, Australia, under the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), into the circumstances attending the loss of the ship. The report made by this court was given in evidence. It is a very significant document. The finding of the court as set forth in it is to the effect that the *Clan Ranald*, at the time of her departure at 7 a.m. on the 31st Jan., laden with grain and flour, had a list to starboard of four degrees. That on reaching the open sea this list increased to six degrees; that about 2 p.m. the vessel heeled to starboard, placing the side of her turret deck under water; that she never righted again, yet she continued on her course firing rockets (of distress presumably); that the helm was starboarded with a view to correct the list, but without effect; that at 5 p.m. the helm was put hard-a-port, but she still maintained her dangerous angle of inclination, and at 10 p.m. sank out of sight. It was also proved that her ballast tanks had been pumped dry before she left the port of Adelaide. It was further found that this ship, when lost, was practically a full ship, having approximately 6500 tons of cargo on board, and in addition seventy tons of coal on her turret deck, fifty on the starboard side, twenty on the port side, and about fifty on each side of the fiddle deck. There was no finding that the cargo had shifted nor was there any finding that the cargo had been badly loaded or stowed. This latter fact is very important, considering the evidence given at the trial of this case by the secretary and a director of the respondents.

This disaster obviously affected vitally the pecuniary interests both of the builders, who were very extensive, if not the most extensive builders of these turret ships, but also of the respondents, who were possibly the largest owners of them. Both naturally and properly desired to prevent, by all reasonable precautions, the recurrence of such a misfortune, and accordingly they turned their respective attentions to the best mode and method of loading these turret ships under certain possible conditions so as to secure their stability. They accordingly determined to compile general instructions for the loading of the turret ships. Experiments and calculations were made to get material for this compilation. The assistant chief draughtsman of the builders filled in the forms ultimately adopted. He stated that the object of preparing these was the guidance of masters of these vessels. The compilation is the document in question. It is headed "General Instructions as to loading Turret Ships issued by Messrs. William Doxford and Sons Limited, Sunderland." Copies of this document, he says, were sent to all the British owners of turret ships—a copy for each ship. In particular, he says, a copy was sent to the owners of the *Clan Gordon*. He believes that some of the owners asked for extra copies. He did not think that any owner ever wrote to say that he did not understand them. [His Lordship went through the evidence, and proceeded:] After a most careful perusal of all the evidence, I have come to the conclusion that the respondents have failed to establish that the instructions contained in this document were either obsolete, unintelligible, or useless. I think that, on the contrary, even to masters of turret ships of general capacity, as seamen, they were very helpful towards the safe navigation of those ships, under conditions which frequently exist, by directing attention to the dangers which might arise from unskilful loading, and indicating how those dangers might be avoided.

I think that the respondents, by leaving the captain of the *Clan Gordon* in ignorance of these instructions, by failing to bring them to his notice so that he would grasp and understand them, failed to discharge the duty which they owed to the shippers of the cargo which the vessel carried, and failed to use due diligence to make their ship seaworthy. The fact, if it be a fact, that few disasters befell the fleet of the respondents in the interval between the loss of the *Clan Ranald* and that of the *Clan Gordon* is no proof that these instructions were useless, or were disregarded, or were not helpful. It is quite as rational, indeed more rational, to conclude that this fortunate immunity was due to the observance of these instructions rather than to the disregard of

them. It follows from what I have said, that, in my view, the loss of the *Clan Gordon* did not take place without the fault or privity of the respondents within the meaning of sect. 503 of the Merchant Shipping Act of 1894.

On the whole, I think that the appeal succeeds, that the decision appealed from was erroneous and should be reversed, and that the appeal be allowed with costs here and in the First Division of the Court of Session.

Lord Parmoor.—The appellants are a company incorporated under the laws of the United States of America, carrying on business in New York, and elsewhere, as oil merchants. The respondents have their registered office in Glasgow, and are owners of the *Clan Gordon*, a turret steamer built of steel in 1900, and of the burden of 2292.45 tons register. In July 1919, the *Clan Gordon* loaded, at the port of New York, a cargo of motor spirit, and of refined petroleum in cases, and of refined wax in bags, to be delivered at Dalny and (or) Taku Bar to the order of the appellants or their assigns. The *Clan Gordon* sailed from New York on the 28th July 1919. On the 30th July 1919 she listed to port, turned turtle in a calm sea, and was totally lost with her whole cargo.

The appellants brought an action for loss and damage, pleading in law that the respondents, having failed to carry and deliver the appellants' cargo, in terms of their contract, were liable in damages. It was alleged that the *Clan Gordon* had been sent to sea in an unseaworthy condition, and that the defendants had failed to exercise due diligence to make the *Clan Gordon* in all respects seaworthy. At the hearing, the appellants endeavoured to prove that the *Clan Gordon* was not structurally seaworthy when she left New York. Both the Lord Ordinary, Lord Hunter, and the judges of the First Division have found that the *Clan Gordon* was structurally seaworthy when she left New York, being tight, staunch and strong, and well equipped for the carriage of her cargo, and in a condition to encounter whatever perils a ship of that character and burden may be fairly expected to encounter on the voyage for which she is destined. The finding of the Lord Ordinary, and of the judges of the First Division on this issue, was not questioned, on the hearing of the appeal before their Lordships.

The question to be decided on appeal is whether the respondents committed a breach of duty for which they are liable, in not communicating to the captain of the *Clan Gordon*, certain information which they possessed which related to turret vessels of the *Clan Gordon* type. The Lord Ordinary found in favour of the appellants, but his interlocutor was recalled by the judges of the First Division. Lord Sands dissented, and was of opinion that the interlocutor of the Lord Ordinary ought to be affirmed.

A further question is raised as to the quantum of damages. The respondents contend that, if there is any liability, they are entitled, in terms of sect. 503 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), to have their liability limited to 8*l*. of each ton of the ship's tonnage.

The *Clan Gordon* was built for the respondents by Messrs. William Doxford and Sons, shipbuilders, Sunderland. She belonged to a class of turret steamers, of which, at one time, the respondents had no less than twenty-nine in their fleet. Turret vessels, up to a certain angle of inclination, or list, possess a greater stability and power of righting themselves than wall-sided vessels ; but if this angle of inclination, or list, is exceeded, then, owing to the shape of a turret steamer, the centre of buoyancy is shifted, and there is a greater risk that the vessel may turn turtle. Captain McLean, who was master of the *Clan Gordon* on the voyage in question, was, as regards skill in seamanship, a competent master, but the appellants maintain that the ship was not well manned on the voyage in question, in that Captain McLean was not furnished with, and had not had brought to his notice, a document of general instructions as to loading of turret ships, issued by the builders, Messrs. William Doxford and Sons, of Sunderland, and headed *Clan Gordon* "General Instructions as to loading." The first instruction is that this vessel is not intended to load down to her marks with a homogenous cargo without water ballast. A homogeneous cargo, in this context, denotes a cargo of approximately the same density throughout, and of quantity sufficient to fill reasonably the whole cargo space. I agree in the conclusion of the Lord Ordinary and Lord Sands that the cargo on the *Clan Gordon* was in substance a homogeneous cargo within the meaning of this instruction.

When the *Clan Gordon* was loaded in New York, two of her ballast water tanks were filled, holding an aggregate amount of 290 tons. After leaving New York the captain determined that he would pump out of the water ballast from both tanks. The actual pumping began on the 30th. At noon it was reported that one tank was empty, and the pumping of the second tank was then started. At four o'clock it was reported that the second tank only contained six inches of water on the port side. At about 4.30 an order was given to put the helm hard aport, and the *Clan Gordon* began to list, subsequently falling right over, and sinking in the open sea. The question is whether there was any duty upon the respondents in the exercise of due diligence in their business as shipowners to bring these general instructions to the notice of Captain McLean. By the terms of the contract of carriage, it was agreed that the respondents should not be liable for "loss or damage occasioned by causes beyond their control by perils of the sea . . . collisions, stranding or other accidents of navigation, not resulting from want of due diligence by the owners." In addition, the provisions of sect. 3 of the Harter Act applied : "That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise

due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel . . ." In substance, the same considerations arise under the clause in the bill of lading, and under the above section of the Harter Act. If, therefore, the loss, of which the appellants complain, resulted from want of due diligence on the part of the respondents as owners of the ship, the respondents are under obligations, as carriers, either to deliver the goods shipped on the *Clan Gordon*, or to pay damages for loss.

In considering whether, under these circumstances, the respondents committed a breach of duty, I think that the tests stated by Lord Gorell in the case of *Lyle and Co.* v. *Owners of Steamship Schwan* (*infrà*) are applicable although they refer to conditions of an entirely different character. In that case the *Schwan* was held not to be seaworthy owing to danger from a defect in a three-way cock, and that the shipowners were liable as their agent had not exercised reasonable care and diligence within the meaning of the second clause of the bill of lading. There was no evidence that the chief engineer, or any of his subordinates, had been warned about the danger, or knew anything of the peculiar construction of the cock, and if the cock had been of a proper and usual character there would have been no danger in its use. Lord Gorell says, in his judgment (11 Asp. Mar. Law Cas., at p. 290; 101 L. T. Rep., at p. 294; (1909) A. C., at pp. 462, 463: "The question then seens to be: Is a vessel seaworthy which is fitted with an unusual and dangerous fitting which will permit of water passing from the sea into her holds unless special care is used, and those who have to use the fitting in the ordinary course of navigation, have no intimation or knowledge of its unusual and dangerous character, or of the need for the exercise of special care, and might, as engineers of the ship, reasonably assume and act upon the assumption that the fitting was of the ordinary and proper character, which would not permit of water so passing however the fitting was used? I think this question should be answered in the negative." In the case under appeal I am unable to come to any other conclusion than that a vessel, which requires special precautions of an unusual character to be taken in the maintenance of a sufficient water ballast to ensure conditions of stability, which would not be known to a captain of ordinary skill and experience, and have not been brought to his notice, although they had been specifically indicated to the shipowners in instructions sent to them from the shipbuilders, is not manned so as to be seaworthy, and that there was a duty on the respondents to have brought such instructions to the notice of the captain.

The relevant considerations may be summarised in the following order: (1) The *Clan Gordon*, when she sailed from New York, was approximately loaded down to her marks with a homogeneous cargo, so that any competent captain, to whom the general instructions issued by Messrs. William Doxford and Sons had been communicated, would have known that the first paragraph applied to the conditions of loading in the *Clan Gordon*. (2) That the *Clan Gordon*, as loaded when sailing for New York, was not seaworthy without water ballast, and that it was in consequence of the pumping out of the water ballast that she failed to right herself, and sank on a fair day, in a calm sea. (3) That the margin of stability in a turret ship of the construction of the *Clan Gordon* is ascertainable by exact calculation, and that the respondents, by means of the general instructions issued by Messrs. Doxford and Sons, knew that the margin of stability had been ascertained, and that the *Clan Gordon* was not seaworthy, as loaded, without water ballast. (4) That the information conveyed to the respondents in par. (1) of the general instructions had not been brought to the notice of the captain of the *Clan Gordon* at the time she sailed from New York. This information was not a matter within his knowledge, although it is admitted that he had all ordinary knowledge in seamanship which a competent skilled seaman should possess. (5) That if the information contained in par. (1) of the general instructions had been communicated to the captain of the *Clan Gordon* he would not have pumped out the water ballast, and the vessel would not have sunk. The captain, in giving evidence at the inquiry before the Board of Trade in 1920, was asked: "If you had these instructions before you, don't you think that you would have refrained from pumping out those two water ballast tanks at sea?" He answered: "Yes, I would have refrained from pumping out those two water ballast tanks, at any rate until I had worked all my coal off 'tween decks." It is true that he qualified this answer on the following day, in the ground that he would not have taken much notice of these instructions because they are entirely contrary to other experience of those turret ships, but it is difficult to appreciate how such experience could have been gained when the result of an experiment would necessarily be disastrous. The captain was further asked: "Why did the *Clan Gordon* turn turtle?" and answered: "I presume she turned turtle because the tanks were pumped out."

The above considerations are, in my opinion, amply sufficient to establish a *primâ facie* case that there was a duty on the respondents to communicate the instructions to the captain of the *Clan Gordon*. The question, therefore, arises whether sufficient explanation has been given by the respondents to justify them in their negative action. Mr. Barr, who had been registered manager for the respondents since the *Clan Gordon* was built in June 1900 expresses quite frankly the reasons which influenced the respondents in not communicating

the instructions to their captains, including the captain of the *Clan Gordon*. He states that when the respondents get vessels they consider that they get their vessels sufficiently stable to carry homogeneous cargo without water ballast. This general statement may be accepted, but it emphasises the duty to communicate a special instruction, which indicated that a vessel of the *Clan Gordon* type was not sufficiently stable to carry homogeneous cargo without water ballast. He further states that an instruction of this kind is so utterly against all experience of the steamers which the respondents had that it would certainly not appeal to them as a document which would be of any use to them, or as a serious document, a document of which they need take serious notice. No doubt this explanation must be taken in reference to the special circumstances, but I think that it was an additional reason for giving weight to the instructions that they were of such a special nature as to be entirely against all former experience.

Counsel, in his able argument on behalf of the respondents, supported the judgment of the First Division on the following grounds: He said that the case presented facts of an unprecedented character, and that there was no instance on the books of the owner of a ship being held liable for not bringing the instructions of the builders, relating to the stability of the ship, to the notice of the captain. This may be admitted; but the question, nevertheless, arises, whether the facts as disclosed in the present appeal do not disclose a danger of an unusual character known to the respondents, which it was their duty to bring to the notice of the captain of the *Clan Gordon*. For reasons already stated, I think that it was the duty of the respondents to bring the instructions to the notice of the captain. Counsel further argued that the conditions of stability in a turret vessel could not be regarded as constituting an unusual danger, in that such a vessel was one of a substantial class of vessels, of which the merits and demerits were known, and of which the respondents had had a prolonged experience, both before and after the loss of the *Clan Ranald*, a ship of similar construction which had turned turtle and sunk in 1910. Among other passages, he referred to the evidence of Captain Ruthven, who was called at the trial on behalf of the appellants. He was asked: "Would you, if you had been in command of this ship when she was two days out from New York, have emptied numbers 1 and 2 tanks?" His answer is: "I certainly would not have done that; if I had had those instructions I should have filled another one. If I had been long enough on the ship, I might have found out for myself what I found out from the builders." It was said that, as the captain of the *Clan Gordon* had been in charge of the vessel for more than a year, he might have found out for himself the information contained in the instructions and that it was more safe to rely on the experience of the captain than to fetter him by issuing special instructions. The fact that the captain of a vessel may find out for himself, after a certain period of time, a source of unusual danger, which was within the knowledge of the shipowners, and might have been communicated directly to him in the first instance, is not sufficient to justify the shipowners in subjecting a cargo to the risk of loss, or to exempt them from liability for not exercising due diligence, if such a loss has been incurred. Evidence of a similar character was given by Thomas Barr, who had been the registered manager of the respondents since the *Clan Gordon* was built in June 1900. He states as follows: "Well, the builders have not an actual experience of the vessel, and how their figures are arrived at we do not know. We do know that our masters and ourselves have the practical experience of the conditions under which these vessels are sailing, and we are rather inclined to take it that the experience which we have of these types put us in a position of being better able to judge whether the ships could carry these cargoes or not." It is not possible to accept evidence of this character as an answer to the allegation that instructions, based on exact calculations of the stability of the vessel, the accuracy of which is not questioned, had not been brought to the notice of the captain.

It was further suggested that the instructions were in themselves ambiguous, and more likely to cause difficulty than to give information which would assist the captain. Mr. Camps, a maritime expert, says that he had no difficulty in understanding the instructions, and that, if you take each paragraph by itself, he thinks that the first paragraph is perfectly clear. Evidence of a similar character is given by Captain Ruthven and Captain M'Intosh, and the three experts called for the respondents—Mr. Wall, Professor Welch, and Dr. Douglas—do not suggest that there is any difficulty in understanding the first paragraph of the instructions. In my opinion, the respondents have failed to establish that the instructions were in themselves of an ambiguous character so that it was prudent not to embarrass their captains by bringing to their notice the information which they contained.

In the result I agree with the conclusions of the Lord Ordinary and Lord Sands that there was a duty on the respondents to bring the instructions to the notice of the captain of the *Clan Gordon*, and that the respondents have failed to prove that they used due diligence. There is no doubt that if there was a duty on the respondents to bring the instructions to the notice of the captain, the vessel was not seaworthy, and that the loss resulted from her unseaworthiness.

It was further argued on behalf of the respondents that they were entitled to have their liability limited in accordance with sect. 503 of the Merchant Shipping Act of 1894, but, in my opinion, they have failed to show that the loss occurred without their actual fault or privity.

The appeal should be allowed with costs here and in the Court of Session, and the judgment of the Lord Ordinary should be restored.

Appeal allowed.

Solicitors for the appellants, *William A. Crump* and *Son*, for *J.* and *J. Ross*, Edinburgh, and *Maclay, Murray*, and *Spens*, Glasgow.

Solicitors for the respondent, *Coward* and *Hawksley, Sons*, and *Chance*, for *Webster, Will*, and *Co.*, Edinburgh, and *Wright, Johnston*, and *Mackenzie*, Glasgow.

Judicial Committee of the Privy Council.

Nov. 1, 2, *and* 23, 1923.

(Present : Lords Atkinson, Shaw, Wrenbury, Carson, and Sir Robert Younger).

India General Navigation and Railway Company Limited *v.* Dekhari Tea Company Limited and others. (*a*)

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

Carrier—Steamship company—Transfer of goods from railway—Common carrier—Loss of goods by fire—Liability for loss—Indian Carriers Act (*No. III. of* 1865), *ss.* 2, 8, 9.

Chests of tea belonging to the respondents were delivered to a railway company for carriage from A. to C. By reason of a breakdown upon the line an arrangement was made between the railway company and the appellants who were common carriers by water, whereby the goods were taken by ships or flats specially assigned for that purpose to a point where they could be put on rail again. There was no evidence that the river carriage was a temporary and exclusive monopoly for the railway company upon special terms.

Held, that in doing this particular set of journeys the appellants were not departing from their usual business which was that of a common carrier as defined by sect. 2 of the Indian Carriers Act 1865. They were, therefore, not relieved from their legal obligations as such in reference to the loss of the goods.

Decision of the High Court of Judicature at Fort William in Bengal affirmed.

Consolidated appeals by the steamship company against decrees made on the appellate side of the High Court of Judicature at Fort William in Bengal on the 30th Nov. 1921, which affirmed seven decrees of Rankin, J. sitting on the original side, dated the 19th Jan. 1921.

The suits were suits for damages brought on the 20th Dec. 1916 by the respondents respectively against the present appellants, the India General Navigation and Railway Company, and the Assam Bengal Railway (who are not concerned in the present appeal). Rankin, J. tried the suits together and delivered judgment therein for the plaintiffs, and his judgment was affirmed on appeal.

The main question raised on the appeals was whether on the facts of the case the steamship company was liable for the destruction of the respondents' goods by fire upon the ground of negligence or at all. The claim was for damages for the loss of certain chests of tea, delivered by the respondents to the Assam Bengal Railway Company for carriage by rail to Chittagong for shipment to England. The hill section of the railway having been breached, the railway company diverted the traffic to Gauhati on the Brahmaputra to be sent on by water to Chandpur, and thence by train to Chittagong. The terms of carriage were (*inter alia*) that the railway company " will not be liable for loss or damage arising from fire, the act of God, or civil commotion." Of the packages a certain number had been destroyed by fire at Gauhati on a vessel of the steamship company to which they had been removed by the railway company.

On the 20th Dec. 1916 the said suits were instituted by the respondents respectively against the Assam Bengal Railway (as first defendant), and the steamship company as second defendant. A written statement of defence put in on behalf of the railway company pleaded, *inter alia*, that no notice of action had been given as required by the India Railways Act of 1890, s. 77. The suit was thereupon withdrawn as against the railway company.

At the hearing before Rankin, J. the plaintiffs, as amended, alleged that the steamship company were common carriers and that the goods had been lost by the negligence of the steamship company. When the case came on for trial issues were framed by the learned judge as follows :

1. Were the goods delivered to the railway company for carriage upon a contract between the plaintiff company and the railway company for the carriage thereof for the entire journey to Chittagong ?
2. (*a*) Did the railway company enter into an agreement with the plaintiff in respect of the said goods on behalf of the steamer company ? (*b*) If so, had the railway company authority to do so ?
3. At the time of the fire were the goods on board the steamer company's flat in pursuance of any, and if so, what contract between the plaintiff company and the steamer company ?
4. If not, is the plaintiff company entitled to maintain this action against the steamer company ?
5. Were the goods lost by reason of the negligence of the steamer company ?

Upon the first point Rankin, J. held that there was no contract between the plaintiffs and the steamship company. Upon the point as to whether the present appellants were common carriers of the tea he said, speaking generally : " The steamship company is engaged in the business of transporting for hire property from place to place by inland navigation for

(*a*) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

all persons indiscriminately and the question remains whether because it was doing this particular set of journeys for the railway company by a special flotilla which was devoted for the time to this purpose only and which was making a through run to Chandpur it was departing from its usual business and engaging in a different kind of business, viz., the business of a sub-contractor for the railway in such special sense as takes it *quoad* these journeys out of the avocation of a common carrier." He then answered this question in the negative. With regard to the fourth point which was a claim in tort, he held that there had been negligence on the part of the steamship company. Accordingly he made decrees in favour of the plaintiffs.

Upon appeal those decrees were affirmed by Sanderson, C.J., and Richardson, J. Sanderson, C.J. held that there could be no doubt that the general business of the appellant company was that of common carriers. Further, he agreed that the plaintiffs had, by their own evidence, established a *primâ facie* case of negligence against the steamship company, and the defendants, having failed to make any attempt to discharge the onus which lay upon them under sect. 9 of the Carriers Act, there was no ground for disturbing the learned judge's finding in that respect. Richardson, J., in his judgment, intimated the view that it was incumbent on the steamship company to prove that in the particular case it did not act in the capacity of a common carrier. In the result decrees were drawn up dismissing the appeals.

The steamship company appealed.

The Indian Carriers Act 1865 (No. III. of 1865) provides :

Sect. 2 : In this Act, unless there be something repugnant in the subject or context—" common carrier " denotes a person, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately.

Sect. 8 : Notwithstanding anything herein before contained, every common carrier shall be liable to the owner for loss of or damage to any property delivered to such carrier to be carried where such loss or damage shall have arisen from the negligence or criminal act of the carrier or any of his agents or servants.

Sect. 9 : In any suit brought against a common carrier for the loss, damage or non-delivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents.

Dunne, K.C. and *K. Brown* for the appellants.

Neilson, K.C., and *E. F. Spence* for the respondents.

The following cases were cited :

Bruid v. *Dale*, 8 Car. & P. 207 ;
Irrawaddy Flotilla Company v. *Bhugwandas*, L. Rep. 18 I. A. 121 ;
Belfast Ropework Company v. *Bushell*, 118 L. T. Rep. 310 ; (1918) 1 K. B. 210 ;
Liver Alkali Company v. *Johnson*, 2 Asp. Mar. Law Cas. 332 ; 31 L. T. Rep. 95 ; L. Rep. 9 Ex 338 ;
Scaife v. *Farrant*, 33 L. T. Rep. 278 ; L. Rep. 10 Ex 358 ;
Nugent v. *Smith*, 3 Asp. Mar. Law Cas. 198 ; 34 L. T. Rep. 827 ; L. Rep 1 ; C. P. Div. 423 ;
Hill v. *Scott*, 73 L. T. Rep. 210 ; (1895) 2 Q. B. 371 ; affirmed 8 Asp. Mar. Law Cas. 109 ; 73 L. T. Rep. 458 ; (1895) 2 Q. B. 713 ;
Johnson v. *Midland Railway Company*, 4 Exch. 367.

Their Lordships took time to consider their judgment.

Lord Shaw.—These are consolidated appeals against decrees dated the 30th Nov. 1921, pronounced by the High Court of Judicature at Fort William in Bengal. These decrees affirmed seven decrees of Rankin, J. dated the 19th Jan. 1921.

The action was directed by the respondents against the Assam-Bengal Railway Company as well as the present appellants, the India General Navigation and Railway Company. It was dismissed by consent against the former called the railway company, and it proceeded against the latter, called the shipping company.

The plaintiffs' claim is for damages for the loss of certain tea, part of a consignment of their goods which in Nov. 1915 was delivered by the respondents to the railway company for the purpose of transport from Assam to Chittagong for shipment to England. Consignments are in ordinary course thus taken and carried over all the railway company's own line without recourse to any other system of transport.

A section of the line, however, south of Lumding, in June 1915, broke down. It had broken down two years previously and arrangements had then been made for taking the goods by ships or flats from Gauhati on the Brahmaputra river down to Chandpur on the Meghna river. At the latter point the goods could again be put on rail and so reach Chittagong This river service was performed both in 1913 and 1915 by the present appellants. The only bargain on the subject of the goods in the present case was contained in a single letter dated the 11th June 1915 from the traffic manager of the railway company to the agents of the shipping company and was to the effect that

All tea from Upper Assam stations for Chittagong will be diverted via Chandpur and Gauhati. The division of the freight between the steamer company and this railway following the precedent of 1913.

No conditions of any kind, other than that were either produced or proved.

What happened to the goods was that they were conveyed from Bordubi Road (Assam) by rail to Gauhati. The railway having broken down the goods were there put on board the steamship company's flat *Cauvery* for carriage by river to Chandpur.

On the 21st Dec. 1915, while the vessel was still lying at Gauhati, a fire broke out and certain of the tea was destroyed

There were two questions in the case. First, whether the steamship company were liable to the respondents, the owners of the goods, in damages as a common carrier; and second, whether if not so liable, they were liable at common law, by reason of the fire having been caused through their negligence. Their Lordships have not thought it necessary to deal with this second legal head of claim, the materials for which are in the evidence, because they are of opinion that the judgments pronounced by both the courts below on the first point are clearly right, viz., that the shipping company in the circumstances described were under the law of India common carriers and answerable to the owner in damages as per the decrees.

It was quite clearly established, to use the language of their own witness, Parrot, one of their staff: "We are undoubtedly common carriers so far as the river portion of the journey is concerned." The case for the appellants, however, was that by reason of the special nature of the contract of carriage entered into in this case the denomination of common carriers could not apply to them nor the liability of common carriers attach.

There was considerable reference made to the law of England. Whether the result under that law would have been in any wise different from that arrived at is doubtful enough; but the reference was unnecessary, because the point to be decided arises under the law of India. The true question in the appeal simply is whether under the Carriers Act, No. 3, which received the assent of the Governor-General in Council on the 14th Feb. 1865, the definition of common carrier there mentioned covers the appellants *quoad* the present transaction. That definition is to the following effect:

In this Act, unless there be something repugnant in the subject or context—"Common carrier" denotes a person, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately.

It is not denied that the appellants were *de facto* "engaged in the business of transporting for hire property from place to place by . . . inland navigation." The challenge, however, is that this was not done "for all persons indiscriminately." There is no question raised as to the goods being beyond the appellants' carrying capacity; they in fact, receiving a large consignment, supplied the ships or flats to carry it. So far as the words "for all persons indiscriminately" are concerned these simply mean that persons so engaged in and catering for business satisfy the demands or applications of customers as they come and are not at liberty to refuse business. This arises from the public employment in which they are engaged. Apart from danger arising, say, from the nature of the goods received, the carrier is by his office bound to transport the goods as clearly as if there had been a special contract which purported so to bind him, and he is answerable to the owner for safe and sound delivery.

In the present case all of these propositions are admitted; but it is said that there was here a contract of a special nature. The specialities in it were two, first that the shipping company did in fact assign particular flats for the considerable block of business coming to them at Gauhati by reason of the railway breakdown; and secondly, that these flats were destined from Gauhati to Chandpur without calling at the ordinary intermediate ports. On the first of these points their Lordships would observe that there is no written proof in the case apart from the letter already referred to, which was simply to the effect that the rate for carriage would be the same as that charged in 1913. And as to special flats being employed there is no trace in the evidence that if there had been other customers' goods awaiting shipment for Chandpur and consigned to Chittagong, these could not and would not have been sent along with the cargo taken over from the railway company. In short, the idea of this portion of the river carriage being a temporary and exclusive monopoly for one single customer on special terms entirely disappears.

On the second point, viz., that this was a through route, their Lordships fail to see how that circumstance decategorises the appellants from being common carriers under the statute, or relieves them from their legal obligations as such. In order to effect such a result the particular contract would require to come up to this, that *quoad* that transaction, another and different type of business had been entered on.

When, for a particular contract, special terms are desired which involve a different category of liability, there is nothing to prevent that being secured; sect. 6 of the Indian Carriers Act can then be taken advantage of. The language of sect. 6 is as follows:—

The liability of any common carrier for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the Schedule to this Act, shall not be deemed to be limited or affected by any public notice; but any such carrier . . . may, by special contract, signed by the owner of such property so delivered as last aforesaid or by some person duly authorised in that behalf by such owner, limit his liability in respect of the same.

The goods were accepted for delivery by the appellants without any such special signed contract for limitation of liability.

What is required in the case of a person who answers the definition under the Indian Carriers Act, viz., of transporting for hire goods from place to place for all persons indiscriminately, is that the nature of the contract entered into must either have the limitation of the liability under the Indian Carriers Act made expressly and in writing or the facts must be such that for the contract in question the contractor was departing from his usual business and engaging in a different type of business from that of common carrier. The judges in both

courts appear to have not only correctly looked at the case from this point of view, but to have been entirely right in their conclusion. Rankin, J. puts the matter thus : " The only question is whether, because it was doing this particular set of journeys for the railway company by a special flotilla which was devoted for the time to this purpose only and which was making a through run to Chandpur, it was departing from its usual business and engaging in a different type of business, viz., the business of a sub-contractor for the railway in such special sense as to take it *quoad* these journeys out of the avocation of a common carrier. On the whole, I think it was not."

Their Lordships agree that the question is correctly thus put in law and the proper answer given in fact.

Sanderson, C.J. quotes the passage just given and agrees with it, as do their Lordships ; and Richardson, J. puts the matter simply thus : " A common carrier cannot divest himself of his responsibilities as such without satisfying the court that in the particular transaction he acted in some other capacity, and in this case, in my opinion, the appellant company have not discharged the burden which lay upon them."

The above also appears correct.

As already mentioned, all other points in the case have disappeared.

Their Lordships will humbly advise His Majesty that the appeals should be dismissed with costs. *Appeals dismissed.*

Solicitors for the appellants, *Morgan, Price, Gordon*, and *Marley.*

Solicitors for the respondents, *Sanderson* and *Orr Dignams.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Nov. 26, 1923.

(Before HILL, J.)

THE COIMBRA. (a)

Limitation of liability—Practice—No affidavit—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 503.

In an action of limitation of liability under sect. 503 *of the Merchant Shipping Act* 1894 *the plaintiffs did not file the usual affidavit verifying their statement of claim. The owners and crew of the vessel injured in the collision, in respect of which judgment had been given against the plaintiffs in the previous action, and some cargo owners appeared by counsel at the trial and consented to a decree of limitation.*

Hill, J. granted a decree without requiring the plaintiff to file the usual affidavit.

ACTION of limitation of liability.

The plaintiffs, the Portuguese Government as owners of the steamship *Coimbra*, claimed to limit their liability, under sect. 503 of the Merchant Shipping Act 1894, in respect of a collision which took place in the North Sea on the 26th Feb. 1923, between the *Coimbra* and the British steamship *Echo.* The *Echo* was sunk and her owners subsequenty recovered judgment against the owners of the *Coimbra* on the 16th May 1923.

The plaintiffs pleaded in the usual form setting out in their statement of claim the circumstances of the collision, the judgment, and the tonnage of their vessel calculated in accordance with the Merchant Shipping Acts, and alleging that the collision took place without their actual fault or privity. They claimed to limit their liability on 2333 tons at 8*l.* per ton, namely to 18,664*l.* and interest. They filed no affidavit verifying the statement of claim.

At the trial the owners, master and crew of the *Echo*, and the cargo owners appeared.

A. T. Bucknill for the plaintiffs.

Dumas for the defendants, the owners, master and crew of the *Echo*, and the cargo owners, consented to a decree as prayed.

HILL, J. granted a decree without requiring an affidavit verifying the statement of claim to be filed.

Solicitors : *R. H. King ; Thomas Cooper* and *Co. ; Waltons* and *Co.*

July 9, 16, *and Dec.* 21, 1923.

(Before HILL, J.)

THE RUSSLAND. (a)

Salvage—Repairs — Maritime lien—Possessory lien — Priorities — Bail — Claim to share in bail given to defendant in another action.

An accrued maritime lien for salvage is preferred to the possessory lien of a ship repairer who has done repairs to the ship. The ship repairer takes subject to salvage liens already accrued, notwithstanding that the salvors have benefited by the repairs.

Plaintiffs who have a claim against a res *in respect of which bail has been given to plaintiffs in another action have no right to share in such bail.*

Salvage services were rendered to a vessel by five sets of salvors and she was ultimately brought into safety and placed in a repairer's yard where repairs were executed to the order of the owners of the vessel. Subsequently each set of salvors commenced an action, and an action was also commenced by the ship repairers, who had possession of the vessel, claiming the

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

contract price for the repairs. The owners appeared in the first action, and gave a solicitor's understanding to provide bail for the ship in the sum of 1000l., and for the cargo and freight in the sum of 327l. 18s. 8d., whereupon the cargo was released. They did not, however, take any further step, nor did they appear in the subsequent actions. The six actions came before the court on motions for judgment in default of defence or of appearance. The vessel had been sold, and had realised the sum of 889l. 8s. 6d., after payment of expenses.

Held (i.) *that there was no principle in law which enabled the claim of the ship repairer to be preferred to an accrued maritime lien for salvage;* (ii.) *that the undertaking for bail having been given to answer the claim of the plaintiffs to whom it was given, there was no undertaking to give bail to answer any other claim, and no party could claim against the bail except the plaintiffs to whom the undertaking was given;* (iii.) *that the plaintiffs who had obtained bail, in whose action the values amounted to 1217l., could treat 327/1217 of 1000l. as bail representing the cargo and freight.*

MOTIONS in six actions for judgment in default of defence or in default of appearance.

The plaintiffs, in the order of time of their writs, were:

The owners, master, and crew of the pilot cutter *Coytobee*.

The Tees Towing Company Limited as owners of the tug *Laceby*, and as having done various salvage operations.

Pilot Dixon.

The Cleveland Shipping and Lighterage Company Limited.

The Tees Towing Company as owners and the masters and crews of the tugs *Florence* and *Ironopolis*.

Smith's Dry Dock Company.

On the 13th March 1923 the *Russland*, laden with a cargo of kainit and potash salt, stranded on the rocks at the entrance to the River Tees. There the pilot steamer *Coytobee* with the plaintiff Dixon on board came up with her, and the plaintiff Dixon took charge at the request of the master of the *Russland*. It was alleged by Dixon that the master agreed that he "should be paid 100l. if he succeeded in refloating the vessel that tide." The tug *Florence* then came up, and the *Coytobee*, which had failed to move the *Russland* alone, with the help of the *Florence* towed off the *Russland* and together they took her up the river, where they were joined by the *Ironopolis*. The *Russland* was ultimately put on Harkness Hard. On the 14th, 15th, and 17th the Cleveland Shipping and Lighterage Company, acting upon the instructions of the agents of the *Russland* and her cargo, discharged the cargo from the *Russland*. On the 17th an undertaking to provide bail was given by solicitors on behalf of the *Russland* in an action which had been commenced on the 15th by the owners of the *Coytobee*, and the cargo was thereupon released and dispersed.

On the 19th March the *Russland* was put into Smith's dry dock, and repaired by the plaintiffs, Smith's Dry Dock and Engineering Company. On the 28th the *Russland* was abandoned by her owners, and on the 3rd April she was arrested by the Marshal. Subsequently the actions mentioned above were commenced, and motions came on for judgment in default of appearance. Smith's Dry Dock and Engineering Company intervened in the action commenced by the Tees Towing Company, and the Tees Towing Company intervened in the action commenced by Mr. Dixon. The facts fully appear from the judgment.

J. R. Ellis Cunliffe for the *Coytobee*.

E. A. Digby for the Tees Towing Company and the masters and crew of the *Florence* and *Monopolis*.

G. P. Langton for Mr. Dixon. Mr. Dixon is entitled to be paid 100l. in accordance with his agreement. It is not an unreasonable figure.

Clement Davies for Smith's Dry Dock and Engineering Company. These plaintiffs have a possessory lien for the value of the repairs which they have done. A possessory lien is superior to a maritime lien for salvage notwithstanding that the possessory came into operation after the maritime liens had attached. Reliance was placed upon the following authorities:

The Gustaf, 1862, Lush. 506;
The Immacolate Concezione, 4 Asp. Mar. Law Cas. 208; 50 L. T. Rep. 539; 9 Prob. Div. 37;
The Tergeste, 9 Asp. Mar. Law Cas. 356; 87 L. T. Rep. 567; (1903) P. 26;
The Aline, 1839, 1 Win. Rob. 111;
Harmer v. *Bell; The Bold Buccleuch*, 1851, 7 Moo. P. C. 267;
Halsbury's Laws of England, vol. xxvi., pp. 624-5.

Geoffrey Hutchinson (*J. B. Aspinall* with him) for the Cleveland Shipping and Lighterage Company.—An undertaking for bail has been given in the action by the *Coytobee* in the full value of the cargo and freight. The court has therefore control of the *res*, and in such a case it will not part with control without ensuring that all just claims against the *res* are satisfied:

The Joannis Vatis (*No.* 1), 15 Asp. Mar. Law Cas. 506; 126 L. T. Rep. 718; (1922) P. 92.

There plaintiffs commenced their action against ship, cargo, and freight and they have a claim for the services to the cargo. Alternatively the claim of the *Coytobee* should be marshalled against the bail.

Cur. adv. vult.

Dec. 21, 1923.—HILL, J.—This is an unforunate case. There are many claims to a very small fund. The paucity of money is ill-compensated for by the multiplicity of points involved. The *Russland* was a small steamer of 680 tons gross, and carried a cargo of kainit, in bulk and

bags, and of potash salt in bulk. On the 15th March 1923 she stranded on the rocks to the southward of the River Tees. As was afterwards discovered, she there received very serious bottom and other damage. She was got off, towed up river, and placed at a buoy, found to be making water fast, placed on a hard, part discharged, holes plugged, and pumped out. She was then moved to Smith's Dry Dock and temporarily repaired. After all this service had been rendered and much expense incurred she was arrested and sold under the order of the Court. She realised gross 1137*l.* 13*s.* 6*d.*; and net, after deducting Marshal's expenses, 889*l.* 8*s.* 6*d.* The expenses include a payment to Smith's Dry Dock Company for pumps and pumping from the date of arrest—the 6th April—to delivery to the purchaser, on the 22nd May, writs claiming salvage were issued as follows: Folio 165, the 15th March, owners, masters and crew of pilot cutter *Coytobee;* folio 181, the 4th April, the Tees Towing Company Limited as owners of the salved tug *Laceby* and as having done various salvage operations; folio 193, the 7th April, Mr. Dixon, pilot; folio 204, the 9th April, Cleveland Shipping and Lighterage Company Limited; folio 180, the 13th April, the owners, master and crew of tugs *Florence* and *Ironopolis*. The owners are the Tees Towing Company, who are also the plaintiffs in folio 181, and a folio which I had not got in July. Smith's Dry Dock Company also issued a writ. Smith's had already intervened in folio 181 setting up a possessory lien. The Tees Towing Company intervened in folio 193. No appearance was entered by the defendants, except in folio 165, and in that no defence was delivered. The suits are therefore all in default.

The main contests as to liability were directed to the claims of Dixon and of Smith's Dry Dock Company as salvors. I also had to be satisfied with regard to each of the claims upon the affidavits as to the nature of the claims. Everybody, however, took part in a contest as to priorities. The fund in court represents only the ship. The Marshal was never instructed to arrest either the cargo or freight. The cargo or what was of any value had been landed before the date of the writs except the first folio 165. In that action by the *Coytobee* a solicitor's undertaking to put in bail to answer ship, cargo, and freight to the amount of 1000*l.* was given, and the plaintiffs in that action must therefore be taken as having a claim against so much of the bail as represents cargo and freight as well as against the proceeds of the ship. The only figures I have are a statement in the defendants' solicitors' letter giving values as follows: "Cargo, 151*l.* 8*s.*; freight, 176*l.* 10*s.* 5*d*—327*l.* 18*s.* 8*d.*" This added to the realised value of the ship—889*l.* 8*s.* 6*d.*—gives a total of 1217*l.* 7*s.* 2*d.* In my opinion 327/1217 of 1000*l.* must be treated as bail representing cargo and freight—say 268*l.* These plaintiffs therefore have a claim against the ship value 889*l.*—and bail representing cargo and freight 268*l.* The other plaintiffs have a claim only against the ship value 889*l.*

I must now consider the claim to see (1) whether the affidavits prove a salvage service, and (2) the value of the services proved. The *Coytobee* with Dixon on board was first on the scene. She is a small screw steamer used as a pilot cutter. She went out with her crew of six and six pilots and found the *Russland* leaking badly and with fires drawn. It was about one hour's flood when she arrived. They recovered a boat which was adrift and Pilot Dixon was requested to take charge and went on board. The *Coytobee* made fast and broke two small wires but failed to move her. The *Florence* then arrived and made fast. The *Florence* was a tug of 117 tons gross. Together they got her off. They took her up river, a distance of thirteen miles to a buoy. Towards the end of this towage the *Ironopolis* also assisted. The service of the *Coytobee* ended at the buoy. Her expense in damaged ropes is 6*l.* 5*s.* Apparently the *Coytobee* was not of sufficient power to get the *Russland* off the rocks without the more powerful aid of the *Florence*, but she helped in getting her off and in taking her up river. Dixon says he had a verbal bargain with the master of the *Russland* for 100*l.* He pleads that this bargain was confirmed by a written memorandum, but his affidavit does not exhibit it. The bargain was "that the plaintiff should be paid 100*l.* if he succeeded in refloating the vessel that tide." What did that mean? It is very vague. If it meant that he was to have 100*l.* for his personal service, whatever other assistance had to be accepted and paid for, it was, having regard to the small size of the ship and the smallness of the values which could possible be at stake, an oppressive bargain, and I could not uphold it; if it meant if he and the *Coytobee* succeeded in refloating the *Russland*, they did not; it was only with the assistance of the *Florence* that the *Russland* was refloated. It is most in favour of Dixon to disregard the alleged bargain and treat him as a salvor and award him such a sum as his services are entitled to. I think I can properly do so for the terms of the agreement are so uncertain that I cannot find a binding agreement. His services on board the *Russland* continued until the *Russland* was put on the hard. The *Russland* being at the buoy was found to be making water very rapidly and was put on the hard by the tugs *Florence* and *Ironopolis*. Neither the *Coytobee* nor Dixon rendered any service after that. They had assisted to bring the *Russland* from the rocks off the mouth of the Tees to the hard in the harbour; but for them, and still more the *Florence*, she might possibly have floated off with the tide, but she would have been in a helpless condition. On the hard she was in comparative physical safety, but as events proved she was almost certainly a constructive total loss and so was her cargo. For the ship only became worth the price she sold for by reason of subsequent services and expenditure

to a large amount. She lay on the hard from the 13th to the 19th March. The Tees Towing Company had put pumps on board of her while still at the buoy. Their representative made the arrangements for her being put on the hard. Then the *Florence* and the *Ironopolis* put her there and wires were put ashore by them. Their salvage tug *Laceby* put on board her pumps. The *Laceby* and the *Ironopolis* moved further up on the following tides. Thenceforward the *Laceby* and the *Ironopolis* remained alongside, using their pumps, and a number of men were employed getting at and plugging holes. The total expense incurred by the Tees Towing Company, including 139*l.* 12*s.* 3d. paid for labour, came to 173*l.* 11*s.* 3*d.* While the *Russland* was on the hard a portion of her cargo—297 tons in all—was discharged into lighters and taken to a wharf, 257 tons sound and 40 tons damaged. This work was done by the Cleveland Shipping Company Limited under arrangement with a Mr. Osten. Their out-of-pocket expenses came to 168*l.* 3*s.*, and they used a tug and jigger of their own. The cargo seems to have been discharged ex lighters on to the wharf of the Tyne and Tees Steamshipping Company Limited who filed an affidavit showing a claim for 23*l.* 18*s.* 8*d.* But as this was clearly work done at the request of the ship's agents and was to the cargo alone and was not on "no cure no pay" terms no claim against the *Russland* can arise, and indeed these claimants have issued no writ. On the 19th March the ship was taken to Smith's dry dock, and the services of the Tees Towing Company there ceased except that their pumps were not removed till the 20th. As to the Cleveland Shipping Company Limited, I am, upon the affidavit, unable to find that the work was done upon "no cure no pay" terms, and the essential element of a salvage claim is therefore wanting. The work mainly benefited the cargo and the fact that they did not cause the cargo to be arrested confirms the view that their claim was not for salvage, but for work and labour done. It conferred some benefit on the ship, but unless done on "no cure no pay" terms does not give them a right to a salvage award. I think they must look to the persons who employed them; upon their affidavit they seem to have a good claim.

On the 19th March the ship was taken to Smith's Dry Dock, and the service of the Tees Towing Company there ceased, except that their pumps were not removed until the 20th. The Tees Towing Company had spent a great deal of time and money; but the result was most disappointing, for she only realised the net sum of 1137*l.* 13*s.* 6*d.*, after further expense amounting to 245*l.* 17*s.* had been incurred in the hands of Smith's Dry Dock Company. Smith's Dry Dock took the ship into their dry dock from the 19th to the 22nd March, and discharged part of the cargo and did temporary repairs. On the 22nd March the ship was moved to their fitting-out quay, and pumps and men were supplied. On the 28th March they moved her back to the dry dock and did further temporary repairs to enable the ship to float; she was moved out on the 5th April and lay at their fitting-out quay till delivered to the purchaser. As to all the work except from the 28th March to the 5th April it was done at request, and I can see nothing to suggest that it was done on no cure no pay terms. In respect of that, Smith's Dry Dock have a claim in the nature of a *quantum meruit* against the person who employed them and had a possessory lien subject to the priorities, if any, of other persons. As to the period between the 28th March and the 5th April, the dry docking repairs were not at request; but, in my opinion, they were done to protect their lien and not as volunteer salvors. I do not think they earned salvage. The whole of their claim is for work done supported by a possessory lien. As to possession, the law is clear that the repairer takes subject to salvage liens already accrued. In my opinion that follows from *The Immacolata Concezione* (4 Asp. Mar. Law Cas. 208; 50 L. T. Rep. 539; 9 Prob. Div. 37 (wages); *The Gustav* (1862, Lush, 506) (wages); and *The Tergeste* (9 Asp. Mar. Law Cas. 356; 87 L. T. Rep. 567; (1903) P. 26) (wages and disbursements). It was suggested on the authority of a passage in Halsbury's Laws of England, vol. xxvi., at pp. 624-5, that because work has benefited the salvors it can be allowed as against them. The authorities referred to are *The Aline* (1 Wm. Rob. 111) cited in *The Bold Buccleuch* (1851, 7 Moo. P. C. 267). But, however fair it may be that the salvors should recognise Smith's claim, I can find no principle in law which enables me to prefer Smith's claim to an accrued maritime lien for salvage.

I award to the *Coytobee* the sum of 66*l.* That includes their expenses and a little over, 6*l.*, 50*l.* of which they will recover against the ship, against the present defendants; they must get the remaining 16*l.* out of the bail for cargo and freight. It is not exact to a few shillings in exact proportions, but it is near enough. I give Dixon 25*l.* I give the Tees Company in respect of the *Florence* and the *Ironopolis* and the master and crew of those two tugs a total of 200*l.* I give the Tees in respect of the *Laceby* and other work, 374*l.* I have made that a round figure, of which 202*l.* is for the work of the Tees Company and the *Laceby*, and 173*l.* is the out of pockets. That makes a total of 666*l.*, of which 650*l.* is ranking against the ship and 16*l.* is the sum against freight and cargo. There is no competition between the salvors, but if there had been I should think that they should rank all *pari passu*. In my view, their efforts were directed to a common effort and not to a separate salvage in which one took priority to the other. Each will have costs, but I allow only one set of costs in folios 180 and 181. There is no excuse, in my mind, for there being two actions—two writs, and so forth—where the plaintiffs are the Tees Towing Company and their tugs *Florence*, *Ironopolis*, and *Laceby*. They all ought to have been joined in one action. If there is a balance it will go to Smith's, not exceeding the sum of

245*l*. 17*s*., which is the amount for which they have got a possessory lien and their costs. It was argued, and I want to say that I have not overlooked it, that others besides the *Coytobee* could claim against the bail for cargo and freight. I do not agree. That undertaking to give bail was given to answer only the claim of the *Coytobee*, and there was no undertaking to give bail to answer anybody else's claim, and I do not think anybody else asks for it.

Solicitors: *Botterell* and *Roche*, agents for *Botterell, Roche*, and *Temperley*, West Hartlepool, for the *Coytebee; Downing, Middleton*, and *Lewis*, agents for *Middleton* and *Co.*, Sunderland, for the Tees Towing Company and tugs *Laceby, Florence*, and *Ironopolis; Holman, Fenwick*, and *Willan*, agents for *Meeks, Stubbs*, and *Barnley*, Middlesbrough, for Mr. Dixon; *Crossman, Block, Mathews*, and *Crossman*, agents for *Hedley* and *Thompson*, Sunderland, for Smith's Dry Dock and Engineering Company; *Charles Russell* and *Co.*, agents for *Mr. S. F. Thompson*, Middlesbrough, for the Cleveland Shipping and Lighterage Company.

Nov. 2 *and Dec.* 21, 1923.

(Before HILL, J.)

THE CHRISTEL VINNEN. (*a*)

Damage to cargo — Leaking rivet — Unseaworthiness — Damage by failure to take soundings and use pumps—Exceptions—" . . . perils of sea . . . even when occasioned by negligence, default . . . of . . . master, mariners, or other servants of the shipowner"—Damage caused partly by unseaworthiness and partly by excepted perils.

The plaintiffs claimed for damage to a cargo of maize caused by the admission of sea water into the hull of the defendants' vessel owing to a defective rivet. It appeared that the defendants' master had negligently failed to take proper soundings. Had such soundings been taken the water could have been prevented by the use of the ship's pumps from rising to the point above the ceiling of the hold to which it in fact rose, and the damage to the cargo would in consequence have been proportionately reduced. By the terms of the charter-party incorporated in the bills of lading of which the plaintiffs were holders it was provided that " the steamer should not be liable for loss or damage occasioned by perils of the sea . . . even when occasioned by the negligence, default . . . of the master, mariners or other servants of the shipowners."

Held, that the defendants could rely upon the the exception, notwithstanding that the vessel was unseaworthy, in respect of the damage caused by the negligence of the master in failing to take proper soundings or pump, but that they were liable in respect of the damage which occurred prior to the time when the inflow of water ought to have been, but was not, discovered. In view of the impossibility of making an accurate apportionment in the circumstances of the case, held that the defendants were liable for half the amount claimed.

THE plaintiffs were holders of a bill of lading for 2,480,000 kilos of maize shipped at San Nicolas on the defendants' schooner *Christel Vinnen*, which incorporated the terms of a charter-party by which it was provided: " The steamer shall not be liable for loss or damage oaccasioned by . . . perils of the sea . . . or any latent defect in hull . . . by collision stranding or other accidents in the navigation of the steamer, even when occasioned by the negligence, default, or error of judgment of the pilot, master, mariners, or other servants of the shipowner. . . ."

The *Christel Vinnen* sailed from San Nicolas for the Azores on the 10th Dec. 1922, but on 20th Dec. it was found that she was making water and that there were then 9ft. of water in her. She accordingly put into Rio Janeiro where her cargo was discharged. The *Christel Vinnen* was a new five-masted motor schooner built in 1922 by Krupps. Her pumps were capable of 1000 tons per day. It appeared that soundings were at first taken regularly twice a day, but according to the evidence of the master, when it was found that no water was being made, he decided that it was unnecessary to take regular soundings. Soundings were recorded in the log at noon on the 18th. At noon on the 19th " no water " was recorded in the log, but at 8.50 a.m. on the 20th, 9ft. of water was discovered in the *Christel Vinnen*.

Stephens, K.C. and *Van Breda* for the plaintiffs.—The *Christel Vinnen* was unseaworthy by reason of the defective rivet. The defect in the rivet was not latent. The damage was therefore caused by unseaworthiness. When unseaworthiness is established the shipowner can no longer rely upon the exceptions:

> *The Glenfruin*, 5 Asp. Mar. Law Cas. 413; 52 L. T. Rep. 769; 10 Prob. Div. 103;
> *Atlantic Shipping and Trading* v. *Louis Dreyfus and Co.*, 15 Asp. Mar. Law Cas. 566; 127 L. T. Rep. 411; (1922) A. C. 250. [Reliance was placed upon the speech of Lord Sumner];
> Carver's Carriage by Sea, 6th edit., s. 17;
> *The Dimitrios Rallias*, 16 Asp. Mar. Law Cas. 62; 128 L. T. Rep. 491.

The burden is on the defendants to show that the damage or any part of it was caused by negligence (assuming that they are entitled to rely upon this exception). The damage was caused by unseaworthiness, *i.e.*, the defective rivet, and not by negligence *i.e.*, failure to sound and pump.

Reference was made to:

> *Ingram and Royle Limited* v. *Services Maritime du Tréport*, 12 Asp. Mar. Law Cas. 493; 108 L. T. Rep. 304; (1913) 1 K. B. 538;

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

Joseph Thorley Limited v. *Orchis Steamship Company*, 10 Asp. Mar. Law Cas. 431; 96 L. T. Rep. 488; (1907) 1 K. B. 243, 660;

Cargo ex Laertes, 6 Asp. Mar. Law Cas. 174; 57 L. T. Rep. 502; 12 Prob. Div. 187.

[During the argument HILL, J. expressed the view that the shipowner may rely upon the exceptions notwithstanding unseaworthiness unless the damage is caused by the unseaworthiness, and referred to *The Europa* (11 Asp. Mar. Law Cas. 19; 98 L. T. Rep. 246; (1908) P. 84).]

Bateson, K.C. and *G. St. C. Pilcher* for the defendants.—The damage is caused by the negligence of the master in failing to sound, and consequently failing to pump, and is not caused by the unseaworthiness.

Reference was made to:

Cargo ex Laertes, sup.;
The Europa, sup.;
The Cressington, 7 Asp. Mar. Law Cas. 27; 64 L. T. Rep. 329; (1891) P. 152;
The Southgate, (1893) P. 329;
The Glenfruin, sup.;
Atlantic Shipping and Trading Company v. *Louis Dreyfus and Co., sup.*;
Owners of Cargo on board Steamship Waikato v. *New Zealand Shipping Company*, 8 Asp. Mar. Law Cas. 442; 79 L. T. Rep. 326; (1899) 1 Q. B. 56.

Stephens, K.C. replied.

Dec. 21, 1923.—HILL, J. read the following judgment:

The plaintiffs as holders of a bill of lading of a cargo of maize dated the 9th Dec. 1922 sue the owners of the German ship *Christel Vinnen* in respect of non-delivery of about half of the bill of lading quantity, and delivery in damaged condition of the other half. The *Christel Vinnen* was a motor five-masted schooner built in 1922 by Krupps at Kiel. After being taken over from the builders she went in ballast to the Plate. She began loading at San Nicolas on the 1st Dec. and sailed on the 10th Dec. for the Azores for orders. At 8.50 a.m. on the 20th Dec. it was discovered that she had 9ft. of water in her. She put into Rio de Janeiro as a port of distress and on the 24th Dec. her cargo was discharged. Part was condemned. The rest was re-shipped after repairs to the ship, and she proceeded on the voyage. At the Azores she was ordered to Belfast. On discharge at Belfast the re-shipped cargo was found more or less damaged. It was argued at the hearing that the questions as to the short delivery, and the damaged delivery, were the same, depending alike on the liability for what happened on or about the 20th Dec. The plaintiffs do not now contend that they suffered damage by a separate breach of contract or duty by the defendants in relation to the re-shipping of the salved portion of the cargo at Rio. Their case is that the loss and damage were caused by the unseaworthiness of the ship from the time she began to load at San Nicolas.

The defendants denied the fact of unseaworthiness, but their real case was that (1) the warranty was qualified by an express exception of latent defects in hull, and the defect was latent; and (2) that the whole, or at any rate part, of the damage was caused not by the unseaworthiness which let in the water, but by the negligence of those on board in not discovering the inflow in time to prevent it doing mischief. They relied on the exceptions in the bill of lading of perils of the sea and collision, stranding or other accidents in the navigation of the ship, even when occasioned by negligence. At Rio after the cargo had been discharged, it was found that the water had entered by a rivet hole in the port bilge amidships, in the third strake at frame 70. This was in the bottom of the ship, and water would have to rise in the bilges before it could overflow them and reach the cargo. The rivet which had filled this hole had disappeared, at any rate no part of it was found. It must have come away from the hole some time between leaving San Nicolas and the 20th Dec. It is admitted that it must have been in some way defective. There was nothing in the weather to account for the breaking of a sound rivet, and the fact that there were no signs of straining upon any of the surrounding rivets shows that the breaking of the rivet was due to some defect in it and not to abnormal straining of the ship. Such a defective rivet made the ship unfit to encounter the ordinary perils of the voyage, that is, made the ship unseaworthy. If it be a question for the Elder Brethren I have to put to them a question based upon a test suggested in Carver's Carriage of Goods by Sea, and adopted by Channel, J. in *MacFadden* v. *Blue Star Line* (10 Asp. Mar. Law Cas. 55; 93 L. T. Rep. 52; (1905) 1 K. B. 697): "Would a prudent owner, had he known of the defect, have required that it should be made good before he loaded the maize?" Their answer is: "Yes." Conflicting evidence was given by the experts on either side as to whether there could be a defect in a rivet not discoverable by examination. But it is common ground that there might be defects which would be discoverable by examination. What the particular defect was could not be proved. The evidence from the builders does not satisfy me that this particular rivet was examined and no defect found. It is possible that the rivet was missed in the general examination. The case cannot be put higher for the defendants than that it is left in doubt whether the defect was latent or patent. It was not proved that it was latent. The defendants do not bring themselves within *Cargo ex Laertes* (6 Asp. Mar. Law Cas. 174; 57 L. T. Rep. 502; 12 Prob. Div. 187), on which Mr. Bateson relied. So far there is proved an inflow of sea water caused by unseaworthiness and no proof that the defect was latent. The maize was damaged by the sea water, and if the case rested there, the plaintiffs would succeed. But the defendants say, and it has been proved by the plaintiffs no less than by defendants' evidence, that, but for the negligence of

those on board the inflow would have been discovered much sooner than it was, and the defendants say it would have been discovered in time to prevent it reaching the cargo at all, for as soon as it was discovered the pumps could have kept it under. At any rate, with proper care in sounding it is quite certain it would have been discovered long before the water rose to 9ft. For so much of the damage as was caused by the inflow of sea water undiscovered and unchecked by reason of negligence the defendants contended they are protected by the exceptions. Without determining the question whether it was an accident in navigation *ejusdem generis* with collision and stranding, the inflow of sea water was clearly a peril of the sea. The words " even when occasioned by negligence," &c., following a comma, relate in my opinion not merely to " collision, stranding or other accidents arising in the navigation of the steamer," but to all the preceding perils. I am, therefore, of opinion that unless the plaintiffs are right in the contention which I will next consider the defendants would be protected against so much of the damage as was caused by negligence in failing to detect and prevent the inflow.

The plaintiffs, however, contend that, unseaworthiness causing the leak having been proved, the defendants are liable for all the damage which followed. Mr. Stephens at first contended that once there was a breach of the warranty of seaworthiness, the exceptions must be disregarded altogether. That is clearly contrary to authority. *Kish* v. *Taylor* (12 Asp. Mar. Law Cas. 217; 106 L. T. Rep. 900; (1912) A. C. 604, approving *The Europa* (11 Asp. Mar. Law Cas. 19; 98 L. T. Rep. 246; (1908) P. 84), made that clear, if it was not clear before. It is quite certain that if there be damage by unseaworthiness, and damage unconnected with the unseaworthiness, but covered by an exceptional peril, the ship is liable only for the damage caused by the unseaworthiness: see Bucknill, J. in *The Europa* (11 Asp. Mar. Law Cas., at p. 24; 98 L. T. Rep., at p. 251; (1908) P., at p. 98). " . . . The plaintiffs are only entitled to recover from the defendants such damages as directly flow from the want of seaworthiness and not for the damage caused by the water which got into the 'tween decks through the collision between the ship and the dock wall which was covered by the excepted perils in the charter-party, and to the protection of which the shipowner was still entitled, notwithstanding the unseaworthiness of the vessel." Mr. Stephen's next contention came to this—that if damage was initiated by unseaworthiness then no attention could be paid to the excepted perils, and that, whatever supervening causes there might be, the whole damage must be treated as flowing from the unseaworthiness. He said that the recent decision of the Court of Appeal in *The Dimitrios N. Rallias* (16 Asp. Mar. Law Cas. 62; 128 L. T. Rep. 491) was authority for this. He further relied on a passage in Carver, s. 17, and words in a speech by Lord Sumner in the *Atlantic Trading Company* v. *Louis Dreyfus and Co.* (15 Asp. Mar. Law Cas. 566, at p. 569; 127 L. T. Rep. 411, at p. 414; (1922) A. C. 250, at p. 260). *The Dimitrios N. Rallias* is no authority at all for Mr. Stephen's proposition. The exception clause in the contract of affreightment in that case contained the words: " All the above exceptions are conditional on the vessel being seaworthy when she sails on the voyage but any latent defects in hull and (or) machinery shall not be considered unseaworthiness provided," &c. The express contract there made a qualified seaworthiness a condition of the application of the exceptions. As soon as it was decided that the ship was unseaworthy, and the defect not latent, there was nothing more to be said. The passage in Carver contains the following words: " If her unfitness becomes a real cause of loss or damage to the cargo, the shipowner is responsible although other causes from whose effects he is excused either at common law or by express contract have contributed to produce the loss." The only colour to Mr. Stephen's argument from this passage is to be got from the word " contributed," but the cases cited to support the passage show what is meant. They are *Lyon* v. *Mells* (1804, 5 East 428)—damage by a leak due to unseaworthiness; *Kopitoff* v. *Wilson* (3 Asp. Mar. Law Cas. 163; 34 L. T. Rep. 677; 1 Q. B. Div. 377)—sinking of the ship due to unseaworthiness; *Steel* v. *the State Line Steamship Company* (3 Asp. Mar. Law Cas. 516; 37 L. T. Rep. 333; 3 App. Cas. 72)—inflow of sea water by an open port as to which the question to be decided was whether it made the ship unseaworthy; *The Glenfruin* (5 Asp. Mar. Law Cas. 413; 52 L. T. Rep. 769; 10 Prob. Div. 103)—breaking of crank shaft due to unseaworthiness. In each of those cases the immediate cause of damage or loss was a peril of the sea or, in *The Glenfruin*, an accident of navigation, but the exception did not protect because unseaworthiness brought the excepted peril into operation. But Mr. Carver says that the unfitness must be the real cause of the loss or damage. The words Lord Sumner relied on are these: " Underlying the whole contract of affreightment there is an implied condition upon the operation of the usual exceptions from liability—namely, that the shipowners shall have provided a seaworthy ship. If they have, the exceptions apply and relieve them; if they have not, and the damage results in consequence of the unseaworthiness, the exceptions are construed as not being applicable for the shipowner's protection in such a case." I do not understand Lord Sumner to be there saying otherwise than this: " If the damage results in consequence of unseaworthiness, an exception which would otherwise be applicable does not protect the shipowner." None of these passages are any authority for saying that you are to treat the exceptions as wholly to be disregarded as soon as unseaworthiness begins to cause damage or that the exceptions are inapplicable

where the causes specified in them operate upon a state of things initiated by unseaworthiness. You still have to find out what "damage results in consequence of the unseaworthiness" (Lord Sumner); of what "damage the unseaworthiness is the real cause" (Carver). This is just what Lord Atkinson, with the approval of Lord Macnaghten, said in *Kish* v. *Taylor, Sons, and Co.* (*sup.*). He quoted Lord Blackburn in *Steel* v. *The State Line Steamship Company* (*sup.*), and added "which appears to me to imply that if the damage was not a consequence of this unfitness, the shipowner's liability must be determined by the provision of his contract of affreightment, so far as it dealt with that liability."

I think it is still the law that the plaintiffs who assert a breach of the warranty of seaworthiness must prove that the damage was caused thereby and that while the shipowner cannot rely upon any excepted peril if it was brought into operation by the unseaworthiness of the ship, he can rely upon an excepted peril if it, and not the unseaworthiness, caused the damage, whether the state of things upon which that cause operated was brought into existence by unseaworthiness or not. To test this by reference to the facts of the case, I asked myself this question—a defect constituting unseaworthiness sets water flowing into the ship an hour before the time when soundings ought to be taken; no sounding is taken that day; had it been taken at the proper time there would have been such a quantity as could at once have been pumped out and thenceforward the inflow kept in check, without any damage at all to the cargo; not being detected, the water flows in till it reaches and damages the cargo. What is the cause of the damage? I have no doubt that the answer is that unseaworthiness is the cause of the inflow of sea water, but the cause of the damage is that the inflow of sea water occasioned by negligence, that is, by a peril of the sea occasioned by negligence. The difficulty in the present case is to determine how much of the damage was caused before and how much after the time when, by reason of negligence, the inflow was not detected and countered.

The burden is upon the defendants. The maize was in the ship's single hold, which was about 180ft. long. The total length of the ship was 252ft. The ship on leaving San Nicolas was 1ft. 9in. by the stern, on a draught of 18ft. 6in. and 20ft. 3in. The rivet hole was somewhat forward of amidships. The size of the hole was ⅞in. Calculations were made by the experts on either side as to the amount of water in her to give a sounding of 9ft. and the time it would take for the amount to flow in, and the amount necessary to fill the bilges. The data were not absolutely fixed. It was not stated whether the sounding of 9ft. was by the forward or the after sounding pipe; and it has to be remembered that the ship was under sail and was rolling, and, moreover, as she sinks the head pressure is increased. Whatever the rate of inflow it is common ground that to get 9ft. of water in the ship would take much more than twenty-four hours. Mr. Camps, for the plaintiffs, put it at forty-one hours; he said 9ft. of water represented 369 tons, and that the mean inflow would be at the rate of nine tons an hour. Mr. Houston for the defendants said that 9ft. of water represented 420 tons and that the inflow would be at the rate of thirteen tons—equalling thirty-two hours. Mr. Camps based his 369 tons on an experiment with maize and I accept it, and the plaintiffs cannot complain if I also accept his rate of inflow, which I am inclined to do.

I arrive at the conclusion that the water began to flow in about forty-one hours before 8.50 a.m. on the 20th Dec., that is on the afternoon of the 18th Dec. (if exactly forty-one hours at 3.50 p.m.). According to Mr. Camps, to fill the bilges would take eighty-eight tons, that is it would take nine-and-a-half hours before the water was over the ceiling on an even keel. But this must be taken with the qualification that with a ship under sail and rolling, some water would reach the cargo some time before the bilges were full; moreover, owing to the ship being 1ft. 9in. by the stern, water from the bilges would reach the cargo aft before the bilges were full throughout.

I can draw no absolutely certain conclusion. The best conclusion I can arrive at is that the water could have flowed in for some five or six hours without reaching any cargo. If it had been discovered within that time, the bilges could have been pumped out and the inflow countered. For the ship's pumps had a capacity of 1000 tons a day, and until there was a substantial amount of water among the cargo, difficulty from maize choking the pumps would not be experienced. When was the sounding last taken before 8.50 a.m. on the 20th Dec. and when ought it to have been taken? It is admitted that the logged record of "no water" at noon on the 19th cannot be true. The preceding record is against noon on the 18th. The carpenter was not called. The mate said that he knew that the carpenter took soundings on the 18th; he did not say at what hour. As to the 19th he knew nothing. On the 17th he said he took soundings at noon, but the carpenter had taken them in the morning. Before the 17th soundings had been taken every watch; the master said that was because the *Christel Vinnen* was a new ship, and that, after a few days of her loaded voyage had shown there was no water being made, he said it was no longer necessary and that soundings should be taken once or twice a day. Neither counsel asked him whether it ought to be twice rather than once. The Elder Brethren think that in such a ship it would be usual to take them twice a day, morning and evening. But I hesitate to find negligence in not taking them more frequently than once a day. And it is for the defendants to prove negligence. The defendants have not shown that they were not taken as recorded in the log at noon on the 18th. I, therefore, take it against them that they were. I am prepared to find negligence at noon on

the 19th. I am not satisfied as to negligence at any earlier time. From this it follows that the inflow of water from about 4 p.m. on the 18th to noon on the 19th and the damage therefrom was caused by the unseaworthiness. That is about half the time. For the first few hours the water would be only in the bilges, for the next few hours with the careening and rolling of the ship, it would be lapping over into the cargo and by the deeper draught aft would get to the cargo aft before the bilges were full. After the bilges were full it would rise in the cargo. Mr. Camps said it would take eighty-eight tons to fill the bilges. That is about nine and a half hours inflow. In twenty hours there would be about 180 tons in the ship. In the twenty-one hours after noon on the 19th the inflow would be about 189 tons. It would really be rather less before and rather more after noon on the 19th, because of the increasing head of water. One cannot take an exact figure. Moreover, even if one could get an exact figure for the maize actually wetted, it would be impossible to get an exact figure as to the consequential damage to maize not actually wetted. The best estimate I can make, and remembering that the burden of proof is on the defendants, is that half the total damage was caused by the inflow of water due to unseaworthiness and half by the inflow of water due to negligence. I give judgment for fifty per cent. of the plaintiffs' proved loss.

Solicitors for the plaintiffs, *Richards and Butler*.

Solicitors for the defendants, *Wm. A. Crump and Son*.

Jan. 21 *and* 28, 1924.

(Before Sir HENRY DUKE, P.)

THE BRITISH TRADE. (*a*)

Seamen—Master and chief engineer—Claim for wages and disbursements—Special contract—Mariner's contract — Breach — Damages — Maritime lien—Admiralty Court Act 1861 (24 *Vict. c.* 10), *s.* 10—*Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60) *s.* 167 (*i*).

A claim by a master or seaman for damages for breach of a special contract for service on board ship, i.e., *a contract containing stipulations other than the intended voyage and the rate of wages, is not supported by a maritime lien, because such a claim would not have been within the ancient jurisdiction of the Admiralty Court. The jurisdiction over such a claim arises solely under sect.* 10 *of the Admiralty Court Act* 1861, *which confers no maritime lien where none existed prior to the statute.*

But (semble) *the maritime lien is not confined to wages actually earned on board ship, but may attach in respect of wages which the seaman might have earned had he been permitted to continue to serve.*

MOTION for judgment in default of appearance.

The plaintiffs, James Ellis Dye and Gerald Stephen Johnson, were respectively the master and chief engineer of the steamship *British Trade*, and were respectively engaged as such by two agreements dated the 18th April 1922, and the 6th April 1922, entered into between the plaintiffs and the defendants, the owners of the *British Trade* to serve on board the said vessel in their respective capacities upon various terms set out in the said agreements. The *British Trade* was owned by a company called the British World Travel Trades and Cinematograph Limited, which was subsequently changed to the British World Trade Expeditions Limited, and it was originally intended that she should be employed as a floating exhibition of British manufactures in various parts of the world. It was a condition of the agreements with the plaintiffs that the master should invest 2000*l.* and the chief engineer 1000*l.* in the company. The master began to serve under the agreement on the 1st May 1922 and the engineer on the 3rd April. By their statement of claim they alleged that on or about the 28th July 1923, when the *British Trade* was at Hull, they received notice that their wages would cease from the 31st July 1923. The intervening period of time since the plaintiffs had been engaged had been occupied in preparations, during the course of which the vessel had proceeded from Tilbury to Southend and thence to Hull. Each of the plaintiffs had at that time incurred certain liabilities and made necessary disbursements in their respective capacities. By their statement of claim they claimed 757*l.* 16*s.* 11*d.* made up as follows: Claim of the Master (James Ellis Dye)—Wages, fifteen months from the 1st May 1922 to the 31st July 1923, at 58*l.* per month, 870*l.*; expenses and disbursements, 149*l.* 15*s.* 3*d.*; making a total sum of 1019*l.* 15*s.* 3*d.*, less 584*l.* 18*s.* 1*d.* received from the owners; 434*l.* 17*s.* 2*d.* claimed. Claim of the engineer (Gerald Stephen Johnson): Wages, sixteen months from the 3rd April 1922 to the 31st July 1923, at 47*l.* 10*s.* per month, 760*l.*; expenses and disbursements, 101*l.* 3*s.* 1*d.*, making a total sum of 861*l.* 3*s.* 1*d.*, less 538*l.* 3*s.* 4*d.*, received from the owners; 322*l.* 19*s.* 9*d.* claimed. In addition, both the plaintiffs, by par. 6 of the statement of claim, claimed damages for breach of their agreements on the 31st July 1923.

The receiver for the debenture holder of the British World Trading Expedition Limited and Rowland Rand, a registered mortgagee, intervened and put in a defence in which they pleaded, amongst other matters, that the plaintiffs' claims were not enforceable by an action *in rem*, and that the court had no jurisdiction *in rem* over such claims or any part of them. Messrs. Livingstone and Cooper also appeared and claimed a possessory lien in respect of repairs.

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

Sect. 10 of the Admiralty Court Act 1861 (24 Vict. c. 10) provides :

The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship.

Sect. 167, sub-sect. 1, of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), s. 167 provides :

The master of a ship shall so far as the case permits have the same rights, liens and remedies for the recovery of his wages as a seaman has under this Act or by law or custom.

Stone Hurst for the plaintiffs. The claims for wages and disbursements and for damages are recoverable by each of the plaintiffs in an action *in rem.*

Reference was made to :

The Mary Ann, 13 L. T. Rep. 384 ; L. Rep. 1, A. & E., 8 ;
The Ferret, 5 Asp. Mar. Law Cas. 94 ; 48 L. T. Rep. 915 ; 8 App. Cas. 329 ;
The Great Eastern, 3 Asp. Mar. Law Cas. 59 ; 17 L. T. Rep. 228 ; L. Rep. 1, A. & E. 384 ;
The Blessing, 3 Asp. Mar. Law Cas. 561 ; 38 L. T. Rep. 259 ; 3 Prob. Div. 35 ;
Roscoe : Admiralty Practice, 4th edit., p. 250.

The claim for damages is maintainable because the plaintiffs have been wrongfully prevented from earning their wages, and the damages are therefore in substitution for wages and recoverable by the same process.

Alfred Bucknill for the interveners the receiver for the debenture holder and Rand. It is a condition of obtaining a maritime lien that the wages should have been earned :

The Castlegate, 7 Asp. Mar. Law Cas. 284 ; 68 L. T. Rep. 99 ; (1893) A. C. 38 ;
Abbott on Merchant Shipping and Seamen, 11th edit., p. 513.

Even in a case where the intended voyage is abandoned it is submitted that no maritime lien attaches. It is service which gives rise to the maritime lien throughout the Admiralty jurisdiction, *e.g.*, in salvage the service is the basis of the lien. It follows that where the claim is for damages for breach of contract no maritime lien attaches since the foundation of the claim is that no service has been permitted to be performed. The doctrine of the maritime lien is not one which the court should permit to be extended : see *The Sara* (6 Asp. Mar. Law Cas. 413 ; 61 L. T. Rep. 26 ; 14 App. Cas. 209) where a maritime lien in respect of disbursements was refused by the House of Lords on the ground that there was nothing to support it in the words of the statute. Here the statute is relied upon, and it is contended that it permits no maritime lien. In the old cases (*e.g.*, *The Justitia*, 6 Asp. Mar. Law Cas. 198 ; 57 L. T. Rep. 816 ; 12 P. D. 145) where seamen were allowed to claim wages which they would have earned had the intended voyage been completed, the court was acting in its equitable jurisdiction, and these cases do not decide that wages which have not been earned are supported by a maritime lien. See Williams and Bruce Admiralty Practice. p. 202. The maxim that "freight is the mother of wages" (see *The Neptune*, 1 Hagg. Adm. 227) is analogous to the contention of the interveners.

W. H. Owen for Messrs. Livingstone and Cooper.

Stone Hurst in reply.

Cur. adv. vult.

Jan. 28.—Sir HENRY DUKE.—The plaintiffs are James Ellis Dye, formerly master, and Gerald Stephen Johnson, formerly chief engineer of the steamship *British Trade.* They sue for wages, disbursements and expenses, and for damages for wrongful dismissal, and assert a maritime lien in respect of all their claims. This action is defended by a receiver for the debenture-holder and a mortgagee, who have intervened. The ship is the subject of an application for sale. The liquidated claims of the plaintiffs amount to 757*l.* 16*s.* 11*d.*, and the amount represented by debentures and mortgages is said to be 70,000*l.* The interveners admitted at the hearing the right of the plaintiffs to be paid the amount of their claims for wages, disbursements, and expenses out of the proceeds of the ship. What is in issue between the parties is whether the plaintiffs have, or either of them has, a maritime lien in respect of their several claims for damages. The matters to be mentioned by me will be mentioned only in respect of their bearing, or possible bearing, upon this question.

The vessel upon which the plaintiffs were employed was the property of a company originally called the British World Travel Trades and Cinematograph Expeditions Limited, and subsequently the British World Trade Expeditions Limited. The company engaged each plaintiff by an agreement under seal, which dealt with various matters. The project in view appears to have been the conveyance about the world by sea of exhibitors and their wares, with a view to a floating exhibition of British manufactures. Each plaintiff, as a condition of his engagement, invested money in the company—the master 2000*l.*, and the chief engineer 1000*l.* After many months spent in preparation, in course of which the vessel was towed from Tilbury to Southend and proceeded under steam to Hull, the vessel was transferred to a new company, and notice was given to the plaintiffs that the old company disclaimed further liability under their respective contracts. The plaintiff Dye had previously given three months' notice to determine his contract, of which one month remained unexpired. The plaintiff Johnson had given no notice.

The argument advanced on behalf of the interveners in opposition to the claim of the plaintiffs to have a wages lien for anything more than wages earned was founded on the proposition that in order to give such a lien the wages must have been, in the words of the Admiralty Court Act 1861, s. 10, "earned on board the ship," and Mr. Bucknill properly insisted that the existence in the Admiralty Court, and in this Division of jurisdiction to deal with all the claims of the plaintiffs under their agreements of service does not necessarily involve a right to a lien. The opinion of Sir Gainsford Bruce against the existence of this lien as expressed in the well-known work Williams and Bruce, Admiralty Practice, p. 202, was relied upon, and in opposition to the claim I was also reminded of a judicial opinion of Lord Gorell that whether such a lien exists is a difficult question.

The difficulty is to be solved by authority, and not by opinion. Such as it is, it seems to me to arise not so much from want of authority in decided cases as from the difficulty there is in making sure, with regard to many of the cases, whether the existence or non-existence of a lien was material or was adjudicated upon in the several judgments which have to be considered. Inasmuch as before 1861 the Court of Admiralty exercised, in its ancient jurisdiction, remedial powers in personal suits and suits *in rem*, as well as in suits for the enforcement of maritime liens, and after 1861 had an enlarged jurisdiction over suits of various kinds without extension to the claimants in those suits of rights of lien, the period, subject-matter, and result must be scrutinised when the several decisions in question come to be examined. It must be borne in mind, too, that until 1861 the seaman's lien for wages, enforceable in the Admiralty jurisdiction, was a lien for the wages recoverable in that jurisdiction under what Lord Stowell called a mariner's contract; that a special contract might be proceeded upon at law, but not in Admiralty; and that the master of a ship had not the seaman's privileges with regard to wages. The plaintiff Johnson would have had it in respect simply of hiring and service, but the plaintiff Dye would not.

The matters to be considered in detail as to both plaintiffs are, therefore, whether a seaman has a maritime lien in respect of damages for wrongful dismissal from his service under a simple contract; whether the contract relied upon by each is such that service thereunder gives a lien to a seaman; and whether they are in substance claiming wages or damages. Further, as to the plaintiff Dye, there is the question whether by virtue of the Admiralty Court Act 1861, s. 10, and the Merchant Shipping Act 1894 he has a maritime lien under his contract.

The argument on the part of the interveners that a seaman's lien upon the ship for wages exists only in respect of wages earned by the seaman on board the ship in the strict literal sense of these words must be examined in the light of decisions in the Court of Admiralty which extend over a long period, and under which the seaman's lien has been held to include subsistence money, *viaticum*, and, as it seems, whatever he could be fairly said to have earned by his services.

In *The Exeter* (2 C. Rob. 261), in 1799, the ship had been sold in a wages action, and Lord Stowell decreed in favour of a seaman discharged at Colombo on a voyage from Bombay to London the payment out of the proceeds of the ship of wages subsequent to his dismissal.

In *The Beaver* (3 C. Rob. 92), where a marine had been put ashore on the African coast on a voyage from Liverpool to Africa and back, the same learned judge determined that the wages recoverable were those due for the whole voyage. Again, in the case of *The Elizabeth* (2 Dodson 403), Lord Stowell spoke of the right of the seaman wrongfully discharged to claim wages until the return of the vessel to the original port as one recognised in most countries, and when an enterprise had been determined by frustration in the Baltic he decreed that wages were payable to the time of the seaman's arrival in England. The same rule was applied by the same judge under different circumstances in *The Eliza* (1 Hagg. Adm. 182), and where the seaman was given half wages from leaving the ship until his arrival in England. Dr. Lushington in 1856, in *The Camilla* (Swabey 312) decreed payment of wages at the contract rate from the date of discharge to the time within the contract period when the plaintiff obtained other employment.

On the same footing, Dr. Lushington also decided, in *The Great Eastern* (3 Mar. Law Cas. 581; 17 L. T. Rep. 228; 1 A. & E. 384), that a lien existed for damages after wrongful dismissal. The case of *The Blessing* (3 Asp. Mar. Law Cas. 561; 38 L. T. Rep. 259; 3 Prob. Div. 35) does not raise the question of lien, but lays down that the statutory jurisdiction of the County Courts in respect of seamen's wages extends to a claim for damages in lieu of wages. The decision of the Privy Council in *The Ferret* (5 Asp. Mar. Law Cas. 94; 48 L. T. Rep. 915; 8 App. Cas. 329) goes to a like question. Lastly, in the case of *Re Great Eastern Steamship Company* (5 Asp. Mar. Law Cas. 511, 53 L. T. Rep. 594), Chitty, J. in 1885 determined in favour of the crew a claim of maritime lien in respect of seamen's wages accrued after a wrongful determination of the hiring. The conflict was between the wages claimants and mortgagees, and wages were held payable to the time of the chief clerk's certificate in the cause.

Having regard to the state of the authorities, I cannot say that the wages for which a seaman has a lien under a seaman's contract of service are limited in the way the interveners contend. There are, however, two other questions to be considered. Are the plaintiffs respectively, in point of substance, claiming under their respective contracts wages which remain unpaid, or

are they claiming damages for breach of contract? Are their respective contracts such as could have been sued upon in the Admiralty jurisdiction, or special contracts?

The distinction between a claim for wages and a claim for damages under a seaman's contract which has been broken depends upon purely legal considerations. The best answer, I think, is that if there has been merely a breach of the contract by the employer the contract subsists and can be made the subject of a simple claim for wages; but on the other hand, if the employer has repudiated the contract and the seaman has accepted the repudiation the contract is at an end, and any claim to be made by him in respect of its stipulations is a claim for damages (see *Johnstone* v. *Milling*, 54 L. T. Rep. 629; 16 Q. B. Div. 460). It is not clear in the present case that the repudiation of the contracts in question by the owners was accepted by the plaintiffs before the issue of the writ. On this footing a claim for wages might have subsisted until that date.

The plaintiff, the chief engineer, has all a seaman's remedies if he is claiming under a seaman's contract. He may also recover judgment here under a special contract, by virtue of various statutes. Whether the plaintiff, the master, has the alleged lien depends upon the combined effect of the provision in the Admiralty Court Act 1861, s. 10, which gave the court jurisdiction over any claim by the master of any ship for wages earned by him on board the ship, and sect. 167 of the Merchant Shipping Act 1894, whereby a master is given the same rights, lien, and remedies for wages as a seaman under that Act, or by law or custom.

By virtue of the decisions in *The Sara* (6 Asp. Mar. Law Cas. 413; 61 L. T. Rep. 26; 14 App. Cas. 209) and *The Castlegate* (7 Asp. Mar. Law Cas. 284; 68 L. T. Rep. 99; (1893) A. C. 38), I must take it that the Admiralty Court Act of 1861, s. 10, did not create any maritime lien which had not existed before that Act, but merely conferred upon the Court of Admiralty jurisdiction in cases where, before then, it had not jurisdiction. As to the chief engineer, then, it is necessary to inquire whether his claim arises under a special contract, so that it became cognisable in Admiralty by the Act of 1861, or was a claim such as that court always had within its jurisdiction. As to the master, the like question arises under the two sections.

The distinction between a seaman's contract which was cognisable before 1861 in the Court of Admiralty and a special contract such as was within the Admiralty jurisdiction by the Act of 1861 was clearly defined when important rights were constantly dependent upon it. Lord Tenterden described the contract which was enforceable in the Court of Admiralty as "a hiring on the usual terms made by word and writing only and not by deed" (Abbott on Shipping, 11th edit., p. 511). Lord Stowell discusses it at some length in *The Minerva* (Hagg. Adm. 347) under the name of "the mariner's contract," and speaks of it as an ancient instrument in which two stipulations only were necessary—on the part of the owner the description of the intended voyage; on the part of the seaman the rate of wages he was content to accept for his services on that voyage. Whether the contracts here put in suit to ground the claims for damages made by the plaintiffs are such as were cognisable in the Court of Admiralty appears upon examination of them. Each of the agreements was a contract under seal. The employment taken by the master is employment not for a voyage but for a year certain, and thereafter for a period determinable by notice, and with terms and incidents which arise from his association with the company as a shareholder. The chief engineer's agreement again entitled him to be employed until the termination of the first voyage, and thereafter until determination of the contract by three months' notice in writing, or constructive total loss of the vessel. Both of them are, in my opinion, special contracts, such as were not within the ancient jurisdiction of the Court of Admiralty.

In view of the admission of the interveners that the plaintiffs have the lien they assert for the wages they in fact earned, I have no concern with any question as to whether the existence of special contracts would have prevented the Court of Admiralty from entertaining, in the case of the chief engineer as a seaman, a claim to a lien for wages upon proof of service performed. No such question is raised in this case with regard to either of the plaintiffs. So far, however, as their claim extends to damages they can only be asserted upon proof of the contracts. They therefore could not have been entertained by the Court of Admiralty without the statutory authority of the Act of 1861, and they consequently do not carry with them any right to a maritime lien.

In the circumstances of the case it is not necessary to consider reported decisions in which, where a mariner's contract and a special agreement were embodied in one writing, the court, upon finding the same to be severable, decreed in favour of the claim which was within its jurisdiction.

In the result there must be paid out of the fund in court 434*l.* 17*s.* 2*d.* to the plaintiff James Ellis Dye, and 322*l.* 19*s.* 9*d.* to the plaintiff Gerald Stephen Johnson, in pursuance of the admission of the interveners to that effect. The claim of the plaintiffs for a declaration that they have a maritime lien for any amount claimed by them under par. 6 of the statement of claim, is disallowed.

Solicitors for the plaintiffs, *Flegg* and *Son*.

Solicitors for the interveners, *Botterell* and *Roche*.

Solicitors for the ship-repairers, *Dawson* and *Loncaster*, Hull.

House of Lords.

Nov. 1, 2, *and Dec.* 18, 1923.

(Before Lords CAVE, L.C., FINLAY, HALDANE, SUMNER, and PARMOOR.)

GRAHAM JOINT STOCK SHIPPING COMPANY LIMITED *v.* MERCHANTS' MARINE INSURANCE COMPANY LIMITED. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Insurance (Marine)—Policy taken out by owner of ship—Money lent on agreement for mortgage—Scuttling of ship—Claim by lenders against underwriters.

The plaintiffs advanced a sum of money to a shipowner upon the security of a first mortgage on the whole of the ship. A policy, on the instructions of the owner's agents, was then taken out by certain brokers in their own names and (or) as agents upon the hull and machinery of the ship against the perils of the seas, barratry of master and mariners, and all other perils. While the policy was still in force the vessel was scuttled by the master and crew with the connivance of the shipowner. In an action brought on the policy against the marine risk underwriters by the plaintiffs as mortgagees,

Held, that the proper inference to be drawn from the evidence was that the plaintiffs were not independently insured under the policy. The insurance was effected on behalf of the shipowner and the title of the plaintiffs rested upon an equitable assignment from him. The plaintiffs were, therefore, not entitled to recover upon the policy as it was found that the vessel had been scuttled by the authority of the owner.

Decision of the Court of Appeal (ante, *p.* 76; 128 *L. T. Rep.* 611; (1923) 1 *K. B.* 592) *affirmed.*

APPEAL from a decision of the Court of Appeal (reported *ante*, p. 76; 128 L. T. Rep. 611; (1923) 1 K. B. 592).

In 1919, one Angelis, a Greek shipowner, contracted with a firm of shipbuilders in Sunderland that they should build for him a steamer, the *Joanna*, for 330,000*l.* Angelis then arranged with the plaintiffs, who were a firm carrying on business in Glasgow, that in consideration of a mortgage of the steamer to be granted to them when she was completed, they would provide moneys payable from time to time to the shipbuilders as construction proceeded. The plaintiffs provided the necessary funds, and the steamer was completed in May 1920. On the 28th July 1920 an agreement for a mortgage was executed giving the plaintiffs a mortgage on the steamer for 145,000*l.* On the 15th June 1920 a policy was taken out by certain brokers in their own names and (or) as agents upon the hull and machinery of the steamer for twelve months from the 29th May 1920 in the sum of 15,000*l.* against, *inter alia*, perils of the sea and barratry of master and mariners, and the vessel proceeded on a voyage to the United States. On the 31st Jan. 1921 she left an American port with a cargo of coal for the Mediterranean. She called at Gibraltar for orders, and was there directed to discharge at Naples. While steaming eastward, along the Spanish coast, she was scuttled by the master and crew with the connivance of the shipowner.

In an action brought on the policy against the marine risk underwriters by the plaintiffs as mortgagees the Court of Appeal held, reversing the decision of Greer, J., that there being no evidence in support of the plaintiffs' case that they were parties to the policy of insurance, they had failed to make a foundation for their claim and could not recover on the policy. The plaintiffs appealed.

Sir *John Simon*, K.C. and *Jowitt*, K.C. (*James Dickinson* with them), for the appellants:

The following cases were referred to:

Leyland Shipping Company Limited v. *Norwich Union Fire Insurance Society Limited*, 14 Asp. Mar. Law Cas. 258; 118 L. T. Rep. 120; (1918) A. C. 350;

Watson v. *Swann*, 11 C. B. (N.S.) 756;

Fred Drughorn Limited v. *Rederi Aktiebolaget Transaltlantic*, 14 Asp. Mar. Law Cas. 400; 120 L. T. Rep. 70; (1919) A. C. 203;

Keighley, Maxted, and Co. v. *Durant*, 84 L. T. Rep. 777; (1901) A. C. 240;

Small and others v. *United Kingdom Marine Mutual Insurance Association*, 8 Asp. Mar. Law Cas. 293; 76 L. T. Rep. 828; (1897) 2 Q. B. 311;

Baker v. *Adam*, 102 L. T. Rep. 248;

Boston Fruit Company v. *British and Foreign Marine Insurance Company*, 10 Asp. Mar. Law Cas. 260; 94 L. T. Rep. 806; (1906) A. C. 336;

Byas v. Miller, 3 Com. Cas. 39;

Yangtsze Insurance Association Limited v. *Luckmanjee*, 14 Asp. Mar. Law Cas. 396; 118 L. T. Rep. 736; (1918) A. C. 585.

R. A. Wright, K.C. and *Claughton Scott*, K.C. for the respondents were not called upon.

The House took time for consideration.

Dec. 18, 1923.—Lord CAVE, L.C.—In the course of the proceedings in this action a good many defences have been raised on behalf of the respondents, but the only question argued on this appeal is one of fact—namely, whether the policy of marine insurance on the *Joanna*, upon which this action is brought, was effected on behalf of Angelis, the owner of the vessel, and by his authority, assigned or made over to the appellants as his mortgagees, or whether it was effected on behalf both of the owner and of the mortgagees. If the former was the case then, as the vessel is found to have been thrown away by the authority of the owner, the

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

appellants claiming under him cannot recover upon the policy (Marine Insurance Act 1906, s. 50 (2), but if the policy was effected on behalf of the mortgagees as well as on behalf of the owner, so that the mortgagees were directly insured, then it would have to be considered whether they can recover upon the policy notwithstanding the fraud of the owner.

On this issue of fact the documentary evidence is as follows: On the 1st Dec. 1919, when the ship was in course of being built for Angelis by Messrs. Doxford and Co., of Sunderland, Angelis created a charge upon the ship in favour of the appellants to secure a large sum advanced by them to him. The deed of charge made no mention of insurance, but it was the term of the deed that the owner should in due course execute in favour of the mortgagees a formal mortgage containing such clauses, covenants, and conditions as in the opinion of the mortgagees or their legal advisers should be necessary or advisable for their protection. There was a further charge dated the 10th March 1920, and there were also some agreements for consolidation of securities; but these documents carried the matter no further so far as the point now under discussion is concerned. Early in May 1920, when the ship was about to be completed and delivered to Angelis, Mr. J. A. Mango, who held a power of attorney for Angelis, instructed Messrs. J. W. Hobbs and Co., who are insurance brokers, to insure her against sea risks for twelve months from the arrival of the ship at Newcastle-upon-Tyne. The brokers accordingly got the risk underwritten by the respondents and others, and on the 18th May they wrote to the appellants' agents as follows:

S.S. Joanna.

We beg to advise you that we have effected the insurance on the above vessel for twelve months from date to be advised, on hull and machinery valued 275,000*l.*, as follows:

275,000*l.* Institute Time Clauses.
68,750*l.* Freight.
41,250*l.* Disbursements.

At the request of our client, Mr. J. A. Mango, we agree that we are holding the policies to your order to the extent of your interest in the vessel, subject to our lien for unpaid premiums, and to our having the right to cancel the policies should the premiums not be paid, it, of course, being understood that we should not so act without first advising you.

Mr. Mango subsequently instructed Messrs. Hobbs and Co. that the period of twelve months was to run from the 29th May, and this was arranged accordingly. The policy issued by the respondents is dated the 15th June 1920, and purports to be effected by " J. W. Hobbs and Co., and (or) as agents hereinafter called the assured"; and the respondent company thereby "promises and agrees with the assured, their executors, administrators and assigns" to make good loss or damage happening to the ship by (among other things) perils of the sea and barratry up to the sum of 15,000*l.* There is the usual f.c. and s. clause, war risks being separately insured. The policy bears upon the back of it the signature " J. W. Hobbs and Co.," apparently by way of general endorsement. The premium was paid by Angelis. On the 28th July 1920 Angelis executed a form of mortgage of the ship to the appellants to secure the amount which was owing to them, and this mortgage contained the following covenant.

Eighth. The said steamship shall be insured at the expense of the owner against all risks of every kind especially including risks resulting from the recent War and any other war risks, and that to the extent of not less than the amount of the said loan from time to time outstanding and shall be kept so insured during the currency thereof and all policies of insurance on which the premiums have been fully paid over the hull machinery and appurtenances of the said steamship shall be suitably endorsed in favour of the mortgagees, and shall be lodged either with them along with the mortgage or with Messrs. Jos. W. Hobbs and Co., of 260, Gresham House, London, E.C., on their behalf in which event the said Messrs. Jos. W. Hobbs and Co., shall address to the mortgagees a letter stating the details of the policies and acknowledging that they are held to the order of and on behalf of the mortgagees.

At first sight, it may appear strange that Messrs. Hobbs and Co., in writing the letter of the 18th May 1920, should have anticipated so closely the provisions of a covenant which was not executed until the following July; but it appears that there had been earlier mortgage transactions between Angelis and the appellants in which the same form of mortgage had been used and the Court of Appeal inferred (no doubt rightly) that all parties took it that the mortgage of the *Joanna* would be in that form. The ship was thrown away off the coast of Spain on the 19th Feb. 1921, and was a total loss.

My Lords, if the above documents stood alone, the inference would, I think, be irresistible that the insurance was effected on behalf of the owner, Angelis, and that the title of the appellants rested on an equitable assignment from him effected by the covenant and the letter of the 18th May. The instructions to insure were given by Mango, the owner's agent, on the owner's behalf, and it was at his request (as appears by the letter of the 18th May) that the brokers informed the appellants that they held the policy to their order to the extent of their interest. The premium was paid by the owner, and there was no evidence that the appellants took any part in the transaction of insurance. But there is a piece of oral evidence which requires consideration. When the plaintiffs' case had been closed and Mr. Wright on behalf of the respondents had raised the point that the mortgagees were not independently insured under the policy, counsel for the appellants asked and obtained leave to call evidence on that point. He accordingly called Mr. P. J. Hobbs, a member of the firm of J. W. Hobbs and Co., who on being examined in chief said that he knew of the mortgage to the appellants and proved the letter of the 18th May, but gave no evidence as to any direct insurance on behalf of the appellants; and it was only in the last

two answers in his re-examination that he gave the following evidence :—

Q.—You have told us that when Mr. Mango instructed you you knew that Mr. Angelis was the owner and you knew that there were mortgagees? *A.*—That is so.

Q.—When you insured, whom did you intend to cover? *A.*—Whomsoever might be concerned.

It was urged on behalf of the appellants that these answers were sufficient to show that Hobbs and Co., when they entered into the contract of insurance with the respondents, intended to and did so contract as agents not only for Angelis, but also for the appellants, and that as the appellants had adopted the contract by suing upon it, there was enough to give them a separate contractual interest upon which they could sue. I do not think that this is the true effect of the evidence. The policy in question in this case is not, as in the usual Lloyd's policy, effected by the broker " in the name of every person to whom the same doth, may, or shall appertain in part or in all." It is effected by the brokers for themselves, " and (or) as agents," and the question is, on whose behalf they, " as agents," intended to and did enter into the contract. Now Hobbs and Co. had no authority other than that which they derived from Mango, namely, to insure as agents for the owner, and the documents show plainly that they acted under that authority and not otherwise. The witness P. J. Hobbs did not say that he acted as agent for the appellants, but only that he intended to cover whomsoever might be concerned. His own letter, written at the time, treated Mango as his principal, and the appellants as persons to whom an interest was to be given on Mango's request; and I do not think that the inference to be drawn from this letter can possibly be displaced by his vague oral statement made two years later when the position of the parties was in dispute. Mango, who was available as a witness, was not called. I think that the Court of Appeal was right in setting aside Mr. Hobbs' answer and in accepting and acting upon the documents as the only relevant and reliable evidence on this point; and, if so, the appellants were not independently insured.

Having regard to the above conclusions, it is unnecessary to consider the other defences raised in the action, and I express no opinion upon them. In my opinion, this appeal fails and should be dismissed with costs.

My noble and learned friends Lords Finlay and Parmoor desire me to say that they concur in this judgment.

Lord Haldane.—I concur in the opinion that has just been expressed by the Lord Chancellor, and I have nothing to add.

Lord Sumner.—I concur.

Appeal dismissed.

Solicitors for the appellants, *Thomas Cooper and Co.*

Solicitors for the respondents, *Pritchard and Sons.*

Nov. 27, 29, and Dec. 18, 1923.

(Before Lords Dunedin, Atkinson, Shaw, Phillimore, and Blanesburgh, with Nautical Assessors.)

United States Shipping Board v. Laird Line Limited. (a)

APPEAL FROM THE FIRST DIVISION OF THE COURT OF SESSION IN SCOTLAND.

Collision — Ship put in a sudden peril by another's negligence—Slight delay in giving right order—Whether contributory negligence.

The R. *was going at full speed in a dense fog and was sounding no signal. The* W. *was going very slow and was sounding her fog siren. The master of the* W. *suddenly saw a white light half a point on the starboard bow about* 1200*ft. away, which was the masthead light of the* R. *He immediately gave the order "Hard-a-starboard." Three seconds later he saw a red light and at once ordered " Hard-a-port and stop and reverse engines." No alteration on the direction of the vessel was effected by the starboard helm. The order given on the appearance of the red light was the proper order. A collision occurred about forty seconds after the* W. *had seen the white light.*

Held, that the delay of the three seconds from the time the white light was seen until the appearance of the red light did not constitute negligence on the part of the W., *and that the* R. *was alone to blame for the collision.*

Judgment of the First Division (1923) *S. C.* 316; 60 *Sc. L. R.* 265) *reversed.*

It does not lie in the mouth of those who have created the danger of the situation to be minutely critical of the conduct of those whom they have by their own fault involved in the danger.

The Bywell Castle (4 *Asp. Mar. Law Cas.* 207; 41 *L. T. Rep.* 747; (1874) 4 *Prob. Div.* 219) *approved and applied.*

Appeal from a decision of the First Division of the Court of Session in Scotland, consisting of the Lord President (Lord Clyde), Lords Skerrington, Cullen, and Sands, who had reversed a judgment of the Lord Ordinary (Lord Anderson).

The action arose out of a collision between the appellants' steamship the *West Camak* and the respondents' steamship the *Rowan*, which took place about midnight on the 8th Oct. 1921.

The Lord Ordinary held the *Rowan* alone to be in fault, but the First Division held that both vessels were in fault.

The owners of the *West Camak* appealed.

Butler Aspinall, K.C. (of the English Bar) and *J. Carmont* (of the Scottish Bar) for the appellants.

C. Sandeman, K.C. (D.F.), *Bateson*, K.C. (of the English Bar), and *Normand* (of the Scottish Bar) for the respondents.

The following cases were referred to:

The Bywell Castle, 4 Asp. Mar. Law Cas. 207; 1874, 41 L. T. Rep. 747; 4 Prob. Div. 219;

(a) Reported by W. C. Sandford, Esq., Barrister-at-Law.

The Emmy Haase, 5 Asp. Mar. Law Cas. 216; 1884, 50 L. T. Rep. 372; 9 Prob. Div. 81;
The Kwang Tung, 1897, A. C. 391.

Their Lordships took time to consider their judgment.

Dec. 18, 1923.—Lord Dunedin.—Shortly after midnight on the 8th Oct. 1921 a collision occurred off the coast of Wigtownshire, not far from Corsewall, between the screw steamer *Rowan*, the property of the respondents, and screw steamer *West Camak*, the property of the appellants.

The *Rowan* was carrying the mails from Glasgow and Greenock to Belfast, and was, at the time of collision, steering a course S.W. to S.½S. The *West Camak*, which had come from America, was bound for Glasgow and, at the time of collision, was steering N. There was a dense fog at the time. The *West Camak* had previously to the collision been enveloped in fog for some time; the *Rowan* had only recently arrived in the fog area. At the time of the collision the *Rowan* was going at full speed, which was thirteen knots. The *West Camak* was going very slow, at from three to four knots. The *Rowan* was sounding no signal; the *West Camak* was sounding her fog siren. Cross-actions were raised by the owners of the two ships, and were conjoined.

Lord Anderson, before whom the actions depended, after proof led found that the *Rowan* was solely to blame for the collision. On a reclaiming note the First Division recalled that interlocutor, and found both vessels to blame, but apportioned the loss two-thirds to the *Rowan* and one-third to the *West Camak*. Appeal has now been taken by the owners of the *West Camak* to your Lordships' House.

For a vessel to proceed in fog at full speed without sounding her whistle or siren was clearly wrong, and the respondents have not sought before your Lordships to excuse themselves. The only point debated is whether the *West Camak* was also to blame. In the matter of speed and of sounding her signals there was no cause for blame. The whole point depends on the manœuvre immediately before the collision. Now the account of the incidents leading up to the collision, as given by those on board the *West Camak*, is clear, and no question has been raised as to credibility. The Lord Ordinary believed the witnesses, and the judges of the Inner House are content with the story as told by them. It is as follows: The master of the *West Camak* was on the bridge. The ship was proceeding as already mentioned cautiously on a north course, when suddenly the look-out sounded three bells indicating something ahead, and at the same time the master became aware of a white light half a point on the starboard bow. This was, as it turned out, the masthead light of the *Rowan*. He estimated it at about 1200ft. away. The moment he saw it he gave the order "Hard-a-starboard." Almost immediately thereafter, the period elapsed being calculated at about three seconds, he saw a red light and he then instantaneously ordered "Hard-a-port and stop and reverse engines." It is satisfactorily proved that the second order superseded the first at so short an interval that no alteration on the direction of the vessel was effected by the starboard helm. It is also admitted by all that the order given upon the appearance of the red light was the proper order. The account given by those on board the *Rowan* was that the *West Camak* only appeared when a collision was obviously imminent; that, upon the appearance of the *West Camak*, the order was given to put the helm hard-a-port until immediately before the collision, when the order was to put the helm hard-a-starboard in order to throw off her stern and minimise the blow. The engines were maintained at full speed. The manœuvre of the *Rowan*, so far as manœuvre is concerned, is agreed to have been in the circumstances right. None the less the collision occurred some forty seconds after the *West Camak* had seen the white light. The *West Camak* bow struck the port side of the stern of the *Rowan* some fifteen or 20ft. from the end of the vessel. It is contended by the respondents that the proper order for the *West Camak* to have given the moment the white light was seen was the order subsequently given, namely, "helm hard-a-port and engines reversed," and that the erroneous order of "helm hard-a-starboard" with no order to the engines was a material contributing cause to the collision. Now so far as the helm is concerned, inasmuch as the "hard-a-starboard" order was countermanded before it had any effect on the vessel, the order may be disregarded. The point is, therefore, reduced to the simple question: Was the delay of three seconds from the time the white light was seen until the appearance of the red light such negligence on the part of the master as to infer liability on the part of the ship?

I do not doubt that, when a vessel is proceeding in fog and sees a white light ahead, the proper order, however slow the vessel is going, is to stop and reverse. But it has been laid down again and again that, when a situation suddenly occurs which demands a manœuvre, the person in charge of the ship at the moment cannot be condemned if he does not act quite instantaneously. He is entitled to an interval, however short, and it must be short, for his mind to grasp the situation and to express itself in an order. This was laid down in clear terms by Butt, J., in *The Emmy Haase* (5 Asp. Mar. Law Cas. 16; 50 L. T. Rep. 372; 9 Prob. Div. 81) and the same was repeated in the Judicial Committee in the case of *The Kwang Tung* (56 L. J. 88 P.C.; (1897) A. C. 391).

I am of opinion that in this case the interval of three seconds was not excessive, and that the right order was given with promptitude sufficient to exclude the idea of negligence in not having given it sooner. The respondents argue from the event that the ship was struck so very near the stern that three seconds would have made all the difference. That

might have been so, although it would be difficult to affirm categorically that it would, but the only reason why this very short time would have made all the difference is to be found in the excessive speed of the *Rowan* itself. Accordingly, the *Rowan* is hit by a consideration analogous to that which prevailed in the well-known case of *The Bywell Castle* (4 Asp. Mar. Law Cas. 207 ; 41 L. T. Rep. 747 ; 4 Prob. Div. 219) and many others ; namely, that it is not in the mouth of those who have created the danger of the situation to be minutely critical of what is done by those whom they have, by their fault, involved in the danger. I am, therefore, of opinion that the judgment of the Lord Ordinary was right and should be restored. The respondents must pay the costs of the appeal.

Lord Atkinson concurred.

Lord Shaw.—I entirely agree with the judgment pronounced by Lord Dunedin.

The *Rowan* was to blame, grossly to blame, navigating as she was at full speed through a dense fog. That is admitted. The master of the *West Camak*, suddenly discerning a white light slightly on his port bow and only 1200 feet away, in the agitation of the moment gave the order to starboard the helm, and within three seconds gave the order, hard-a-port and stop and reverse engines. The first order was erroneous, but it is proved beyond doubt that it did not deflect the course of the vessel, the second order having followed within three seconds. The case is accordingly one in which no act of bad seamanship brought the vessels together. With regard to the second and the correct order, the House has to judge not so much a question of seamanship as a question of psychology. The issue is whether the master of the *West Camak* should have given the order to port the helm and reverse the engines within a less time than three seconds from the moment when he suddenly discerned the white light.

We are not dealing with the psychology of a superman, but simply of a ship's captain. One is familiar only too often with cases of collisions being brought about by rashness owing to want of due consideration as to the order to be given, but the present case is different. It is ascribed to the opposite of rashness, and is so minute in its apportionment of blame as this, that the captain of the *West Camak* gave the right order in an emergency, but gave that right order too late by the twentieth part of one minute. I do not see my way to hold in law that that brief and fragmentary period of time for consideration, or before the correct order in the emergency was given, can be held to be blameworthy conduct, or legitimately entered as negligence contributing to the collision. I have always held *The Bywell Castle* to be a case of the highest authority, and I will conclude my own opinion by saying that I think that the language of the three great judges, namely, James, Brett, and Cotton, L.JJ., may be said to apply in terms to the present case. For instance, Brett, L.J., says (4 Asp. Mar. Law Cas., at p. 211 ; 41 L. T. Rep., at p. 751 ; 4 Prob. Div., at pp. 226, 227) : " I am clearly of opinion that when one ship, by her wrongful act, suddenly puts another ship into a position of difficulty of this kind, we cannot expect the same amount of skill as we should under other circumstances. The captains of ships are bound to show such skill as persons in their position with ordinary nerve ought to show under the circumstances. But any court ought to make the very greatest allowance for a captain or pilot suddenly put into such difficult circumstances ; and the court ought not, in fairness and justice to him, to require perfect nerve and presence of mind, enabling him to do the best thing possible." How analogous in point of fact *The Bywell Castle* was to this case may be seen from the language used by James, L.J., namely (4 Asp. Mar. Law Cas., at p. 211 ; 41 L. T. Rep., at p. 750 ; 4 Prob. Div., at pp. 222, 223) : " Then there comes the very last thing that occurred on the part of the *Bywell Castle*, which is that she, in the very agony, just at the time when the two ships were close together, hard-a-ported. The judge and both the Trinity Masters were of opinion that that was a wrong manœuvre. I understand our assessors to agree in that conclusion, but they advise us that it could not, in their opinion, have had the slightest appreciable effect upon the collision. That view, if adopted by us, and I think that it should be adopted, would be sufficient to dispose of the case upon the question of contributory negligence. But I desire to add my opinion that a ship has no right, by its own misconduct, to put another ship into a situation of extreme peril, and then charge that other ship with misconduct. My opinion is that if, in that moment of extreme peril and difficulty, such other ship happens to do something wrong, so as to be a contributory to the mischief, that would not render her liable for the damage, inasmuch as perfect presence of mind, accurate judgment and promptitude under all circumstances are not to be expected. You have no right to expect men to be something more than ordinary men."

I have thought it right to cite these very authoritative judgments, because, if the doctrine there laid down be lost sight of, a region of refinement is apt to be entered upon under which the true responsibility for the substantial wrong-doing may be improperly whittled down, and a fanciful wrongdoing may be raised improperly into the region of substance, as a contributing cause.

Lords Phillimore and Blanesburgh concurred.

Appeal allowed.

Solicitors for the appellants, *Thomas Cooper and Co.*, for *Beveridge*, *Sutherland*, and *Smith*, Edinburgh ; and *Fyfe*, *Maclean*, and *Co.*, Glasgow.

Solicitors for the respondents, *Botterell and Roche*, for *J.* and *J. Ross*, Edinburgh ; and *Maclay*, *Murray*, and *Spens*, Glasgow.

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Nov. 2, 6, 8 ; Dec. 10, 11, 1923 ; and Feb. 25, 1924.

(Before Lords Cave, L.C., Haldane, Finlay, Sumner, and Parmoor.)

Samuel and Co. Limited *v.* Dumas. (*a*)

On appeal from the Court of Appeal in England.

Insurance (Marine)—Ship—Mortgage—Interest of mortgagee—Separate insurance—Assignment of interest—Ship scuttled with connivance of owner—Perils of the sea—Barratry—" All other perils, losses, &c."—Right of mortgagee to recover on policy—Excessive insurance—Owner's warranty.

By a mortgage, consisting of a deed of covenant, and a statutory first mortgage to be registered in Greece, a shipowner purported to mortgage his ship to secure moneys due, and to become due, upon a current account. He assigned to the mortgagee all the shares in the ship, all present and future policies on the ship or freight, and a power for the mortgagee to sue in the name of the owner for insurance moneys; and he covenanted to insure the ship and freight and keep them insured and to deliver to the mortgagee the policies duly indorsed, or give the mortgagee a broker's guarantee that he held the policies solely for the mortgagee; and he appointed the mortgagee his attorney, and in his name to sue for all insurance moneys on the ship. By the mortgage the owner covenanted to pay the sums for the time being due and mortgaged the whole interest of the ship free from incumbrances. The mortgage was never in fact registered in Greece. The plaintiffs, who were shipbrokers, took out, in pursuance of the covenant in the deed, a time policy for twelve months " and (or) as agents as well in their own name as for and in the name of all and every other person or persons to whom the same doth, may, or shall appertain in part or in all " against perils of the sea, including barratry, " and of all other perils, losses and misfortunes that . . . shall come to the hurt, detriment, or damage of the said . . . ship, &c., or any part thereof." During the currency of the policy the ship was scuttled with the connivance of the owner, but not with the connivance or complicity of the mortgagee. The plaintiffs sued on the policy on behalf of the mortgagee.

Held, that the mortgagee had an insurable interest in the ship to the extent of the sum secured by the mortgage, and that on the facts the mortgagee was independently insured.

Held (Lord Haldane not expressing any opinion and Lord Sumner dissenting), that the loss was not covered by the policy inasmuch as loss by wilful scuttling was not a loss by " perils of the sea."

Decision of the Court of Appeal (ante, p. 199 ; 128 L. T. Rep. 706 ; (1923) 1 K. B. 592) reversed on this point.

Small and others v. United Kingdom Marine Mutual Insurance Association (8 Asp. Mar. Law Cas. 293 ; 76 L. T. Rep. 828 ; (1897) 2 Q. B. 311) in part overruled.

The policy contained a warranty that the amount insured on freight should not exceed a specified sum. The freight was insured against war risks for an amount considerably exceeding the sum specified.

Held, that there had been a breach of warranty (Lord Sumner dissenting), but that there had been a waiver of the breach within the meaning of sect. 34 of the Marine Insurance Act 1906 by the conduct of the insurer.

Decision of the Court of Appeal affirmed.

Appeal by the plaintiffs from the decision of the Court of Appeal (reported *ante*, p. 199 ; 128 L. T. Rep. 706 ; (1923) 1 K. B. 592), reversing the judgment of Bailhache, J.

The plaintiffs, P. Samuel and Co. Limited, insurance brokers, sued on a policy of marine insurance, in which the plaintiffs were named as the assured, on behalf of D. G. Anghelatos, the owner of the steamship *Grigorios*, and one Percy Samuel, who carried on business as P. Samuel and Co., and was a mortgagee of the steamship.

The mortgage agreement was dated the 13th Sept. 1920, and made between Anghelatos (thereinafter called " the shipowner ") and Percy Samuel, carrying on business as P. Samuel and Co. (thereinafter called " the mortgagee "). It recited that the shipowner was the absolute owner free from incumbrances of the steamship formerly called the *Grindon Hall*, but then called the *Grigorios*, and intended to be registered under the Greek flag at Piræus in Greece, and that the mortgagee had agreed to advance to the shipowner the sum of 22,500*l.* upon having repayment of the same and any other moneys to become due from the shipowner to the mortgagee with interest secured as thereinafter appearing and upon delivery to the mortgagee of (*a*) a statutory or formal first mortgage of the steamship duly executed and registered in Greece (thereinafter referred to as " the said mortgage ") ; (*b*) good and approved policies of insurance upon the vessel as thereinafter provided ; (*c*) the said indenture itself ; and (*d*) bills of exchange. It then assigned all the 100/100th shares in the vessel " and all policies cover notes slips certificates of entry effected or hereafter to be effected granted or issued on the said steamship and on its appurtenances and also on the freight and outfit of the said steamship and also in respect of the protection and indemnity of the said steamship and the full benefit thereof all powers rights remedies and authorities thereunder and in particular with full power for the mortgagee in the name of the shipowner or otherwise to ask demand sue for and recover the said insurance moneys including the right to compromise any claim or suit and to receive the said insurance moneys or any moneys payable by way of compromise and to give valid and effectual discharges for the same and all the right title

(*a*) Reported by Edward J. M. Chaplin Esq., Barrister-at-Law.

interest and demand of the shipowner of in and to the said steamship policies and premises To hold the premises hereby assigned unto the mortgagee as security for the payment of all moneys secured by the said mortgage and of all moneys which may hereafter become payable under any of the provisions hereof." By the indenture the shipowner covenanted with the mortgagee as follows :

1. The shipowner shall pay to the mortgagee the said sum of 22,500*l.* on or before the 13th March 1921, together with interest for the same at the rate of 1½ per cent. per annum above the Bank of England rate current for the time being from the 13th Sept. 1920, and will also pay all other moneys which may be or become due under the security of the said mortgage and of these presents upon the dates whereon the same shall be or become payable or upon demand and until payment the same shall carry interest at the rate aforesaid.

2. In addition to the interest above provided for the shipowner shall pay to the mortgagee on the execution of these presents a commission of one-half per cent. on the said loan.

3. The shipowner will immediately upon the execution hereof hand to the mortgagee his acceptances for the whole of the principal sum aforesaid.

4. The shipowner shall be entitled to repay the whole or any part of the said principal sum of 22,500*l.* or such amount as may from time to time remain outstanding at any earlier period than that herein stipulated for upon giving fourteen days' previous notice in writing to the mortgagee of his intention to make such repayment and any interest included in the outstanding bills shall be deducted *pro rata*. . . .

6. The shipowner will without delay take such steps as may be necessary to effect the complete registration of the said steamship as a Greek steamship. . . .

9. The shipowner will at all times during the continuance of this security insure and keep insured the said steamship and her freights whether at home or at sea against all losses perils and misfortunes usually covered by marine insurance with first-class insurance offices or underwriters or mutual associations as the mortgagee shall from time to time in their (*sic*) discretion approve, and in effecting any such insurance the shipowner will also duly pay the premiums and other sums necessary to keep the said policies in force and produce the receipts therefor to the mortgagee or his agents and will immediately after effecting any such insurance deliver to the mortgagee the stamped policies therefor duly indorsed or give to the mortgagee the guarantee of a broker approved by the mortgagee that he holds such policies solely on account and for the benefit of the mortgagee. . . .

11. In the event of any claim arising under the hereinbefore mentioned policies of insurance . . . the proceeds of the insurance and all other moneys received shall be applied in the case of a partial loss in reinstating the damage which shall have been sustained and in the event of a total loss in repaying to the mortgagee the balance which shall then remain owing hereunder with interest and all costs charges and expenses which have been reasonably incurred by the mortgagee and any balance shall be paid to the shipowner. All other sums received under such policies of insurance . . . shall be applied in discharging the claim in respect of which they are paid.

12. If default shall be made in keeping the said steamship in good seagoing order and condition or in keeping her insured . . . or delivering any such policies receipts or orders as aforesaid the mortgagee may himself enter upon and repair the said steamship and may insure her and keep her insured or entered as aforesaid, and the shipowner will on demand repay to the mortgagee every sum of money expended for the above purposes or any of them . . . with interest at the rate of 8 per cent. per annum from the time of the same having been expended until repayment and until such repayment the same shall be secured by the said statutory mortgage and these presents and shall be a charge upon the mortgaged premises . . .

18. The shipowner for the purpose of giving effect to and carrying out the provisions of this indenture hereby constitutes and appoints the mortgagee to be his true and lawful attorney for him and in his name to ask demand receive sue for and recover all insurances and other moneys of the said steamship which may become due and owing under the security of the said statutory mortgage and of these presents with full power to compromise any claim or suit and to receive any moneys payable by way of compromise and to do such other acts and things in the name of the shipowner or otherwise as the mortgagee may in his absolute discretion deem to be necessary for the due preservation and enforcement of the said security and on receipt of any such money as aforesaid including any money payable by way of compromise to give proper receipts and discharges for the same. And whatever the mortgagee shall lawfully do in the premises the shipowner does hereby and will thereafter ratify and confirm.

19. The mortgagee shall hold the security under the said mortgage of the said steamship not only for the said sum of 22,500*l.* but also for any sum or sums of money together with interest thereon as aforesaid and all charges and expenses incurred in respect thereof which may now or at any future time be owing to them by the shipowner.

The statutory mortgage was headed "Mortgage (to secure Account Current, &c.)," and was dated the 13th Sept. 1920. After describing the *Grindon Hall* to be re-named *Grigorios*, and stating that she was registered at Piræus in Greece, it proceeded :

Whereas I Denis Anghelatos . . . shipowner am indebted in an account current to Messrs. Samuel and Co. . . . brokers and by an agreement under seal bearing even date herewith and made between myself and the said Samuel and Co. it has been agreed that all moneys now or hereafter to become owing to the said Samuel and Co. in respect of the said account shall become due and payable at the times and in the manner provided in the said agreement with interest as therein specified and if no time is provided for repayment of any such moneys then it is agreed that the same shall be payable on demand Now I the said Denis Anghelatos, covenant with the said Samuel and Co. and their assigns to pay to him or them the sums for the time being due on this security, whether by way of principal or interest, at the times and manner aforesaid And for the purpose of better securing the said Samuel and Co the payment of such sums as last aforesaid, I do hereby mortgage to the said Samuel and Co. 100/100th shares, of which I am the owner in the ship above particularly described, and in her boats, guns, ammunitions, small arms, and appurtenances. Lastly I for myself and my heirs (*sic*) covenant with the said Samuel and Co. and their assigns that I have power to mortgage in manner aforesaid the

above mentioned shares and that the same are free from incumbrances.

The policy of insurance was effected on the 19th Oct. 1920 by one F. T. Whelar, the manager of the plaintiffs. It was a time policy, and was taken out by the plaintiffs "and (or) as agents as well in their own name, as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain in part or in all," for twelve calendar months from the 25th Sept. 1920 to the 25th Sept. 1921. The amount insured was 24,000*l.*, part of a larger amount of 105,000*l.* insured upon hull and machinery of the *Grigorios*, valued at 110,000*l.* against adventures and perils of the seas and other contingencies, including barratry, of the master and mariners, "and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said . . . ship, &c., or any part thereof."

The policy included No. 22 of the Institute Time Clauses. That clause is as follows:

Warranted that (except as hereinafter mentioned) the amount insured for account of assured and (or) their managers on . . . freight . . . shall not exceed 15 per cent. of the values of the hull and machinery as stated herein but this warranty shall not restrict the assured's right to cover . . . (2) Freight and (or) chartered freight and (or) anticipated freight on board or not on board, insured for twelve months or other time.—Any amount not exceeding 25 per cent. of the value of hull and machinery as stated herein, but if the insurance be for less than twelve months, the 25 per cent. to be proportionately reduced. . . . Provided always that a breach of this warranty shall not afford underwriters any defence to a claim by mortgagees or other third parties who may have accepted this policy without notice of such breach of warranty.

On the same day F. T. Whelar effected for the benefit of P. Samuel an insurance on freight against war perils to the amount of 27,500*l.*

The mortgage was never registered according to Greek law; and the evidence went to show that it never could have been so registered, because the amount secured thereby was an uncertain amount.

On the 26th Feb. 1921 the *Grigorios* was lost about nine miles from Cape de Gata on a voyage from Philippeville on the coast of Algeria to the Tyne with a cargo of iron ore. The plaintiffs claimed upon the policy for the benefit both of the owner and P. Samuel. The defendant Dumas was the underwriter whose name was first on the list of subscribers of the policy.

The policy also contained a warranty that the amount insured on freight should not exceed a specified sum. The freight was insured against war risks for an amount considerably exceeding the sum specified.

The Court of Appeal reversed the decision of Bailhache, J.

It was held by Bankes, L.J. and Eve, J. (1) that the mortgagee had an insurable interest in the ship, although the mortgage was never registered in Greece; (2) that the mortgagee's interest was intended to be separately covered by the policy, and was not merely derivative from the owner's interest; and (3) (Scrutton, L.J. dissenting) that the mortgagee was not debarred from asserting that the ship was lost by perils of the sea.

They also held that there had been a breach of warranty, notwithstanding that the insurance on freight was against war risks and that the mortgagee could not recover on the policy.

The plaintiffs appealed.

Sir *John Simon*, K.C., *A. T. Miller*, K.C., and *S. L. Porter* for the appellants.

R. A. Wright, K.C. and *W. L. McNair* for the respondent.

The following cases were cited:

Reischer v. *Borwick*, 7 Asp. Mar. Law Cas. 493; 71 L. T. Rep. 238; (1894) 2 Q. B. 548;

Leyland Shipping Company v. *Norwich Union Fire Insurance Society Limited*, 14 Asp. Mar. Law Cas. 258; 118 L. T. Rep. 120; (1918) A. C. 350;

Mountain v. *Whittle*, 125 L. T. Rep. 193; (1921) 1 A. C. 615;

Wilson and Co. v. *Owners of the Cargo of the Xantho*, 57 L. T. Rep. 701; 12 App. Cas. 503;

Hamilton v. *Pandorf*, 57 L. T. Rep. 726; 12 App. Cas. 518;

Trinder, Anderson, and Co. v. *Thames and Mersey Marine Insurance Company*, 78 L. T. Rep. 485; (1898) 2 Q. B. 114;

Sassoon and Co. v. *Western Assurance Company*, 106 L. T. Rep. 929; (1912) A. C. 561;

Jones v. *Nicholson*, 10 Exch. 28;

Board of Management of Trim Joint District School v. *Kelly*, 111 L. T. Rep. 305; (1914) A. C. 667;

Nutt v. *Bourdieu*, 1 Term Rep. 323;

Sheppard v. *Allen*, 3 Taunt. 78;

Stamma v. *Brown*, 2 Str. 1173;

Small and others v. *United Kingdom Marine Mutual Insurance Association*, 8 Asp. Mar. Law Cas. 293; 76 L. T. Rep. 828; (1897) 2 Q. B. 311;

Gordon v. *Rimmington*, 1 Camp. 123;

Boehm v. *Bell*, 8 Term Rep. 154;

Matthews and another v. *Smallwood and others; Smallwood* v. *Matthews and others*, 102 L. T. Rep. 228; (1910) 1 Ch. 777;

Bank of England v. *Vagliano Brothers*, 64 L. T. Rep. 353; (1891) A. C. 107;

Stainbank v. *Fenning*, 11 C. B. 51;

Ajum, Goolam, Hossen, and Co. and others v. *Union Marine Insurance Company*, 84 L. T. Rep. 366; (1901) A. C. 362;

Bentsen v. *Taylor, Sons, and Co.*, 69 L. T. Rep. 487; (1893) 2 Q. B. 274;

British and Foreign Marine Insurance Company v. *Gaunt*, 125 L. T. Rep. 491; (1921) 2 A. C. 41;

Castellain v. *Preston*, 49 L. T. Rep. 29; 11 Q. B. Div. 380;

Cullen v. *Butler*, 5 M. & S. 461;

Heyman v. *Parish*, 2 Camp. 146;

Thames and Mersey Marine Insurance Company v. *Gunford Ship Company*, 105 L. T. Rep. 312 ; (1911) A. C. 529 ;
Thames and Mersey Marine Insurance Company v. *Hamilton, Fraser, and Co.*, 6 Asp. Mar. Law Cas. 200 ; 57 L. T. Rep. 695 ; 12 App. Cas. 484 ;
North British and Mercantile Insurance Company v. *London, Liverpool, and Globe Insurance Company*, 36 L. T. Rep. 629 ; 5 Ch. Div. 569 ;
Davidson and others v. *Burnand*, 19 L. T. Rep. 782 ; L. Rep. 4 C. P. 117 ;
Midland Counties Insurance Company v. *Smith and wife*, 45 L. T. Rep. 411 ; 6 Q. B. Div. 561 ;
Thompson v. *Hopper*, E. B. & E. 1038 ;
Wilson v. *Jones*, 15 L. T. Rep. 669 ; L. Rep. 2 Ex. 139 ;
Ebsworth and others v. *The Alliance Marine Insurance Company*, 2 Asp. Mar. Law Cas. 125 ; 29 L. T. Rep. 479 ; L. Rep. 8 C. P. 596 ;
Dudgeon v. *Pembroke*, 3 Asp. Mar. Law Cas. 393 ; 36 L. T. Rep. 382 ; 2 App. Cas. 284 ;
Grant, Smith, and Co. and McDonnell Limited v. *Seattle Construction and Dry Dock Company*, 122 L. T. Rep. 203 ; (1920) A. C. 162 ;
Davenport v. *The Queen*, 37 L. T. Rep. 727 ; 3 App. Cas. 115 ;
Earl of Darnley v. *London, Chatham, and Dover Railway Company*, 16 L. T. Rep. 217 ; L. Rep. 2 H. of L. 43 ;
Fenton v. *Thorley and Co.*, 89 L. T. Rep. 314 ; (1903) A. C. 443 ;
The Chasca, 32 L. T. Rep. 838 ; L. Rep. 4 A. & E. 446 ;
Anghelatos v. *Northern Assurance Company*, 39 Times L. Rep. 629.

The House took time for consideration.

Lord Cave.—The steamship *Grigorios* (formerly the *Grindon Hall*) was purchased by one Denis Anghelatos, a Greek subject, on the 13th Sept. 1920, and on the same day she was removed from the British register and received a provisional certificate of Greek nationality which enabled her to fly the Greek flag pending registration in Greece. On the same day Anghelatos, who was already indebted to his bankers, Messrs. Samuel and Co., in a considerable sum, borrowed from them a further sum of 22,500*l.* to enable him to pay off a charge on the *Grigorios* on the terms that he should give them a mortgage on the ship to secure the whole of his current account. Accordingly on the 13th Sept. 1920, Anghelatos executed in favour of Samuel and Co. two documents namely, first a mortgage of the ship in British statutory form to secure his account current, and secondly a deed whereby he assigned the ship as security for the 22,500*l.* and all other moneys due or to become due from him, and covenanted (among other things) to effect the complete registration of the ship as a Greek steamship and to insure her and her freight against all perils as the mortgagees should approve. While the advance and mortgage were being negotiated Mr. Percy Samuel, who carried on business as Samuel and Co., told Anghelatos that he would have to insure the steamship against all risks through the appellants, P. Samuel and Co. Limited (brokers who looked after insurances for the banking firm), for not less than 100,000*l.*, and in the presence of Anghelatos instructed Mr. Whelar, the manager of the appellant company, to see that this insurance was effected. Anghelatos also desired Mr. Whelar to get the freight insured against all risks for 27,500*l.* The appellant accordingly opened three slips and procured them to be underwritten by the respondent Dumas and other underwriters—namely (1) a slip for insuring the hull and machinery of the *Grigorios* against marine risks in a sum of 110,000*l.* for a period of twelve months ; (2) a slip for insuring the freight of the same vessel against marine risks in a sum of 27,500*l.* for the same period ; and (3) a slip for insuring the hull and machinery in 110,000*l.*, the freight (f.i.a.) in 27,500*l.* and the disbursements (f.i.a.) in 16,500*l.*, all against war risks, for a period of six months only. In the month of Oct. 1920, policies of insurance in accordance with the above slips were duly issued and delivered to the mortgagee.

On the 26th Feb. 1921 the *Grigorios*, while on a voyage from Philippeville to the Tyne, foundered in calm weather off the coast of Spain and became a total loss.

On the 20th May 1921 the appellants commenced this action against the respondent Dumas on his policies of insurance on the vessel, alleging that the vessel had been lost either by war perils or by ordinary marine perils. Similar actions were commenced against the other underwriters responsible, on their policies. The respondent, among other defences which will be referred to later, pleaded that the loss was due to the wilful misconduct and fraud of Anghelatos and his agents in procuring or conniving at the sinking of the ship ; and at the hearing of the action the trial judge (Bailhache, J.) found this plea to be proved. He accordingly dismissed the claim on the war risk insurance, but, holding that his finding of fraud against the owner did not prevent the broker from recovering on behalf of the mortgagee under the marine risk insurance, and overruling the other defences raised by the respondent, he gave judgment against the respondent on the marine risk policy for his proportion of the loss.

On appeal to the Court of Appeal that court reversed the decision of the trial judge and dismissed the action. The judgment of the Court of Appeal was founded principally on the ground that there had been a breach of No. 22 of the Institute Time Clauses, which were incorporated in the marine policy. The material parts of that clause were as follows :—

"Warranted that (except as hereinafter mentioned), the amount insured for account of assured and (or) their managers on premiums,

freight, hire, profit, disbursements, commissions, or other interests (policy proof of interest or full interest admitted), *or on excess or increased value of hull or machinery however described*, shall not exceed 15 per cent. of the values of the hull and machinery as stated herein, but this warranty shall not restrict the assured's right to cover. . . .

"(2) Freight and (or) chartered freight and (or) anticipated freight on board or not on board, insured for twelve months or other time.—Any amount not exceeding 25 per cent. of the value of hull and machinery as stated herein, but if the insurance be for less than twelve months the 25 per cent. to be proportionately reduced."

The value of the hull and machinery as stated in the policy was 110,000*l.*, and accordingly the maximum amount which the assured was entitled under the warranty to cover by p.p.i. or f.i.a. policies on freight, &c., was, for a twelve months' insurance, 25 per cent. of the stated value, or 27,500*l.*, and for a six months' insurance one-half of that sum, or 13,750*l.*; and as the freight had in fact been insured with the knowledge of the mortgagee for the full 27,500*l.* for six months only, the court held the warranty to have been broken, and dismissed the action on that ground. A plea that the breach of warranty had been waived by the respondent was disallowed. In addition to the above ground Scrutton, L.J. expressed the opinion that, the ship having been intentionally scuttled with the connivance of the owner, the loss did not fall within the policy either as a loss by perils of the sea or under the general words; but the other members of the court held themselves precluded by the decision of the Court of Appeal in *Small and others* v. *United Kingdom Marine Mutual Insurance Association* (*sup.*) from deciding the case on that ground. Thereupon the present appeal was brought.

It is convenient to deal first with the point upon which all the judges of the Court of Appeal decided the case against the appellant as, if their decision on that point is right, the remainder of the questions argued do not arise.

Upon the question whether there was, in fact, a breach of the warranty contained in clause 22 of the Institute Time Clauses, I agree with the unanimous judgment of the Court of Appeal. That clause contained a warranty or condition that the amount insured on freight, &c. (p.p.i. or f.i.a.), should not exceed (in the event which happened) 12½ per cent. of the stated value of the hull and machinery, or 13,750*l.*, and, as the f.i.a. insurance of the freight against war risks was for 27,500*l.* there was a clear breach of the warranty unless the word "insured" in the warranty is to be confined to insurances against the perils insured against by the policy in question, that is to say, to insurances against marine perils only to the exclusion of war perils. I see no sufficient ground for so restricting the meaning of the word. The word "insured" in a policy of marine insurance *primâ facie* covers all insurances against sea risks, including war risks; and there is in the policy in question in this case no context sufficient to cut down the natural meaning of the word. It is true that the insurer of a ship against ordinary marine risks is not directly interested in the amount of the insurance of the freight against war risks. But it is said that an over-insurance of freights by honour policies against war risks may tempt the owner to throw away his ship with a view to claiming under the war risk policies and, alternatively, under the ordinary marine policies, and so may involve the marine underwriters in litigation and loss; and certainly the course of events in the present case supports that view. Upon the whole I think that the word "insured" must be construed in its natural and ordinary sense, and as including all kinds of marine insurance; and on this point I desire to adopt the reasoning of Scrutton, L.J., who said, at p. 713: "It is argued by the mortgagees and found by the judge that, as this is an insurance against war perils, it does not affect a policy on marine perils because, as the judge says, the marine underwriter would not have to pay a loss by war perils. This involves reading into the policy of the words 'against marine perils' in the first line of clause 22 after the words 'amount insured.' I see no reason for inserting these words, and every reason for not inserting them. Warranties are construed strictly. The reason for this warranty is that the insured should not by heavy insurances p.p.i. have an opportunity of over-valuing his ship and a temptation to lose her. This temptation is just as great if the over-valuation and over-insurance are on war risk policies as if they are on marine policies. Indeed, so long as war risks producing loss by sinking may be argued to be losses by perils of the sea, by the incursion of sea water, war risk policies may be very important to the marine underwriter. In the present case the attempt was first made to recover on a fictitious explosion as a war risk, and then changed to a claim in respect of a marine peril."

But, while I am satisfied that there was a breach of the warranty, I think that the respondent Dumas is prevented from taking advantage of it by the circumstance that he was himself a party to the excessive insurance on freight which constituted the breach. Sect. 34 of the Marine Insurance Act 1906 provides that "a breach of warranty may be waived by the insurer." Now a right may be waived either by express words or by conduct inconsistent with the continuance of the right; and even where there is no actual waiver, the person having the right may so conduct himself that it becomes inequitable for him to enforce it. Here the respondent, who must be assumed to have been aware that the assured was prevented by the terms of the policy of insurance on the vessel from taking out honour policies on the freight for six months for any sum in excess of 13,750*l.*, joined in the issue of such policies for double that amount and took his share of the premiums on those policies; and I can conceive no conduct more inconsistent with

an intention on his part to enforce the restriction. It is argued that at the moment when the representative of the respondent initialled the war risk slip the amount underwritten if apportioned between the ship, freight, and disbursements was not in excess of the amount allowed; but the answer is that the slip then already contained the words, "Hull and machinery, 110,000*l.*; freight, f.i.a., 27,500*l.*; disbursements, f.i.a., 10,500*l.*," and specified the period as six months, so that it was obvious on the face of the document that the underwriters were taking a share in an insurance of that character and amount and expected and intended it to be carried through. Further, when the policy was issued in October, it was known that the full amount specified in the slip had been underwritten; and Mr. Dumas through his representatives, who must be taken (in the absence of any evidence to the contrary) to have acted with his authority, was a party to the issue of the policy. In my opinion, the respondent and the other underwriters who took that course are prevented by waiver or acquiescence from treating the marine policy on the vessel as void for breach of the warranty.

In view of my opinion on the above point, it becomes necessary to deal with the other points argued on behalf of the respondent, and I propose to deal with them in the order in which they arise.

First, it is said that, as the *Grigorios* was a Greek ship at the time of her loss and neither the ship nor the mortgage upon her had then been registered in Greece, the mortgagee had no valid security upon the ship and so had no insurable interest. Upon this point I accept the finding of the learned trial judge that before you can have a valid mortgage on a Greek ship under Greek law the ship and the mortgage must be registered in Greece, and the mortgage must be for a specific sum and not merely for the balance of a current amount, and that these conditions were not complied with; but, nevertheless, I agree with his view that the mortgagee in this case had an insurable interest. Sect. 5 of the Marine Insurance Act 1906 provides as follows:

"(1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.

"(2) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss or by damage thereto or by the detention thereof, or may incur liability in respect thereof."

In the present case the appellant held a British mortgage on the ship and a deed of covenant which recited an agreement by the owner to deliver to the mortgagee a "formal first mortgage of the said steamship duly executed and registered in Greece," and contained a covenant by him to "take such steps as might be necessary to effect the complete registration of the said steamship as a Greek steamship:" and he was entitled in equity to enforce these agreements. This being so, I think it impossible to say that he was not interested in the adventure within the meaning of the above section; and if so, he clearly had an insurable interest to the extent of the sum secured by the mortgage. This decision is in accordance with such authorities as *Boehm* v. *Bell* (*sup.*) and *Wilson* v. *Jones* (*sup.*).

Secondly, it is said that the mortgagee was not originally insured by the policy sued upon but was a mere assignee of the policy from the owner, and accordingly that as the owner, having scuttled his ship, could not sue upon the policy, this defence is available under sect. 50 (2) of the Act against the mortgagee. In my opinion the evidence shows clearly that Mr. Samuel, the mortgagee, was an original party to the insurance, which was effected on his personal instructions, and that the brokers, when they took out the policy "as well in their own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain in part or in all," intended to and did enter into the contract of insurance on behalf of the mortgagee as well as on behalf of the owner. This was sworn to by three witnesses, who were neither cross-examined nor contradicted on this point; and I think that the learned judge was fully entitled to find (as he did) that the policy was to be taken out on behalf of the mortgagee to secure the joint interest of himself and the mortgagor, and that there was no question of an assignment. If so, that disposes of this point.

But thirdly, it is argued that, assuming that the insurance was for the joint benefit of the mortgagee and the owner, still it was avoided by the misconduct of the owner. Sect. 55 (2) of the Act provides that "the insurer is not liable for any loss attributable to the wilful misconduct of the assured;" and it is argued that, where two persons interested in the same property or adventure are jointly insured by one policy, the misconduct of either is sufficient to avoid it. In support of this contention, a well-known American authority—(Duer on Marine Insurance, Lecture III., s. 15) was cited; and it was pointed out that the proposition contended for is not inconsistent with the English case of *Trinder Anderson and Co.* v. *Thames and Mersey Marine Insurance Company* (*sup.*) which was a case of negligent navigation and not of wilful misconduct. My Lords, there is force in this argument, but I am not prepared to say that in the present case it should prevail. It may well be that, when two persons are jointly insured and their interests are inseparably connected so that a loss or gain necessarily affects them both, the misconduct of one is sufficient to contaminate the whole insurance (Phillips on Marine Insurance, vol. I., s. 235). But in this case there is no difficulty in separating the interest of the mortgagee from that of the owner; and if the mortgagee should recover on the policy, the owner will not

be advantaged, as the insurers will be subrogated as against him to the rights of the mortgagee. In such a case the "assured" referred to in sect. 55 (2) is the particular assured to whom it is sought to make the insurer liable. In my opinion, therefore, this contention also fails.

But lastly, it is said on behalf of the respondent that the ship having been wilfully scuttled by the direction of the owner, the loss is not covered by the policy sued upon. In that policy the perils insured against are defined (in the ordinary terms) as perils "of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, &c., or any part thereof." In considering whether the loss of the ship falls within these words, it is necessary first to determine what was the proximate cause of the loss, for it is provided by sect. 55 of the Act (which reflects the law as previously established) that unless the policy otherwise provides, the insurer is liable only for losses proximately caused by a peril insured against. Now it was found as a fact by the learned trial judge that the *Grigorios* was thrown away by the master and engineers and some of the crew with the connivance of the owner; and he was apparently satisfied that this was done by deliberately letting water into the ship and into the bilge connections and afterwards causing a sham explosion which induced the innocent members of the crew to leave the ship with those who were guilty and to refrain from using the pumps. The vessel in fact sank very slowly and did not disappear until thirteen hours after the explosion. In these circumstances the question is, whether the proximate cause of her sinking was the act of letting the water into the vessel, or the actual inrush of the water. Apart from authority, I should feel no doubt that the former is the true view. There appears to me to be something absurd in saying that, when a ship is scuttled by her crew, her loss is not caused by the act of scuttling but by the incursion of water which results from it. No doubt both are part of the chain of events which result in the loss of the ship, but the scuttling is the *causa causans*. The scuttling is the real and operative cause—the nearest antecedent which can be called a cause; and the subsequent events—the entry of sea water, the slow filling of the hold and bilges, the failure of the pumps and the break-up of the vessel—are as much parts of the effect as is the final disappearance of the ship below the waves. And if one turns to the cases, then, notwithstanding a dictum of Lord Campbell on the argument of the demurrer in *Thompson* v. *Hopper* (6 E. & B., at p. 192) and the decision on the appeal in *Small's* case (*sup.*) to which I will refer later, I think that the balance of authority is in favour of the same view. In *Reischer* v. *Borwick* (*sup.*), where a ship damaged by collision with a snag in the river was temporarily repaired, but on the leak again opening foundered and was lost, it was held that the collision was the proximate cause of the loss; and that case was approved and followed by this House in *Leyland Shipping Company* v. *Norwich Union Fire Insurance Society Limited* (*sup.*), where a ship having been torpedoed and having sunk two days afterwards in consequence of the damages caused, it was held that the torpedoing was the proximate cause of the loss. There are many other authorities to the same effect, but these two cases are sufficient to illustrate the point; and it is hardly necessary to have recourse to the maxim *dolus circuitu non purgatur* (*Thompson* v. *Hopper*) (*sup.*), which perhaps applies only as against persons who are parties to the *dolus*. On the whole I think that the scuttling of the *Grigorios* was the proximate cause of her loss.

Then, was the loss a loss by perils of the sea? Surely not. The term "perils of the seas" is defined in the First Schedule to the Act as referring only to "fortuitous accidents or casualties of the seas." The word "accident" may be ambiguous, and has even been held in another connection to include a wilful murder (*Board of Management of Trim Joint District School* v. *Kelly*, (*sup.*), but the word "fortuitous," which is at least as old as *Thompson* v. *Hopper* (*sup.*), involves an element of chance or ill luck which is absent where those in charge of a vessel deliberately throw her away. In *Wilson and Company* v. *Owners of the Cargo of the Xantho* (*sup.*), Lord Herschell said that in order that there might be a peril of the seas "there must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen"; and in *Hamilton* v. *Pandorf* (*sup.*), Lord Bramwell approved the definition of Lopes, L.J., "it is a sea damage occurring at sea and nobody's fault." In *Sassoon and Co.* v. *Western Assurance Company* (*sup.*), Lord Mersey, in delivering the judgment of the Judical Committee of the Privy Council, adopted a similar view, which is also to be found in the judgment of the Judical Committee in *Grant Smith and Co. and McDonnell Limited* v. *Seattle Construction and Dry Dock Company* (*sup.*). On this view the expression "perils of the sea," while it may well include a loss by accidental collision or negligent navigation, cannot extend to a wilful and deliberate throwing away of a ship by those in charge of her.

Against this strong current of authority there is to be set the decision of the Court of Appeal in *Small and others* v. *United Kingdom Marine Mutual Insurance Association* (*sup.*). There, in an action by a mortgagee under a policy of marine insurance, it was alleged by way of defence that the ship had been wilfully cast away by her master, who was also a part owner and mortgagor; and upon the argument of the

preliminary question whether this plea was a sufficient defence to the claim, it was held by the trial judge (Mathew, J.), that, assuming the plea to be true, the loss was due to barratry and the mortgagee, who had taken part in appointing the master, could recover on that ground. On appeal, the Court of Appeal agreed with that decision but also expressed the opinion that, if the mortgagee had taken no part in appointing the master, he could have recovered as for a loss by " perils of the sea." With the latter opinion I am unable to agree. It appears to me to be inconsistent not only with the statute afterwards passed, but also with the decisions of this House and of the Judicial Committee; and I think that *Small's* case (*sup.*) must stand on the ground of the barratry alone. In the present case there is no question of barratry, the owner having been a party to the fraud and the mortgagee having taken no part in appointing the master and crew.

With regard to the general words " and of all other perils, &c.," it has been repeatedly held that they are to be construed as applying to perils of the same kind as those which have been previously specified (see *Thames and Mersey Marine Insurance Company* v. *Hamilton, Fraser, and Co.* (*sup.*), where the decisions are reviewed); and this rule has now been made statutory (Marine Insurance Act 1906 Sched. I., r 12). It follows that a loss by scuttling is not covered by those words.

For the above reasons I am of opinion that this appeal fails on the ground last stated, and I move your Lordships that it be dismissed, with costs.

Lord Finlay.—This action was brought to recover for a total loss on the steamer *Grigorios* on behalf of the owner, Anghelatos, and a mortgagee, Percy Samuel, upon a marine risks policy. The vessel foundered off the south coast of Spain on the 26th Feb. 1921.

The case was tried before Bailhache, J. He found that the vessel was scuttled by the master and engineers and some of the crew, with the connivance of the owner, Anghelatos. Anghelatos did not appeal against this decision. This, of course, disposed of any claim by the owner; but the case has been proceeded with on behalf of the mortgagee, who was not in any way implicated in the fraud of Anghelatos.

The vessel had been British, but was taken off the register on being bought by Anghelatos, who is a Greek subject, and was provisionally recognised as a Greek vessel. The first issue raised was as to the existence of the mortgage. Bailhache J. found, though there was no legal mortgage according to Greek law, that Anghelatos had entered into a valid agreement with Samuel for a mortgage to secure his advances and that the latter had a right to call for a mortgage to be executed with all proper formalities. He therefore found that Samuel had an insurable interest as mortgagee. The Court of Appeal agreed with him, and I take the same view.

It was further objected to Samuel's claim that he took the policy of insurance as assignee from Anghelatos. If this had been the case the assignee would be on no better footing than the assignor. This point, however, is disposed of by the finding of Bailhache, J., with which the Court of Appeal agreed, that the policy had in fact been effected on behalf of Samuel, the mortgagee, as well as on behalf of Anghelatos, the owner. His title, therefore, would not be impaired by the fraud of Anghelatos, as he took directly from the insurers. I proceed upon the basis that this finding also is correct.

A third objection was made, based on the allegation that the insurance was made subject to a condition and that the condition had been broken. This condition is contained in the twenty-second of the Institute Time Clauses which are attached to the policy. It was alleged that the assured had violated this condition inasmuch as on a war risks policy he had insured the freight f.i.a. in excess of the amount permitted by clause 22. Bailhache, J. overruled this objection, because, as he said, the further insurance on a war risks policy could not affect the underwriter upon the marine risks. The Court of Appeal, however, held that the condition had been broken as the object of the clause was to guard against persons who made over-insurance, p.p.i. or f.i.a., in respect of any risk, whether within or without the marine risks policy. The Court of Appeal accordingly entered judgment for the underwriters on this point, holding that by the infringement of this condition the policy was avoided.

I agree with the view which the Court of Appeal took of the meaning of this clause. It was, however, urged that one of the underwriters on the policy sued on, Dumas, was a party to the further insurance, and it was argued for the plaintiff that this concurrence by Dumas in the further insurance prevented him from treating it as avoiding the policy sued on. I do not think that this " waiver," as it was called, is established on the materials before the House, but I do not rest my decision upon clause 22. In my opinion, all the defendants are entitled to judgment upon another and a much broader ground.

The action was brought, as I have said, on behalf of the owner and on behalf of the mortgagee. Any claim on behalf of the owner is, of course, out of the question, as it was he that scuttled the ship. Can the innocent mortgagee recover—can he, in virtue of his independent right as one of the assured under the policy, claim in respect of the loss of the vessel? This will be found to resolve itself into the inquiry whether the loss can be considered as a loss by perils of the sea. The loss was not by barratry, as the captain, in destroying the vessel, was acting under the orders of the owner, and the captain was not in the service of the mortgagee. It follows that, to recover, the mortgagee must show that the sinking of the vessel by the entrance of the sea water which followed from the scuttling can be considered as a loss by perils of the sea, as otherwise the loss would not be from a peril covered by the policy.

The answer to this question must primarily depend upon an examination of the language of the Marine Insurance Act 1906. When the

law has been codified by such an Act as this, the question is as to the meaning of the code as shown by its language. It is, of course, legitimate to refer to previous cases to help in the explanation of anything left in doubt by the code, but, if the code is clear, reference to previous authorities is irrelevant. Lord Herschell put this point with great force and clearness in *Bank of England* v. *Vagliano Brothers* (*sup.*), and there can be no doubt that his statement of the law there made is correct.

I therefore begin with the examination of the Marine Insurance Act 1906 itself. The relevant passages are three in number—sect. 3, sect. 55, and the seventh of the rules for construction of policy contained in the First Schedule to the Act.

The third section of the Act provides that "there is a marine adventure where any ship, goods, or other moveables are exposed to maritime perils," and defines maritime perils as follows :—

"Maritime perils" means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the sea, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints and detainments of princes and peoples jettisons, barratry, and any other perils either of the like kind or which may be designated by the policy."

If entrance of water in consequence of scuttling by the owner is a "maritime risk" it must be because it is included under the term "perils of the sea." which is the first in the enumeration of the varieties of maritime risks. There is no other head in the clause under which it could fall apart from barratry.

I turn to sect. 55 of the Act :—

"55—(1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.

"(2) In particular,—

"(*a*) The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but unless the policy otherwise provides he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew. . . ."

By sub.-sect. (1) of this clause, the insurer is liable for any loss proximately caused by a peril insured against. It is obvious that the proximate cause of the loss, and, indeed, its only cause was in the present case the act of scuttling, It was for the purpose of letting in the sea water that the holes were made and all that followed was the inevitable consequence of what had been so done. There is a marked distinction between such a case as the present and a case where the hole has been made by negligence, *e.g.*, by carelessly leaving a valve open, as in *Davidson and others* v. *Burnand* (*sup.*). In that case the weight of the cargo brought the discharge pipe below the water level and in consequence of a valve being negligently left open water entered from the discharge pipe and damaged the cargo. That clearly was an accident incident to the carriage of goods, while in the present case the hole was wilfully made for the purpose of letting in the water. In another reported case arising under a bill of lading, rats gnawed a hole in a pipe which passed through the rice cargo, with the result that sea water entered and damaged the rice (*Hamilton* v. *Pandorf, sup.*). In that case also the hole was the result of an accidental cause incident to the carriage of goods on a ship. If a man for the purpose of damaging the rice had made the hole in the pipe the damage would have been the result of an act directed by human intelligence for the very purpose and there would be nothing in the nature of an accident about the occurrence. I use the word "accident" in its ordinary sense and not in the somewhat artificial sense in which it has sometimes been used in cases relating to Acts for compensation of workmen.

The terms of the seventh of the Rules for Construction of Policy in the First Schedule to the Act are directly in point : "7. The term 'perils of the seas' refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves."

The scuttling of this vessel occurred on the seas, but it was not due to any peril of the seas ; it was due entirely to the fraudulent act of the owner. The scuttling was not fortuitous, but deliberate, and had nothing of the element of accident or casualty about it. Storms are "fortuitous ;" the ordinary action of the waves is not, and fraudulent scuttling is even more decisively out of the region of accident. The entrance of the sea water cannot for this purpose be separated from the act which caused it.

I might rest my judgment on the terms of the statute, which show that a peril of the seas must be fortuitous, while here the sea water was let in deliberately. But as the greater part of the argument has been devoted to a discussion of the authorities apart from the statute, it is desirable that I should deal also with this aspect of the case. I may observe, however, that the authorities relied upon by the appellant were anterior in date to the Marine Insurance Act, the latest being in 1897, and on the view of Lord Herschell as to the effect of a codifying Act any earlier authorities inconsistent with the terms of the Act would cease to apply when it came into operation.

The main authority relied upon by the appellant is *Small's* case (*sup.*). That case was heard by Mathew, J. (76 L. T. Rep. 326 ; (1897) 2 Q. B. 45), and his decision proceeded entirely on the ground of the barratry of the master which was covered by the express terms of the policy. He said : "The mortgagee in this case" (Small) "took part in placing Wilkes in the position of master ; and Wilkes, if he committed a barratrous act, would be guilty of a fraudulent breach of trust against his mortgagee as well as against his co-owners." The underwriters appealed (*sup.*). Both Lord Esher, M.R., and A. L. Smith, L.J., agreed with the finding of Mathew, J., that Small had taken part in the appointment of Wilkes as

captain, so that the act of Wilkes would be barratrous as against Small just as it was against the co-owners. On that view the case has no application to the appeal now under consideration. But both Lord Esher and A. L. Smith, L.J., in their judgments, put the case in the alternative, saying that if Wilkes was not appointed by Small then Small could have recovered as for a loss by a peril of the seas. This was not at all necessary for the decision, but the appellant in the present case is quite entitled to say that these two eminent judges did give it as an alternative reason for supporting the decision of Mathew, J. This House, however, is certainly not bound by what they said, although any opinion expressed by either of these two very eminent masters of maritime law deserves the most respectful consideration. Nor has there been any such general acceptance of the doctrine as to cause any difficulty as to overruling it, if in the opinion of this House it is erroneous.

In my opinion the view so expressed was erroneous and did not correctly state the law as it stood before the Marine Insurance Act 1906. The true view of the common law on this point is that which is embodied in the Act itself. The sea water cannot in a case of scuttling be regarded as the cause of the loss. The cause was the fraudulent act which admitted it into the ship.

The view that the proximate cause of the loss when the vessel has been scuttled is the inrush of the sea water, and that this a peril of the sea, is inconsistent with the well-established rule that it is always open to the underwriter on a time policy, to show that the loss arose not from perils of the seas but from the unseaworthy condition in which the vessel sailed (see Arnould on Marine Insurance, sect. 799). When the vessel is unseaworthy and the water consequently gets into the vessel and sinks her, it would never be said that the loss was due to the perils of the sea. It is true that the vessel sank in consequence of the inrush of water, but this inrush was due simply to unseaworthiness. The unseaworthiness was the proximate cause of the loss. Exactly the same reasoning applies to the case of scuttling, the hole is there made in order to let in the water. The water comes in and the vessel sinks. The proximate cause of the loss is the scuttling, as in the other case the unseaworthiness. The entrance of the water cannot be divorced from the act which occasioned it.

The view of the law on this point put forward by the appellant is also inconsistent with the decision of the Judicial Committee of the Privy Council in *Sassoon and Co.* v. *Western Assurance Company* (*sup.*). In that case opium stored in a wooden hulk moored in a river was damaged by water percolating through a leak caused by the rotten condition of the hulk. There was a time policy on the opium insuring against the perils of the sea, but it was held that the plaintiff could not recover for the loss. The case was tried in His Majesty's Supreme Court in Shanghai and it was there decided that the damage was not due to sea peril at all, but simply to the weakness of the hulk. The Judicial Committee affirmed this ruling. Lord Mersey said in delivering the judgment of the Privy Council, "There was no weather, nor any other fortuitous circumstances, contributing to the incursion of the water; the water merely gravitated by its own weight through the opening in the decayed wood and so damaged the opium. It would be an abuse of language to describe this as a loss due to perils of the sea. Although sea water damaged the goods, no peril of the sea contributed either proximately or remotely to the loss." Lord Mersey then quoted what was said by Lord Herschell in *Wilson and Co.* v. *Owners of the Cargo of the Xantho* (*sup.*), and concluded by saying that the damage by sea water was not in any sense due to sea peril and, therefore, did not fall within the policy. This decision was approved and followed in *Grant Smith and Co. and McDonnell Limited* v. *Seattle Construction and Dry Dock Company* (*sup.*). At p. 171 Lord Buckmaster, in delivering the judgment of the Judicial Committee, said, after citing the *Xantho* and the *Sassoon* cases, "It is just as though a vessel, unfit to carry the cargo with which she was loaded through her own inherent weakness and without accident or peril of any kind, sank in still water. In such a case recovering under the ordinary policy of insurance would be impossible."

Lord Collins in the case of *Trinder Anderson and Co.* v. *Thames and Mersey Marine Insurance Company* (*sup.*) expressed himself as follows: "The wilful default of the owner inducing the loss will debar him from suing on the policy in respect of it on two grounds. . . . First, because no one can take advantage of his own wrong, using the word in its true sense which does not embrace mere negligence. . . . Secondly, because the wilful act takes from the catastrophe the accidental character which is essential to constitute a peril of the sea; 'I think,' said Lord Halsbury in *Hamilton* v. *Pandorf* (*sup.*), 'the idea of something fortuitous and unexpected is involved in both words "peril" or "accident."'"

As regards the first of the two grounds referred to in this passage, it is to be observed that the mortgagee was in no way party to the fraud of the owner in the present case. The first ground would therefore be applicable to him only if in the circumstances of this case the mortgagee is to be considered as so identified with the owner whose wilful misconduct brought about the loss as to be incapable of taking advantage of it. It is not necessary to decide whether he was so identified in the present case, and I reserve my opinion upon it. Lord Collins' second ground is in terms applicable to the present case. The loss was directly due to the wilful and deliberate act of the owner, and there was nothing of the accidental element which is essential to constitute a peril of the sea.

In the case of *Cullen* v. *Butler* (*sup.*) the court doubted whether the loss of a vessel

which sank from the fire of a man-of-war which mistook her for an enemy was a loss by perils of the seas, but held the loss recoverable on a special count stating the facts. This case formed the subject of some very illuminating comments by Lord Herschell in the *Xantho* case (*sup.*). One passage is so apposite to the present case that I venture to cite it (p. 509): "I think it clear that the term 'perils of the sea' does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves, which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities or by common understanding. It is beyond question, that if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering, owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category. Indeed, I am aware of only one case which throws a doubt upon the proposition that every loss by incursion of the sea, due to a vessel coming accidentally (using that word in its popular sense) into contact with a foreign body which penetrates it and causes a leak, is a loss by a peril of the sea. I refer to the case of *Cullen* v. *Butler* (*sup.*), where a ship having been sunk by another ship firing upon her in mistake for an enemy, the court inclined to the opinion that this was not a loss by perils of the sea. I think, however, this expression of opinion stands alone, and has not been sanctioned by subsequent cases."

It will be observed that Lord Herschell emphasises the point that it is necessary to constitute a peril of the seas that there should be something in the nature of a casualty or accident. He gives as instances extraordinary violence of the winds and waves, striking upon a sunken rock, foundering as the result of a collision with another vessel even when the collision resulted from the negligence of that vessel, and he summarises by saying that he is aware only of one case which throws doubt upon the proposition that "every loss by incursion of the sea due to a vessel coming accidently (using that word in its popular sense) into contact with a foreign body, which penetrates it and causes a leak, is a loss by peril of the sea." He adds that the expression of opinion in *Cullen* v. *Butler* (*sup.*), the case he referred to, stood alone and had not been sanctioned by subsequent cases. Lord Herschell treats the firing upon the vessel in *Cullen* v. *Butler* (*sup.*), owing to her being mistaken for an enemy, as an accident which supplied the fortuitous circumstance necessary to constitute a peril of the sea. The possibility of scuttling is not a peril of the sea, it is a peril of the wickedness of man and would have to be mentioned expressly in the policy, like barratry or pirates, in order that the assured should recover from the underwriter in respect of it. If the scuttling is carried out by the captain and crew in fraud of the owner it is an act of barratry and the owner may recover under the policy, which ordinarily enumerates barratry as one of the perils insured against.

Sir John Simon cited a remark made in the judgment of Lord Campbell in *Thompson* v. *Hopper* (*sup.*). In commenting upon a plea alleging personal misconduct of the plaintiffs which produced the loss, Lord Campbell said: "The plaintiffs' counsel said truly that the perils of the sea must still be considered the proximate cause of the loss; but so it would have been if the ship had been scuttled or sunk by being wilfully run upon a rock." It is true that the sea in all these cases would be the actual agent of destruction, but this does not make the loss a loss by perils of the seas. As pointed out by Scrutton, L.J., in his judgment, the question as to proximate cause is really as to what is the dominant or effective cause; in the present case it was, of course, the scuttling, and that is not a "peril of the sea."

A dictum of Lord Ellenborough in *Heyman* v. *Parish* (*sup.*) was also cited. That dictum was a criticism of a ruling of Buller, J. on the question whether, if a plaintiff declared for a loss by perils of the seas and it turned out that it was the result of barratrous misconduct in the navigation of the vessel, the plaintiff could recover. Reference was also made to *Dudgeon* v. *Pembroke* (*sup.*). In that case a vessel encountered very bad weather and was lost. It was alleged that she was unseaworthy, but it was decided that a loss caused immediately by the perils of the seas is within the policy, though it might not have occurred but for the concurrent action of some other cause which is not within the policy. Neither of these cases appears to me to have any material bearing upon the present.

Upon the whole I arrive at the conclusion that there was no loss in this case by a peril insured against, and that the appeal must fail upon that ground.

Lord Sumner.—Your Lordships have held that the mortgagees in this case were independently insured by the defendant and are not entitled simply through the mortgagor and by derivation from him, and further that they had a separate insurable interest in virtue of their agreement with the mortgagor, which gave them the right to call for a regular and legal mortgage, a right enforceable by legal process.

I concur in both points, though as to the first, had I tried the action, I think I should have decided otherwise, for the written agreement provides for a derivative insurance only, the mortgagor insuring himself and giving the mortgagees the benefit of his insurance, and the evidence does not prove a clear departure from this arrangement. The conversations proved are ambiguous, for Mr. Samuel, the mortgagee, whose intention, and not that of his broker, was the intention that really mattered, only said in substance that proper policies were to be effected, and the point that this policy was treated, exactly as policies were treated, in which the mortgagees had no insurable interest, namely, those on freight and disbursements, and were held by the mortgagees along with them, apparently as collateral security, has received less attention than I think it deserves. The question is, however, one of fact, and I should not presume to differ from your Lordships' view upon it.

To the independent claim of the mortgagees thus established the defendant raises two defences, the first that the loss was not proximately caused by any perils insured against, and the second that, even if it was, the insurer's liability is enforceable by reason of the fact that a condition incorporated in the policy—viz., No. 22 of the Institute Time Clauses—was not fulfilled. Both questions are of importance, the former because it involves a radical reconsideration of a part of the law of marine insurance which has long been thought to be settled, the latter because, in consequence of a reply of waiver of the condition, the practical business of underwriting is seriously affected.

That this loss was not a loss by perils insured against, that is to say of the sea, is argued for the respondents under two heads, (1) that the peril was not fortuitous and accidental but that the loss was deliberately designed, and (2) that the loss was not proximately caused by foundering at sea but was proximately and solely caused by the act of scuttling the ship. The argument was approved both by Bailhache, J. (so far as his own opinion went) and by Scrutton, L.J. The former, however, says in his judgment in the present case, that the incursion of sea water would in the circumstances be a peril of the sea, but being due to the action of the owner or his agents in scuttling her, it would be a risk not covered by the policy. This is consistent with saying that the guilty owner fails to recover on the policy because he is guilty and not because the loss is not otherwise a loss by perils insured against. Scrutton, L.J. says, first, "there must be a peril, an unforeseen and inevitable accident, not a contemplated and inevitable result," though in fact, whether the matter was one of accident or design, the result was not in either event inevitable; and secondly "when a stranger and still more an owner directly and intentionally lets sea water into a ship, the dominant, effective or proximate cause of the loss is the deliberate action of the owner and not any peril of the sea."

This proposition is framed to cover the intentional act alike of the owner or of a stranger which, I think, is strictly logical. The reasoning seems to be this. A loss arising out of such action is a loss outside the words of an ordinary Lloyd's policy, because the action is intentional, the outcome of human volition, and apart from the relations between the actor and the underwriter. The reason why the sinking of a ship so brought about is not a loss by perils of the sea must be that man, not inanimate nature, is the cause of it; that it issues from the conscious working of the human will and not from the haphazard operation of natural forces. What then, one asks, has wilful misconduct to do with it? Yet it is specially enacted that an assured cannot recover for a loss attributable to his own wilful misconduct. What is the use of such a rule? It is only a particular instance of a wider general proposition. He cannot recover for a loss attributable (proximately) to the wilful conduct of anybody, saint or sinner, because it is not fortuitous but is caused by human volition and is substantially what was willed.

To these weighty opinions may, I think, be added two observations by Mr. McNair, the respondents' junior counsel, which are well worthy of attention for they put these points freshly. The one is that a wicked scheme carried out with *mens rea* is not really a chance at all; it is a certainty. Of course it may fail and be defeated, but, if it succeeds, it succeeds through human machination. The other is that if, say, the sinking or burning of a ship was a loss by perils of the sea or by fire, even though the master or crew swamped or kindled her, barratry in a large number of cases of loss is an otiose addition to the perils insured against.

I cannot understand how these propositions are to be reconciled with the well-established law applicable to collision cases. Neither the deliberation nor the wickedness of the action which produces the collision appears to affect the right of owners, who are insured, to recover as for a loss by perils of the sea. Two ships on crossing courses collide and sink. Either navigating officer may have kept his course and been right, or, kept his course when he should have given way or kept his course when, being in liquor, he was oblivious of the other ship's existence. In each case his action is the same; he steers the ship exactly where he meant to steer her and by being where he elected to place her she is cut down and founders. The result is the same whatever his state of mind, and neither his negligent navigation nor his liability to be indicted for manslaughter affects the right of owners of ship and cargo to recover. If the matter goes a little further and the navigator of the give-way ship, being inflamed by his liquor, stands on and vows he will sink the other rather than give way, he may, I suppose, be hanged for murder but his owners will be indemnified just the same; at least, I know no authority which decides the contrary. In each case the officer has done what he designed to do; in one

intending to sink the other ship and take his chance of sinking his own. In all of them he has thus far intended the consequences of his action; that he has proposed to take the consequences, whatever they may be. To take one case more, there are situations in which it becomes the duty of a navigator to steer into and collide with a floating object to avoid collision with a third. For insurance purposes the result is the same. It is not true to say that he has no choice; the truth is that he has his choice and makes the right one, with consequences as before. In all these cases the action taken by the navigator is the same, and is persisted in up to and into the actual collision; the difference is purely in his state of mind and ranges from conscious rectitude through panic and intoxication to crime. How can the law applicable to such cases consist with the proposition contended for? An act has been intentionally done which let in the water as it might be expected to do, and yet loss resulting from that act is a loss by perils of the sea. If the navigator in each of the above cases be the sole owner of the ship he, of course, is defeated on proof that he shaped his course with a view to getting judgment in his favour on the policy, and it may be he would fail (I express no opinion) in some other cases, but as everything else is the same, except that in the case supposed the ship is his property and he has insured her, I cannot see how the cause of the loss is not the same throughout. Surely the difference does not rest on the fact that instead of an indictment for manslaughter the indictment of the owner is one based upon fraud.

I could put other cases but do not think anything would be gained by them, nor does it appear to me to help the argument to say that in some of these cases there might be a loss by barratry. There is a good deal of overlap in the wording of a Lloyd's policy, and the same event may give cargo-owners indemnity under perils of the sea and shipowners an alternative indemnity under barratry. Thus there is very old authority for saying that cargo-owners cannot recover as for barratry, when the barratrous act leading to the loss was assented to by the shipowner, for it is of the essence of barratry that the shipowner is wronged, and he is not wronged when he consents: (*Stamma* v. *Brown* (*sup.*); *Nutt* v. *Bourdieu* (*sup.*). In such a case I think the cargo-owners recover for a loss by perils of the seas, but on the respondents' argument they had no remedy except against the shipowner and the captain. Contracts of indemnity are intended to make good losses where they happen in certain events, and except where, as with barratry, culpability is a quality of the cause of loss itself, they are not concerned with the guilt or innocence of the action. The case of loss attributable to the wilful misconduct of the assured is not an actual term of the contract. It is a restriction placed by law on the right to enforce it in order that a contract of indemnity may not serve as an instrument of fraud.

It is then said that the very definition of a peril of the sea excludes from the term the operations of wilful misconduct, whether of the assured or of anybody else; that the expression is perils of the sea, not perils on the sea; and on the other side, that the wilful murder of a workman may, as an accident, be a ground for compensation to his widow, which is not unlike an accidental loss under a policy. My Lords, I have failed to find these arguments helpful. Nor do I think much is to be gained by reference to the decisions themselves in the *Xantho* case (*sup.*) and *Hamilton* v. *Pandorf* (*sup.*). Sir Robert Phillimore points out in *The Chasca* (*sup.*) that the analogy between bill of lading cases, as those cases were, and insurance cases is fallacious. The words "perils of the seas" have the same meaning in both instruments, but on the question of the cause of loss different rules and reasoning apply. Of course perils of the sea are not the same as perils on the sea, but in law epigrams only dazzle, and as for decisions on the Workmen's Compensation Act, they shed even on that Act an illumination which is sometimes dim. In marine insurance we shall do better with the light of reason.

The interpretation of the term "perils of the seas" is now statutory and is subject to the provisions of the Act, including sect. 55. Perils of the seas refer to accidents or casualties of the seas, so, evidently, accident or casualty is the point of definition. Fortuitous, probably, adds nothing to either substantive. A fortuitous casualty is a matter of chance, a mischance; but in causation there is no chance. The effect is caused, it does not happen. Along this line the interpretation seems to carry us no further. If the chance refers to something to be expected and not to be precisely foreseen something may be made of the term. If a ship has a hole in her below the water-line and nothing is done to close it, probably she will eventually sink and the point at which she sinks is the point at which the entrance of water passes from what she can carry to what she cannot. That is what makes her sink. That point is capable of determination if sufficient data are known. Her ultimate fate is a matter of the intervention of something to stop the inflow before that point is reached. What difference, does it make how the hole was made—by negligence or by crime, by impact of heavy cargo slipping from the slings, or contact with floating submerged wreckage? Given the hole and the water, Nature does the rest. I am speaking of such a case as the present; if all the time the water was rushing in, the fraudulent owner was busily enlarging the hole with an axe, possibly this simultaneous joint causation might affect the matter, especially in view of the special language of some policies. Here, however, I do not see how it can be affirmed that the ship did not go to the bottom by getting too full of water, whether the owner let the water in at the beginning or not.

In the present case the owner's part was played and played out before the ship left

Philippeville. We do not know exactly what the plotters on board did. The learned judge says that an entrance for the water might have been arranged before the cargo was loaded. It might have been done by opening sea-cocks or tampering with valves immediately before the alarm was given. Many hours elapsed from the time of sailing to the time of the fictitious explosion; thirteen more passed from that time before she sank, and during those thirteen hours she was slowly filling. For a long time she was in no danger. Even if the entry of water could not have been cut off the pumps would have overcome it. The attempt to tow would probably have succeeded if it had been made earlier. One need not know much about the sea and about ships to realise that the sinking was by no means an inevitable result of opening the aperture. Floating chips constantly get into and choke inlet valves. Again, the ship might with the movement of the sea take a list that would lift this unknown aperture above the water-line. It is true that in the interval very little actually happened, though the chapter of accidents might have been a long one, but the interval is significant. To say that the proximate cause of the sinking was the instructions given by Anghelatos, and was not the entrance of water seems to me to give a new meaning to proximate cause, and if, for this purpose, the acts of his agents on board are regarded as his acts I think the result is still the same. A ship is none the less burnt and destroyed by fire because the striking of the match was an act of arson. There is authority for saying that fire voluntarily caused to avoid capture is recoverable as a loss by fire (*Gordon* v. *Rimmington, sup*), and I think it is plain that Lord Herschell would have held in *Cullen* v. *Butler* (*sup.*) that a ship sunk by gunfire is lost by perils of the sea, for she is lost by incursion of sea water due to her coming accidentally (in the popular sense of the word) into contact with a cannon ball. To my mind the real significance of the statutory interpretation is shown by the second sentence in rule 7, which is in anthithesis to and is complementary of the first. Accidents are not what is ordinary ; what will happen more or less in any case is not fortuitous. To say that if you make a hole under water, water will ordinarily come in, is only a gibe. That is an extraordinary manner for water to enter a hold at sea. To say that scuttling is not a peril of the seas because it has nothing to do with the seas except that they are the scene on which the drama of crime is played out appears to me also to be chopping logic. Negligence in navigation is not in this sense "of the seas," though it is pretty common at sea. It is more uncommon still to find an owner who is an Anghelatos; yet foundering is a peril of the seas in the case of a ship negligently navigated, and it must be so equally if she is deliberately holed.

Scrutton, L.J. uses language which seems to suggest that recent decisions have altered the rule as to *causa proxima* and have even, to some extent, substituted the rule of *causa remota.* I hardly think that this is so. The rule is statutory and courts have to apply, not to change it. If recent applications have not been altogether consistent with older ones, I do not think that was intended, though no doubt it is in the unintended and unforeseen effects of reported decisions that judge-made law finds its most interesting development. Where a loss is caused by two perils operating simultaneously at the time of loss and one is wholly excluded because the policy is warranted free of it, the question is whether it can be denied that the loss was so caused, for if not the warranty operates. It is then convenient and even necessary to test the application of the term proximate otherwise than by sequence in time, and attempts, more or less successful, have been made to explain it by using other adjectives, but the rule remains. I doubt if the present question would ever have been disposed of in favour of the respondents simply by saying that the hole had to be made first and then the water came in afterwards. Accordingly, the explanation of the two cases cited in this connection, *Leyland Shipping Company* v. *Norwich Union Fire Insurance Society Limited* (*sup.*), and *Reischer* v. *Borwick* (*sup.*), I think, is this. In the former where the question was really one of fact, the pressure of the water overcame the resistance of the bulkhead and the ship filled and sank, but it was the explosion of the torpedo which admitted that pressure to the bulkhead. Thus there were two concurrent causes proximately operating, namely, the opening of the ship's side and the pressure of the sea, and the policy, being free of the consequences of the former, it was free of this loss, though, if the insurance had been against perils of the sea and no more, the loss would have fallen within it. So in the other case. The policy was against collision and damage received in collision only, and it could not be denied that the vessel was damaged in collision. It took two things to sink her; the hole made in collision and water flowing into it. They were both immediate and concurrent causes, and if either was within the policy the assured recovered. If either of these cases goes beyond this it does not merely rename *causa proxima* and try to put it into English, but substitutes for it *causa causans*, whether *proxima* or not, which is in the teeth of the Act.

Before passing to sect. 55 of the Marine Insurance Act may I say a few words about the decided cases? So far as I know there is no case which actually decides either of the propositions upon which the respondents rely. *Sassoon's* case (*sup.*), approved in *Grant, Smith, and Co. and McDonnell Limited* v. *Seattle Construction and Dry Dock Company* (*sup.*) is not really in point. The hulk was not navigated but was used as a floating store, and was so old and rotten that she could no longer withstand the pressure of the water in which she floated. The allusion to the absence of

fortuitous circumstances made by Lord Mersey does not mean that nothing can be a peril of the sea that does not happen by chance (whatever that may be), but that nothing except the rottenness of the hulk let in the water. So it is in cases on time policies where the loss is directly caused by unseaworthiness, for then it is plain that the loss was a certainty, whatever the state of the weather or the sea, and, as has been often said perils of the sea refer to things that may happen, not to things which must happen in the ordinary course of navigation.

There is also the well known passage in the opinion of Collins, L.J. in *Trinder's* case (*sup.*), which was much relied upon. In spite of my respect for the lightest dictum of that great judge, the words themselves seem to me to be self-contradictory. The assured must prove a loss by perils insured against or fail. If it be true that his " wilful act takes away the accidental character which is essential to constitute a peril of the seas," then on proof of this wilful act he fails, because the words of the contract do not cover the loss. Forbidding him to take advantage of his own wrong means that something, which in itself would be his of right under the contract, is denied to him because the law is more moral than the contract. Of course it is true that he cannot take advantage of his own wrong, or as it is sometimes put *dolus circuitu non purgatur*. This, however, seems to me to be obviously a case of personal disability, which cannot affect persons who are neither parties to the *dolus* nor only standing in the guilty person's shoes. Fraud is not something absolute, existing *in vacuo* ; it is a fraud upon someone. A man who tries to cheat his underwriters fails if they find him out, but how does his wrong against them invest them with new rights against innocent strangers to it ?

It seems to me impossible to study the judgments of A. L. Smith, L.J. in the same case, and of Kennedy, J. in the court below, without seeing how carefully both avoid saying that the exclusion of the assured from recovering on policy for a loss attributable to his wilful misconduct has anything to do with the fortuitous character of perils of the sea. Kennedy, J. says : " In regard to the conduct of the assured exonerating the underwriters, the line, in my judgment, is to be drawn at acts done knowingly or wilfully, or, at the least, with a reckless disregard of possible risk to the safety of the subject of the insurance." A. L. Smith, L.J. says that when the loss is occasioned by the wilful act of the assured *causa proxima non remota spectatur* does not apply at all. I think " exoneration " is not the word to use for not being liable because the loss is not by any peril insured against, and, if proximate cause does not apply, the policy is subjected to an exceptional rule of law to prevent the assured from profiting by his own misconduct, but no further.

If there are not decisions there certainly are dicta to the contrary, for example, Lord Ellenborough's opinion in *Heyman* v. *Parish* (*sup.*), and Lord Campbell's opinion quoted from *Thompson* v. *Hopper* (*sup.*, at p. 191, 192). In *Thompson* v. *Hopper* (*sup.*), Lord Campbell, with the concurrence of Coleridge and Wightman, JJ., said in terms that " if the ship had been scuttled or sunk by being wilfully run upon a rock," the loss would have been a loss by perils of the seas, a proposition not contested for over sixty years. That case is so largely quoted and adopted in *Dudgeon* v. *Pembroke* (*sup.*), that the absence of any criticism on Lord Campbell's observation is strong ground for believing that it was taken to be the law, and in the Court of Queen's Bench (L. R. 9 Q. B., at pp. 593, 594), Blackburn, J. quotes these very words with approval. When the judgment of that court was restored in your Lordships' house, Lord Penzance, with the concurrence of Lord Cairns (Lord Chancellor), and Lord Blackburn says, " any loss caused immediately by perils of the sea is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it," and then, passing to *Thompson* v. *Hopper* (*sup.*), adds that it is the only case which establishes an exception to this liability—the liability, that is, for losses immediately caused by perils of the seas—and that in this exception the knowledge and wilful misconduct of the assured himself was an essential element in the decision. This appears to me to be fatal to the contention that scuttling by a stranger to the insurance sued on prevents the sinking from being a loss by perils of the seas at all, for why otherwise speak of " the assured himself " ? In fact, loss by perils insured against, though brought about by the felonious act of a third party, has been held to be a loss within a fire policy (*Midland Counties Insurance Company* v. *Smith and Wife* (*sup.*). Is it to be taken that this case is to be overruled ?

I think, however, there is a direct authority, namely, *Small and others* v. *United Kingdom Marine Mutual Insurance Association* (*sup.*). The contention that a loss by the wilful misconduct of Wilkes, which was by order assumed to be the fact, could not be a loss by perils of the sea was expressly raised in argument before Mathew, J. (see 76 L. T. Rep., at p. 326), and must, I think, have been before the minds of the Court of Appeal, not merely as an incident in the proceedings below, but as a question lying at the bottom of the entire case. I am not aware that *Small's* case has been questioned till the present litigation, and certainly it is very well known, and the Act contains nothing expressly to the contrary of it. Neither is there, as far as I know, any case in which innocent cargo-owners have failed to recover for cargo lost at sea with the ship, on the ground that the water was let into her with the owner's privity.

Whether what is said in *Small's* case (*sup.*) is a decision or a dictum, it is in itself so important that the Legislature could hardly have failed to put it right if it were wrong. The subject is dealt with in sect. 55. The proposition is that a loss caused by wilful misconduct involving the sinking or burning of the ship is

a loss for which, under the ordinary wording, the insurer is not liable. Why, if so, does not sect. 55 (2) (*b*) add wilful misconduct to delay as a proximate cause of loss, for which it expressly states that the insurer is not liable? Had it done so it would at once have corrected *Small's* case (*sup.*) and have affirmed a general and important rule. Again, if this proposition is true, why does sect. 55 (2) (*a*) say that the insurer is not liable for wilful misconduct of the assured? The insurer can only be liable for losses covered by perils insured against, and, if he is never liable for losses caused by wilful misconduct, why specify the particular case and omit to state the general rule? Why is the language varied and the words "attributable to" used instead of "proximately caused by"? If the code meant to affirm the disputed passage in *Small's* case (*sup.*), the words in sect. 55 (1)—"is liable for any loss proximately caused by a peril insured against"—are adequate for the purpose. If the Legislature intended to correct it, that intention failed. Again, if non-liability for losses attributable to wilful misconduct is a personal disqualification preventing the recovery of something otherwise recoverable, the addition of the words "of the assured" is apt; otherwise it is otiose. On the other hand, as sub-sect. (1) states the general rule of liability, first affirmatively, and then negatively, and sub-sect. (2) begins "in particular . . ." the sub-section is the expression of particular cases of non-liability. What is there to show that this expression is not meant to be exhaustive? Why is loss attributable to someone's wilful misconduct omitted from the code and left to be implied at common law? As a matter of construction sect. 55 seems to me to prescribe that the assured's wilful misconduct is a ground for refusing to him, but to him only, the indemnity which the proximate origin of the loss would otherwise have brought about. It is to be observed that the whole section is framed to state for what an insurer is liable, that is, upon a policy to a person assured by that policy and is not framed as a definition of proximate or of remote causes. In fact, perils insured against are causes, and losses are effects. If the proximate cause of the effect, be it what it may, is not within the perils named in the policy, there is no liability and no more need be said about it. I cannot see any need for introducing this question of misconduct, unless it is first assumed that the loss has been brought within the policy by being proximately caused by perils mentioned therein. If so, wilful misconduct constitutes a case of exception, but of exception out of the insurer's liability to the assured who has misconducted himself, and not out of the perils covered by the policy, and the statement then becomes relevant to the section because the object of the section is to declare for what the insurer is liable and for what he is not.

That the law, common or statute, should declare exceptions from liability which are not provided for by the words of the policy itself is nothing new. For example, apart from the custom of particular carrying trades, cargo stowed on deck is excepted out of the protection of a policy on cargo. So in a policy against capture in time of war British capture is excepted when the underwriter is a British subject. As it seems to me though, as it is a somewhat thorny subject, it may be better not to express any decisive opinion now, the indubitable freedom of the policy from liability for inherent vice and wear and tear really rests on the principle of special exceptions out of general categories of liability, though I recognise that they may be regarded as being merely instances of a limited interpretation placed upon the named perils. The Act, however, appears to regard them as exceptions from liability as it does the wilful misconduct of the assured.

I find it impossible not to be influenced by the consideration that if a scuttled ship is not proximately lost by perils of the sea then every cargo-owner who loses his goods with her is as uninsured as the scuttling shipowner. Curious results may follow. An owner-skipper of a craft of small value laden with, say, bullion, finds his anchor dragging as he lies in shelter and in shallow water, and to save his cargo from total loss if his vessel faces the gale outside and sinks in deep water, blows a hole in her stern and drops her on the mud in four fathoms, where the bullion is easily raised. I take it this, if reasonably done, is a general average sacrifice of the vessel and, subject to the ship's contribution, is directly recoverable from cargo-owners and freighters. Can the captain not recover anything on his hull policy, nor the cargo-owners anything on theirs, a loss by general average sacrifice being a loss by perils of the seas? That result follows from the respondent's argument, but I think it is not a result which underwriters desire or intend. It is true that, as Scrutton, L.J. says, to hold the contrary means that underwriters insure cargo-owners against fraudulent casting away of their goods by shipowners. It is true that, as Mr. McNair argued, a cargo-owner is defeated in some other cases by the default of the shipowners, *e.g.*, the unseaworthiness or the deviation of the ship, though he be ignorant of it in fact and powerless to prevent it. Then why not in the case of scuttling also? To the first observation I think the answer is that it is the business of an underwriter to take risks, and the risk, an inconsiderable one, of the ship-owner's wilful misconduct, can be considered in the premium as well as the risk of negligent navigation. Though it is the underwriter's business to take risks, however, he refuses to be swindled. I would add that historically I do not think it is known whether this exclusion from liability for the assured's wilful misconduct really originates in the layman's construction of his contract or in the lawyer's ethical objection to allowing a man to profit by his own wrong. Quite possibly the case was always so exceptional that, left to himself, the underwriter would have made the best of it. As to the other point, I do not think the cases are parallel. Unless the contract of indemnity is to be absolute and, at all events,

some normal conditions must be assumed, and in voyage policies these include a definite voyage, definitely pursued, and a carrying vehicle reasonably fit for that voyage. These are not really cases of making an innocent assured bear the consequences of the default of a stranger.

In your Lordship's conclusion that the condition as to the permissible limit of p.p.i. cover on freight has been broken, I entirely concur. I have no doubt that it is intended to exercise and does exercise some useful restraint on persons who are tempted by the prospects of success in the same walk as that of Mr. Anghelatos, but the question is not what is intended or is effected, but what is said. Clause 22 is one of a code of clauses incorporated bodily into the policy, and that code contains disconnected and self-contained provisions which the parties think fit to adopt. It is true that the whole policy, the clauses included, must be read together; but the way in which policies are built up by the addition of isolated clauses or groups of clauses is quite familiar, and the mode of construction is different from that which applies to a continuous instrument designed as a whole and drawn systematically with all a conveyancer's art. Clause 22 is a warranty, quite different from, say, the f.p.a. warranty. It is a condition; it must be enforced as a condition and exactly complied with, whether material to the risk or not (sect. 33 (3): being a condition it can be answered only by performance or by waiver. In my opinion, on the facts it clearly was not performed and the appellants in fact relied on waiver, no reliance being placed on the proviso at the end of the clause.

It was pleaded in the reply that " the insurance against war risks only on freight for six months was effected (*inter alia*) by the defendant Dumas, who was also " an insurer (*inter alios*) in respect of the marine risks on hull and machinery, and in respect of war risks on hull and machinery and freight, and in respect of both on premiums and demurrage. " The said Dumas thereby waived the said warranty and is estopped from relying upon the same."

How much was made of this plea at the trial we do not know. No evidence was given upon it except that all the slips were put in. The war risks policies do not appear in the record, but an original example of each of the groups of policies was produced during the argument for your Lordships' inspection. If Bailhache, J. appreciated that this point was relied on he did not think it merited by any reference to it on his judgment. All that can be gleaned of its fortunes in the Court of Appeal is that Scrutton, L.J., having stated the appellants' contention, dryly adds " I could not understand how this result followed."

Before your Lordships this point was elaborately made and, probably for the first time was one of the main props of the appellants' case. I think your Lordships might well have declined to entertain it. We have not the benefit of the opinions of either court below, manifestly because the appellants did not think fit to develop this point sufficiently to attract the court's attention or to make their reasoning intelligible. They called no evidence of actual intention or of knowledge of material circumstances on the part of the defendant. I do not think that your Lordships are bound to decide a point on which the party on whom the burden of proof lies has not elicited the proper evidence, or, by explaining the point, obtained clear judicial opinion upon it. I could have wished that your Lordships had refused to consider it under such circumstances.

Estoppel, though pleaded, may be dismissed at once. Mr. Dumas entered into a new contract of insurance; he did not agree upon valuable consideration to modify the old one. He made no representation that he would not rely on the conditions in the first policy, and, if he had done so, it would have been only a promise *de futuro* and not a representation of an existing fact. The appellants did not change their position on the faith of any representation, but no doubt continued to act, after the second slip was initialled on Mr. Dumas' behalf, exactly as they had intended to act before. There was nothing done to encourage the broker to go on completing the freight cover which he had opened. and he simply pursued his own course about it. This is not a case in which the law imputes or presumes any particular intention, and as to any intention in fact, I have no doubt that the person who initialled the second slip had at the time no thought, and probably no knowledge, of the first. It must, in my opinion, be clear that the broker acted by inadvertence when he opened a cover on freight f.i.a. for more than clause 22 permitted. Why is not the underwriter to be supposed to have been inadvertent too? Unless he is treated on the same footing as the broker in this respect, the effect is that one party is bound to a consequence which he did not intend, while the other is relieved from all consequences on the ground that he did not intend them. An anticipatory election to waive a breach in case the amount covered should reach a sum which would involve a breach will not do, while of any actual election there is no evidence at all. No permission was given to the broker to cover as much on freight as he chose, nor was the condition abrogated by consent or by conduct. The matter is all the more serious for the underwriter since clause 12 is a condition or nothing; if waived, it goes entirely. It cannot simply be reduced to a promise, of which the breach will sound in damages. The contention makes an underwriter's position difficult indeed, if without proof of knowledge or intention, he is held to waive something in a prior contract, for when a risk is offered to him his mind is, and must be, bent on the risk so put before him and on the premium appropriate to it, and it is not reasonable in fact to expect him to have his mind on the terms of other insurances to which he is party, except to see whether he has exhausted the limits which restrict

him in taking a further risk. Of course, for the purpose of disclosure, an underwriter is deemed to know whatever it is part of the current knowledge of an underwriter to know in the course of his business, but the question here is not a question of disclosure. Of course, too, Mr. Dumas is bound by the acts of his agents and the terms of his contracts, and he abides by both the insurances which he subscribed, and accepts liability for his agents' acts. The question is what is the effect of what he or his agents did ; is it only that he made two distinct contracts, or does it go further and alter one, when all that was in fact intended was to make another, and then observe both ? No case was cited which would justify the inference of a waiver from such materials. In the most familiar of examples—waiver of a forfeiture by acceptance of fresh rent with knowledge of the existence of a cause of forfeiture—the mere doing of an act is taken as a conclusive waiver without inquiry into the lessor's actual state of mind, but this is an act, in itself unequivocal, done under the very contract under which the cause of forfeiture arises, and it is itself an act inconsistent with the prior determination of the contract for that cause (see the observations of Parker, J. in *Matthews and another* v. *Smallwood and others, sup.*). No case was produced in which a like result was held to follow, irrespective of actual intention, where no act is done under the contract to be affected, but another and independent contract is entered into, which, according to its terms, leaves the old contract untouched.

It is said, as I apprehend, first of all, that as the breach of the condition consisted and could only consist in contracting subsequently for an excessive amount of insurance of a particular kind, and as such contracting postulates an underwriter as well as an assured, Mr. Dumas, by taking a line on that subsequent insurance, was art and part in the breach himself, and could not thereafter rely on the condition which he himself had had a hand in breaking. This involves some examination of the war risks slip and policy so far as they include freight. It is further said that, by executing the marine risks policy, which was done after the war risks cover had been completed for an excessive amount, Mr. Dumas affirmed that the marine risks insurance was still in effect, the excess freight insurance notwithstanding, and thus, by an act inconsistent with an intention to rely on the breach of the condition, in law disentitled himself from doing so thereafter.

I will take first the war risks cover on freight f.i.a. itself, which was initialled on behalf of Mr. Dumas. As a matter of business it is the initialling of the slip which makes the contract and binds the underwriter to execute a policy, and, as a matter of law, rectification of a policy is granted to make it conform to the slip, and the obligation of disclosure has reference to the date of the slip. Except for the purposes of statutory stamp requirements, there need not be a policy at all. A policy was however, in fact, duly issued as the law required (I treat the p.p.i. question as one not before your Lordships) and the legal effect of issuing the policy has to be examined. I would add that no attention was drawn to the payment of the premium on either policy nor is there any evidence about it, and it may well be that, having regard to the substitution of the broker for the assured as the person who alone is debtor for the premium, any evidence about it would, for present purposes, have been irrelevant. The question is, therefore, whether the subscription of either document makes Mr. Dumas a party to the breach of warranty.

It appears from the copy of the slip which is in the record that Mr. Dumas is the first underwriter who happens to be on both risks. There may be another before him, but, at any rate, he is not by any means the only one on both. He, however, is the one selected to be sued, and, under the usual agreement to be bound, the fortunes of the others must stand or fall with his. It appears also that, as the slip stood when it had been initialled on his behalf, the limit permissible under the condition—clause 22—had not been exceeded or reached. As to these questions, I have had to use my own experience, since no evidence was given beyond the slip itself, but I think I am right. On the face of the slip it appears that a total "war risks only" cover is contemplated of 110,000*l.* on hull and machinery, 27,500*l.* f.i.a. on freight and 16,500*l.* f.i.a. on disbursements. To anyone who had seen and remembered the marine slip initialled, in the case of Mr. Dumas, three days earlier, it could be made to appear from these materials that the total insurance of the hull and machinery against marine risks with institute time clauses having been 110,000*l.* for twelve months and the war risks slip being for six months only, the permissible limit of an f.i.a. insurance on freight would be 13,750*l.* I do not believe that any underwriter, with his mind on the question whether he should take a line on the war risk slip or not, would or could make the calculation in fact, and no one gave evidence that he could. After the event it undeniably appears possible, but why it is to be assumed in law that the underwriter knew this I do not know.

As far as the slip is concerned, I think Mr. Dumas is entitled to have it judged as at the moment when it was presented. Within the limit of 13,750*l.* there can be no question of breach of the condition, and, if Mr. Dumas' subscription does not pass the limit, there can be no right to impute to him that it made him party to a breach by picking it out afterwards when other subscribers had raised the total subscribed beyond the limit. At any rate if he had been the leading underwriter on the slip he would still have waived the condition. How then is his action to be tested ? "A waiver," says Lord Chelmsford in *Earl of Darnley* v. *London Chatham and Dover Railway Company* (*sup.*) "must be an intentional act with knowledge." It is a question for a jury unless the facts are

undisputed: (*Davenport* v. *The Queen*, *sup.*). The name of the ship was on both slips; the name of Anghelatos was only on the marine risks slip; the other slip named no assured. At the most he had means of inferring that the assured was probably the same person, since the same broker was employed and who could wish to pay premiums on 110,000*l.* on hull and machinery against war risks only except the person who had covered the same sum on the same subject-matter against marine risks f.c. and s.?

He might then recall the terms of clause 22 which are intricate, note that the time for the second cover is half that of the first, and, having done the arithmetic in his head, say "my proportion will not make this insurance on freight up to and inclusive of my line, as much as 13,750*l.*" (this, as I read the slip, being the fact). "The broker, it is true, has opened his slip for 27,500*l.* on freight, which is 13,750*l.* too much, but it is his business. He knows certainly as much and probably more about it than I do, and no harm is done so far. He will find out his mistake presently and either ask to have the amount reduced, which, of course, I shall agree to do, or will have to make his client his own underwriter for the excess of 13,750*l.*, and so keep on the safe side."

I do not know what course an underwriter would feel bound to take if he said all this to himself, nor does it matter, for in fact I am sure this never would occur to him, but at any rate there would be no waiver for I do not think a man can be a party to a breach, which is not yet and quite possibly never may become a breach at all, at the time when this action begins and ends. Whether or not it would be inequitable for Mr. Dumas to be allowed to enforce the condition under these circumstances, I am sure I do not know. Counsel cited no authority to show that equity has ever restrained an underwriter from relying on a condition in such a case, but, if it would do so, it must be on some ground, and the statute specifies that ground and the only ground, namely, waiver. For my part I can see none.

Now as to the two policies produced. Both are signed by Lloyd's Underwriters' Signing Bureau, though in the case of the war risks policy one underwriter signs for himself, the subscription being 1,000*l.* only, after the signing by the bureau is complete and in the case of the marine risks policy there are three such personal subscriptions, all subsequent to the work of the bureau. In the war risks policy the subscriptions by the bureau follow the order of the initials on the slip; in the other case they do not, and for some reason the subscription of Mr. Dumas is last but two, the three last being those of the groups of names who sign per E. R. Pulbrook, Mr. Dumas being a member of the first of the three. It is to be noted that there are other policies, presumably similar, neither policy produced exhausting the respective total amounts insured. It would appear from the documents themselves that the official in the bureau had before him a battery of stamps, each with the list of "names" and of the proportions that they take in printed characters and the signature of the writing member in facsimile, and, having checked the policy with the slip, stamped the subscriptions with the stamps selected from his battery, sometimes following the order in the slip and sometimes for reasons unknown adopting another order. Of Lloyd's Underwriters' Signing Bureau we only know what is to be found in the note to sect. 102 of the 1921 edition of Arnould's Marine Insurance.

Each subscription is a separate insurance and there is no joint contract by all the underwriters. I am afraid the appellants' argument somewhat overlooked this. The practice is to take many subscriptions, often all, on one slip and, in the case of Lloyd's underwriters, one policy. Even if the total insurance effected on freight f.i.a. eventually was excessive, joining many subscriptions in one policy cannot by itself make any individual underwriter a party to an excessive insurance. It is, therefore, in the addition of the figures 27,500*l.* to the words "Freight f.i.a." that the whole burden rests. Now this does not make it a part of the assured's contract with the individual underwriters that insurance to the extent of 27,500*l.* shall be effected. The contract does not make the underwriter join in or make him a party to a collective insurance. The underwriter takes a part of that total, but whether the assured actually insures that total or not the result is the same; for any sum which he does not insure he will be his own underwriter. That is not enough. It surely cannot be said that if 13,750*l.* only was effected with underwriters and the assured was his own underwriter for the balance there could be an "amount insured for account of the assured," within the meaning of clause 22, in excess of 13,750*l.* The figure put into the slip becomes the basis of a calculation. It may be expected and intended to be carried through. That is a question of fact not proved in this case, but what of that? A man does not disentitle himself to rely on a condition when, knowing that the other party intends to do something which will be a breach, he simply stands by and leaves him to take his course: (*Sheppard* v. *Allen*, *sup.*). As to the policy I suppose it is plain that the signing clerk at the bureau has no authority from Mr. Dumas to do anything but to see that the policy correctly carries out the slip and then to sign for him by using the stamp provided. He has no authority to waive anything, or to receive notice of any other subscription so as to bind Mr. Dumas thereby, or to do anything except to execute the policy. If so it seems to me to follow that in the case of the war risks policy the subscription of the policy carries the case no further than the slip did, for it does not affect Mr. Dumas with notice that the 13,750*l.* on freight f.i.a. has now been exceeded, and that such excess amount was contemplated appeared on the slip itself when opened. It is as though a separate policy in terms of the slip had been brought by the broker to Mr. Dumas and signed by him as a matter of course.

As to the marine risks policy, the execution at the Signing Bureau involves nothing in the way of notice, knowledge, or election except that the policy is executed. For an underwriter to refuse to issue a signed policy in terms of his slip is a grave matter, all the graver because he is not legally compellable to do so. In business it means no more than giving the assured the means to enforce at law rights already acquired in substance on the initialling of the slip. In truth Mr. Dumas, or his underwriting agent, knew nothing more in Oct. than was known on the 25th Sept., and the clerk in the Signing Bureau knew nothing at all except that the two documents corresponded. I would draw attention to one further point. By the policies the risk begins at noon on the 25th Sept., and if the slip was initialled by Mr. Dumas at the end of the day on the 25th Sept he was at risk forthwith, even though no other line was initialled afterwards, and thereupon he was entitled to his premium. Apparently the permissible amount of cover on freight was not exceeded on the 25th Sept at all. If my inference is right as the ship was at risk for two days before there was any breach of condition completed, and, as signing the policy could not at any rate affect the underwriters' liability for loss, if any, during that period and the right to the premium also, signing the policy cannot in itself show an intention to affirm that the insurance is valid at all events, no matter what has happened to the condition, but only that, for whatever Mr. Dumas may be liable on the slip, he is content to be legally bound and no more.

I am therefore of opinion that no waiver is proved and that the condition has been broken and that on this ground the appellants fail.

Lord CAVE.—My noble and learned friend Lord Parmoor informs me that he agrees on all points with the opinion I have expressed to your Lordships. My noble and learned friend Lord Haldane desires me to say that he concurs in the conclusion at which your Lordships have arrived that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants, *W.* and *W. Stocken.*

Solicitors for the respondent, *William A. Crump* and *Son.*

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, Feb. 13, 1924.

(Before BANKES, SCRUTTON, and SARGANT, L.JJ.)

THE SAXICAVA. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Practice — Counterclaim — Notice in correspondence with plaintiffs' solicitor of intention to set up a counterclaim — Discontinuance of action—Setting up of counterclaim otherwise than in a pleading—Whether notice sufficient setting up—Rules of Supreme Court, Order XIX, *r.* 3, *Order XXI.*, *rr.* 10, 16—*Judicature Act* 1873 (36 *&* 37 *Vict. c.* 66), *s.* 24.

By sect. 24 *of the Judicature Act* 1873, *a defendant may be granted such relief as he may have properly claimed in his pleading, and it is accordingly provided by Order XIX.*, *r.* 3, *that a defendant in an action may set off or set up, by way of counterclaim against the claims of the plaintiff, any right or claim which he could have claimed in separate proceedings. It is further provided by Order XXI. r.* 16, *that " if in any case in which the defendant sets up a counterclaim, the action of the plaintiff is stayed, discontinued, or dismissed, the counterclaim may nevertheless be proceeded with."*

The defendants' solicitors in an action in personam, *claiming damage sustained in a collision between ships, gave notice in the correspondence with the plaintiffs' solicitors of their intention to set up a counterclaim at the hearing of the action. Subsequently the plaintiffs discontinued their action.*

Held, that the notice contained in the correspondence was not a " setting up " of a counterclaim within the meaning of Order XXI., *r.* 16, *and that the counterclaim could not be proceeded with.*

APPEAL from a decision of the president of the Probate, Divorce, and Admiralty Division, dismissing an appeal by the defendants, the Anglo-Saxon Petroleum Company, owners of the steamship *Saxicava*, refusing to order the plaintiffs, the owners of the Greek steamer *Despina*, to file a preliminary act.

The appeal raised the question whether the defendants had " set up " a counterclaim within the meaning of sect. 24 of the Judicature Act 1873 and the relevant rules of the Supreme Court.

On the 12th Sept. 1923 a collision took place between the *Despina* and the *Saxicava*, in which the *Despina* was sunk. The owners of the *Despina* thereupon commenced an action in rem in the Vice-Admiralty Court at Gibraltar, and the defendants commenced an action in rem in this country, but were unable to proceed as the *Despina* was sunk, and her

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

owners were not within the jurisdiction. It was then arranged that the owners of the *Despina* should commence proceedings in this country and abandon the proceedings at Gibraltar, and the writ in the present action was accordingly issued. The plaintiffs' solicitors were aware that the defendants intended to set up a counterclaim, but on the 5th Jan. 1924 they filed a notice of discontinuance of their action. The defendants accordingly took out a summons, requiring the plaintiffs to file a preliminary act, but the assistant registrar dismissed the summons. The defendants appealed, but their appeal was dismissed by the President (Sir Henry Duke.) The facts and arguments fully appear from the following judgment, which was delivered by the learned President.

Sir HENRY DUKE, P.—This is an appeal from the assistant registrar upon his refusal to order delivery by the respondents in the appeal of a preliminary act. The parties on the one side are the owners of the Greek steamship *Despina* and her master, officers and crew, and on the other side the Anglo-Saxon Petroleum Company Limited, as the owners of the *Saxicava*. The matters in question between the parties arise out of a collision at sea in which the plaintiffs' vessel, the *Despina*, was sunk with total loss. The demand of the defendants in the collision action for a preliminary act raises somewhat difficult questions of practice, and it has to be approached under the weight of the observation made on behalf of the respondents that there does not appear to be any business reason why the appellants should be seeking to compel the respondents to deliver a preliminary act. Well, I do not myself take that view. I think the appellants have business reasons for seeking to compel the respondents to deliver a preliminary act. The respondents, who were plaintiffs in the action in question, are owners not resident or domiciled in this country, and their vessel was sunk, and it may be of advantage to the appellants to be able, in a suit to which the respondents are ex necessitate parties, to obtain a judgment in this jurisdiction. So that I do not accept the suggestion that there is no business importance in this demand which is being strenuously pressed by the appellants.

The difficulty of the question arises by reason of this, that at a time when primâ facie the respondents were entitled to discontinue their action, in the present month they served what, on the face of it, was a perfectly good notice of discontinuance, and having been called upon for a preliminary act under Order XIX. r. 28, the respondents' solicitors replied: "There is not any action; our clients are not plaintiffs, and so there is no right on your part to demand a preliminary act; our clients are quit of these proceedings." Thereupon the appellants replied in substance: "Well, if you are not plaintiffs, you are defendants to our counterclaim. We set it up in the action, and it subsists. The counterclaim being set up in the action"—as is said, according to the requirements of Order XXI., r. 16—"it must proceed, and"—say the appellants—"now we have a counterclaim set up in this action, and although you may abandon and discontinue your claim, you cannot discontinue our counterclaim." That is the substance of the matter, and that, of course, raises technical questions of some complexity. The first which it is necessary to consider arises under Order XIX., r. 28, and involves the consideration of that rule, and of Order XXI., r. 16, which I have mentioned. I will refer to those orders and rules again presently. Now, in addition to that contention, the appellants make another contention which is based upon the particular facts of the case, and I will deal with that before I deal with this question of law which is involved. In substance, the appellants say: "You, the respondents, by your solicitors, when the subject of the loss of your vessel and the damage to our vessel by the collision was in discussion between us, and after you had instituted some proceedings, undertook to deliver and file an undertaking for bail." Now, if that were so, in my judgment the appellants would have a very substantial ground for endeavouring, by some means, to enforce against the solicitors who were said to have given the undertaking, and against the clients, every step that was necessary to make the proceedings between the parties effectual in order to determine the controversy in this jurisdiction between them. I look at the facts of the case in order to see whether I ought to hold that, apart altogether from the construction of the rules, the respondents, by their solicitors, have bound themselves to give an undertaking for bail. Now I heard what Mr. Langton said, and took account of the extent to which it was in dispute, but really the matter arises upon the correspondence between the parties. There are no affidavits; although I gave leave to file affidavits when the summons was at hearing last week, neither party has filed an affidavit, and I come back to the correspondence. Now, in order to understand the correspondence it is necessary to see exactly to what it relates. The collision and sinking of the respondents' ship took place on the 12th Sept. and forthwith—namely, on the 13th—the respondents instituted an action in rem in the Vice-Admiralty Court at Gibraltar. The action in rem led to the correspondence. The action in rem has been discontinued. The respondents became plaintiffs in an action in personam in this jurisdiction. There being at the time an action in rem, the respondents' solicitors wrote to the appellants, saying that they were instructed on behalf of the respondents, and they were advised that an action had been commenced in Gibraltar against the appellants' ship; but that it was the wish of the respondents and the appellants that the proceedings should take place in England. Then they went on to say: "Our clients have no objection to the case being transferred to London upon the understanding that you will

be prepared to provide bail up to the statutory limitation of liability of your vessel, plus a sum to cover the usual interests and costs. If you will at once refer us to solicitors here who will give the necessary undertakings to accept service, appear and provide bail as stated, we will arrange for the Gibraltar proceedings to be withdrawn." That letter relates, as I say, to the action in rem in Gibraltar. The answer was a letter from the appellants' solicitors in which they said that they were prepared to give an undertaking in lieu of bail, as proposed by the respondents, "on the understanding that you give us a cross-undertaking in respect of the damage sustained by the *Saxicava* and that you will withdraw the proceedings which we understand have been commenced in Gibraltar against our clients' vessel." Then they say: "We await the receipt of your writ and we will endorse our undertaking thereon." In answer to that the respondents' solicitors replied that their clients had decided to withdraw the Gibraltar proceedings and to proceed against the appellants in personam in this country. The appellants' solicitors thereupon replied that the respondents' solicitors had agreed to give a cross-undertaking. That was denied, and there that correspondence, for the time, ceased. That was as early as the 17th Sept. The appellants on the 14th Sept.—at the time of the conversations and the letters which had passed—had issued a writ in rem in London against the *Despina*, but they obviously could not proceed upon it. The respondents on that same day had commenced an action in personam—the action which is here in question—against the Anglo-Saxon Petroleum Company and correspondence followed upon that.

Now, matters being in the position I have stated down to the 17th Sept. and an action in personam by the respondents against the appellants having been instituted, during the latter part of last year communications passed between the parties, and in Nov. and Dec. the appellants called upon the respondents—the plaintiffs in the action—to file their preliminary act. Two orders were made for the filing of a preliminary act, but those orders do not materially affect the case, because, if no counterclaim was set up, the time had not arrived when it had become impossible, under the rules, to discontinue, the action. There were communications also by telephone, in which the respondents' solicitors ascertained the amount of the loss alleged to have been sustained by the appellants in respect of the damage to their ship. Now it is said upon that correspondence, and upon the necessary implication arising from it as well as in relation to the business meaning of these inquiries as to what was the amount of the damage, that the now respondents by their solicitors undertook to give bail, or an undertaking in lieu of bail, to meet the claim of the appellants in respect of the damage to their ship in this jurisdiction. The burden of proof as to that is upon the appellants. So far as the correspondence goes, it ends with an absolute denial by the respondents' solicitors that they had given the alleged undertaking, and they say—it is corroborated in some slight and indirect ways in the transaction—"We not only did not give such an undertaking but we had no authority to do so. What we were speaking of was the action in rem in Gibraltar, and it had been withdrawn and there had been a substitution of proceedings here, and when our clients understood what the situation was, or was alleged to be, they decided at once to take no proceedings in rem against the appellants or their vessel but to proceed in personam." Looking at the whole matter it seems to me that the appellants have not satisfied the burden of proof that is upon them, and that there is not here any evidence upon which the court ought to act of a concluded agreement between the parties for the giving of bail so as to necessitate that the respondents should proceed with this litigation in all its various branches in this jurisdiction. The submission upon the particular facts of the case thereupon fails, and it is necessary to consider whether, apart altogether from any agreement between the parties, the respondents are bound by the true effect of the rules relating to the matter to deliver a preliminary act. Now that depends upon the tenor of the rules to which I have referred. Some authorities were referred to: and among them the cases of *Bildt* v. *Foy* (9 Times L. Rep. 34, 83), and a case in this division—a judgment of Lord Mersey, in the case of *The Salybia* (11 Asp. Mar. Law Cas. 358; 101 L. T.Rep. 959; (1910) P. 25), and another case having an indirect bearing on the matter—the case of *Re General Railway Syndicate* (82 L. T. Rep. 134; (1900) 1 Ch. 365, 369). It is not suggested that either of the cases concludes this matter. In the case of *Bildt* v. *Foy* the question arose as to when it could be said that a counterclaim had been set up in an action so as to make the theretofore plaintiff subject to liability, the short question being as to whether a counterclaim had been set up. The action was an action in the King's Bench Division in which the plaintiff who had bought timber and received it was seeking to prevent by injunction the negotiation of some bills he had given in respect of it, and in the course of the interlocutory proceedings the plaintiff had been ordered as a condition of continuance of an injunction, to bring into court 800*l.*, which was to remain in court to abide the order of the court. As the matter developed he gave notice of discontinuance of his action, and he thereupon applied for payment out of court of the 800*l.* on the ground that the action in respect of which it was paid in was at an end. He was met with the reply: "You were ordered for equitable reasons to pay 800*l.* into court in these proceedings, to abide the order of the court and no order has been made, and until there is clear evidence as to whether the defendants intend to proceed with the counterclaim which they set up by affidavit no order should be made." The question incidentally arose whether the statement of the counterclaim of

the defendants by affidavit was a setting up of the counterclaim, and there is a distinct intimation in the judgment of the Lord Chief Justice (Lord Coleridge) that a counterclaim may be set up otherwise than in the defence, as part of the defence. That case was disposed of upon equitable grounds, and I notice that the learned judge, who was sitting with the Lord Chief Justice, did not expressly adopt his view. The case went to the Court of Appeal, and, in the Court of Appeal, Lord Esher, on behalf of the court, said that the question whether a counterclaim could be set up otherwise than in the manner prescribed by the rules was a very serious question which, if it had to be decided, must be decided by the whole Court of Appeal, convened for the purpose. Singularly enough, although a very long time has passed since then, it never has been necessary that the question should be decided in the Court of Appeal.

Now in this court in the case of *The Salybia*, in 1910, Lord Mersey intimated considerable doubt as to whether a counterclaim could be set up except by a pleading, but he said that, in that case, all that there was was what he called "a casual reference in a letter," and the counterclaim had not been set up there at the time when the action was discontinued. Now what is relied upon here is the express notice to the respondents on the part of the appellants of the existence of a counterclaim or grounds for a counterclaim on the part of the appellants, and a discussion upon the footing that the appellants were setting up a right to proceed by counterclaim. It is said that that is, and ought to be regarded as, the setting up of a counterclaim. When the rules are referred to—and, after all, the rules under which counterclaims are set up must be, at any rate in the vast majority of cases, the absolute guide to determine whether a counterclaim is set up—it seems to me that upon, at any rate, the primary meaning of the relevant rules, the intention of the framers of the rules is that counterclaim shall be set up by pleading, and that when they refer, in Order XXI., r. 16, to a case in which the defendant sets up a counterclaim, and say: "If in any case in which the defendant sets up a counterclaim the action of the plaintiff is stayed, discontinued or dismissed, the counterclaim may, nevertheless, be proceeded with," they mean when the defendant sets up a counterclaim in the cause. I do not say that that exhausts all possibilities. It seems to me, having regard to the scheme of the rules, that the possibility of setting up a counterclaim arose under the Judicature Act of 1873, s. 24.

The rules which were made to carry into effect that section of the Judicature Act, are rules which have not been substantially changed, at any rate in recent times, and the first of them for consideration here is Order XIX., r. 3, which provides that: "A defendant in an action may set off or set up by way of counterclaim against the rights of the plaintiffs any right or claim whether such set off or counterclaim sound in damages or not, and such set off or counterclaim shall have the same effect as a cross-action so as to enable the court to pronounce a final judgment in the same action." All the subsequent rules with regard to the setting up of a counterclaim are founded upon and have their genesis in that general rule. That general rule relates to the setting up of a counterclaim in the action by a pleading so that judgment may be given upon it pursuant to the Judicature Act, and there is a rule, to which I need not pause to refer, by which it is directed that counterclaims shall be set up in the defence. It is not necessary for me to consider whether that is exhaustive. I bear in mind that the procedure under the Judicature Act and rules permit of the trial of cases between parties upon affidavit—particularly by reason of the Order XIV. procedure in the King's Bench Division. At any rate, there is a provision for trial upon affidavit, and I have no doubt that in this court you might proceed to trial upon preliminary acts, if the substance of the matter admitted of it, and there would there be no counterclaim set up in the strict sense of the rules, but the parties would be bound by consideration of the general policy of the law in respect of the conduct of litigation to proceed where they had in effect undertaken to proceed.

In this case there is no affidavit. There is nothing in the cause; there is correspondence; there is express notice of the alleged counterclaim—that is, of the right to maintain a counterclaim; and there is a discussion upon the footing of it, and the appellants thought they had got an undertaking for bail. They have not made that out. The question is whether correspondence between the parties not establishing an agreement, but giving notice of grounds of counterclaim, is sufficient to be held under the rules to set up a counterclaim. In my opinion, it is entirely contrary to the plain meaning of the rules and to any extension of the rules which is consistent with their general tenor to allege that a counterclaim may be set up by notice outside the action, without any setting of it up by any proceeding in the action.

It has been necessary because of the complex nature of this question and the want of authority, to deal with it at some length. The parties were entitled to know the grounds upon which it is dealt with. They argued it strenuously, and the result is that the appeal is dismissed and the appellants must pay the costs of it.

The defendants appealed.

Langton (*Raeburn*, K.C. with him) for the appellants.—The meaning of "setting up" a counterclaim is not clear from the rules. "Setting up" cannot be confined to "set up in a defence," because it is clear that a counterclaim can be set up by affidavit in Order XIV. proceedings. It is sufficient if the other side has notice in the course of correspondence of the intention to set up a counterclaim.

Reliance was placed upon :

Whiteley's case (*Re General Railway Syndicate*), 82 L. T. Rep. 134 ; (1900) 1 Ch. 365 ;
Bildt v. *Foy*, 1892, 9 Times L. Rep. 34, 83 ;
The Salybia, 11 Asp. Mar. Law Cas. 358 ; 101 L. T. Rep. 959 ; (1910) P. 25.

Dunlop, K.C. and *Balloch* for the respondents were not called on.

Bankes, L.J.—I wish personally that I could do something here to assist, but I am afraid the language of the rules is too strong, and in substance I entirely agree with the view taken by the learned President. The material facts are these : there having been a collision between the *Despina* and the *Saxicava*, the owner of the *Despina*, the vessel that was sunk, started proceedings in rem in Gibraltar. Subsequently, the respective solicitors got into communication as to whether it would not be better to commence proceedings in England and discontinue the proceedings in Gibraltar. That course apparently was agreed to, and the owners of the vessel *Despina*, who were Greek subjects, commenced an action in personam in this country against the owners of the *Saxicava* and the latter started an action *in rem* in this country by issuing a writ, with which it was impossible for them under the circumstances to proceed because the *Despina* was at the bottom of the sea. However, they did issue this writ, and I think the strongest point that has been made in their favour is that they did in fact take that legal proceeding, and proceed as far as they could go with it, namely, the issue of the writ. It was obviously anticipated in the first instance that the rival claims—because there were rival claims, the owners of each vessel blaming the owners of the other—should be proceeded with in this country, and it was only because of some misunderstanding about the giving of security that ultimately the owners of the *Despina* discontinued their action before it had proceeded beyond an appearance. The defendants, under those circumstances, are placed in a difficulty. They had commenced this action in rem with which they could not proceed, and they have now taken these proceedings in personam against the owners of the Greek vessel in this country to try and establish, if they can, that they have not lost their right of counterclaim by reason of the discontinuance by the plaintiffs of their action.

Now, the difficulty in which defendants who have within the meaning of the rules set up a counterclaim might be put, in the event of the plaintiff discontinuing, had to be met by a special rule—namely, Order XXI., r. 16 : " If in any case in which the defendant sets up a counterclaim, the action of the plaintiff is stayed, discontinued, or dismissed, the counterclaim may nevertheless be proceeded with." The object of that rule and the necessity for it are obvious because the right of counterclaim takes its origin from sect. 24 of the Judicature Act of 1873, which gives the court power to grant to a defendant all such relief against a plaintiff as the defendant shall have properly claimed by his pleadings. The effect of discontinuing is to remove the plaintiff from the proceedings ; and, therefore, unless the difficulty was provided for by other rules dealing with the matter, the defendants' case would no longer come within the language of sect. 24 in the event of the plaintiff disappearing from the action by means of discontinuance. So this rule is framed, and that uses an expression " sets up " of which there is no definition in the rules ; but from the rules themselves it appears that it is used in a different sense with reference to different subject-matters. For instance, Order XIV., r. 4 deals with a case of an application by a plaintiff under Order XIV. for judgment : " If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim," and so forth. The " setting-up " there must necessarily refer to a setting-up in an affidavit, because at that stage of the proceedings there is no other process by which the defendant can set up this defence. It is plain, therefore, that the phrase " set up " is not used in the rules always in the same sense. But it does seem to me that " set up " can only refer to some step in the proceedings which is either directed by or recognised by the rules, because it is in reference to such matters only that the rules are dealing ; and when it speaks of setting-up a defence it must mean set up in some proceeding which is recognised or directed by the rules. Under Order XIV. the proceeding is by way of affidavit, but when one comes a stage further and refers to pleadings it seems to me that Order XXI., r. 16, in speaking of " setting-up " must refer to a setting-up in a pleading, or, at any rate, in some proceeding which is recognised or directed by the rules, and which becomes part of the record, or something which is filed in the court.

We have been referred to three authorities, and it is plain from two of them that the court considered that a counterclaim which was set up by way of affidavit was sufficient and in one of them, although it was not set up under Order XIV. Now in the first case, that of *Bildt* v. *Foy* (9 Times L. Rep. 34, 83), the facts were that a sum of 800*l.* had been paid into court and the plaintiff desired to get it out ; the defendant desired that it should remain where it was, and by affidavit he asserted —and in that sense set up—that he had got a counterclaim, and that, therefore, until that was disposed of, the court ought not, in the exercise of its discretion, to order the money to be paid out. The Divisional Court and the Court of Appeal also thought that the assertion by the defendant of the existence of the counterclaim was a sufficient setting up of the counterclaim to prevent the plaintiff, who subsequently discontinued, from saying that the defendant had no right to proceed with the counterclaim. In *Whiteley's* case (*Re General Railway Syndicate* (82 L. T. Rep. 134 ; (1900) 1 Ch. 365, 369) the counterclaim was set up in an affidavit under

Order XIV., and the Master of the Rolls, in the part of his judgment referring to this matter, says: "Now it is true that the petition to wind up was presented before he could put in his counterclaim. If he had put in his counterclaim the case would not have been arguable. The difficulty arises from the fact that he had not put in his counterclaim. But he got leave to defend upon the affidavit to which I have referred, and I think he did all that could be reasonably expected to assert in a legal proceeding his right to repudiate these shares. That is the principle on which the court has acted in several cases." I do not think I need refer to *The Salybia* (11 Asp. Mar. Law Cas. 358; 101 L. T. Rep. 959; (1910) P. 25) except to say that there Bigham, P. seems to have taken a very strong view about the contention that it was sufficient to set up a counterclaim in order to bring the defendant within the rules if he has simply asserted it or referred to it in correspondence, because the learned judge speaks there of a mere casual intention to prefer a counterclaim.

Under these circumstances, I confess with regret, but still with a clear view, I have come to the conclusion that this appeal must be dismissed with costs.

Scrutton, L.J.—The defendants desire to proceed with a counterclaim against the plaintiffs, who have discontinued their action. Whether they can do so or not turns on Order XXI., r. 16, which confines their right to go on with the counterclaim to cases where they have "set up" a counterclaim, and the question is as to the meaning of these words in the rule. There is nothing on the files of the court, or on the proceedings of the court, to show that they have ever set up any counterclaim. But what is alleged to be a setting-up of a counterclaim is that the defendants' solicitors have written a letter to the plaintiffs' solicitors saying that the defendants are going to set up a counterclaim. The question is: Is that within the meaning of these rules, "setting up" a counterclaim?

The right of counter-claim comes in from the Judicature Act of 1873, s. 24, sub-s. 3, of which provides that the courts shall have "power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading." When one looks at the rules relating to pleading they all appear to assume that the counterclaim will be begun by a pleading and will be set up by a pleading. By Order XIX., r. 3: "A defendant in an action may set-off or set up by way of counterclaim against the claims of the plaintiff, any right or claim," and so on. And when one inquires how he is to set up by counterclaim one finds a series of rules beginning with Order XXI., r. 10: "Where any defendant seeks to rely upon any grounds as supporting a right of counterclaim, he shall, in his defence, state specifically that he does so by way of counterclaim." Rule 11 is to the same effect: "Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff along with any other persons, he shall add to the title of his defence a further title similar to the title in a statement of claim, setting forth the names of all the persons, who, if such counterclaim were to be enforced by cross action, would be defendants to such cross action, and shall deliver his defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff." Rule 15 is: "Where a defendant sets up a counterclaim, if the plaintiff or any other person named in manner aforesaid as party to such counterclaim contends that the claim thereby raised ought not to be disposed of by way of counterclaim, but in an independent action, he may at any time before reply apply to the court of a judge for an order that such counterclaim may be excluded, and the court or a judge may, on the hearing of such application, make such order as shall be just."

It appears to me that setting up a counterclaim must be done by something which is recorded in the court. I do not think it is necessary to decide in this case whether setting it up in an affidavit under Order XIV. as a defence to a claim, or as a reason why execution should not issue or judgment be given on a claim, is "setting up" a counterclaim or not, because there is nothing of that sort in this case, but it seems to me clear that one cannot extend it by notice from the defendant to the plaintiff. I am not certain whether the learned counsel who argued this case contended that oral notice would do. Here we have solicitors communicating with each other over the telephone and disagreeing as to what has happened. One is in the realms of uncertainty, and the rules limit dealing with counterclaims to matters of which there is a record on the files of the court.

Sargant, L.J.—Order XXI., r. 16, deals with the setting-up of a counterclaim, and refers to some definite step in the proceedings, but I do not think that the phrase "sets up" is satisfied by a general intimation outside the proceedings of the intention of the defendant to proceed by way of counterclaim. The phrase "set up" in that rule must have the same meaning as in the immediately preceding rule, and in the other two rules to which Scrutton, L.J. has referred (rr. 10 and 11). Each of these rules as it seems to me, is a definite legal step in the delivery of the counterclaim which is for the purpose of the counterclaim the commencement of the action. I agree with the view which I think was indicated by Bankes, L.J., that in the case of an affidavit under Order XIV. the setting-up there is a setting-up for the purpose of the particular proceeding contemplated by that order, and I do not think, myself, that the filing of the

affidavit under Order XIV. could be a setting-up of the counterclaim for any purpose except the purpose of replying to the plaintiff's attempt to get judgment. It seems to me that in the rules as to pleadings under Order XXI. the setting-up of the counterclaim means the delivery of the counterclaim according to rules.

With regard to the cases that have been cited, the only case I wish to refer to is *Whiteley's* case (*sup.*). I do not think that case has any definite bearing on the matter here. The point to be decided there was this : A winding-up petition had been presented ; and it is well ascertained law that in order to obtain a rescission of his contract it is absolutely necessary for the shareholder to have commenced his action before the presentation of the winding-up petition. He has got to take some legal step for the purpose of announcing his claim to obtain a rescission of his contract to take up shares ; and the court in that case held that the repudiation set up in his affidavit some ten days before, when resisting the claim for calls made under Order XIV., was a step in the legal claim for rescission which was sufficient to render him at liberty to pursue that claim for rescission, notwithstanding that the petition for winding-up the company had been presented before the actual issue of the proceeding.

Appeal dismissed.

Solicitors for the appellants, *Waltons* and *Co.*

Solicitors for the respondents, *W. A. Crump* and *Son.*

Wednesday, Feb. 27, 1924.

(Before BANKES, SCRUTTON, and SARGANT, L.JJ.)

MICHALINOS AND CO. *v.* LOUIS DREYFUS AND CO. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Demurrage—Detention of ship by ice not to count as lay days—Ship detained by ice before expiration of lay days—Alternative method of loading available before detention—Responsibility of charterers for delay—Measure of damages.

By a charter-party it was stipulated that the vessel should proceed to S. for orders. When she arrived there she was ordered to B. to load a full cargo of wheat. Seventeen running days, Sundays and any other recognised holidays excepted, were to be allowed for loading and unloading, and the days on demurrage over and above the said lay days, at 40l. per running day. By clause 11 : "Except as herein provided, detention by frost or ice from B. down to S. . . . shall not count as lay days." On the 10th Dec. the vessel, by direction of the charterers, entered the dock at B. to load part of her cargo. On the 12th Dec. the dock became frozen over and it became impossible for the vessel to be moved and she remained there until April.

Held, that clause 11 must be construed to mean that if there was ice which prevented the loading and that ice was within the limits specified, that is to say, from B. down to S., the charterers were entitled to rely upon the fact of ice being in the dock at B. as a cause of prevention.

APPEAL by the charterers from the decision of Rowlatt, J.

By the terms of a charter-party, dated the 28th Nov. 1921, the steamship *Matheos* was chartered to go to Sulina for orders. Clause 7 of the charter-party provided that seventeen running days, Sundays and other recognised holidays excepted, were to be allowed for loading and unloading and the days on demurrage over and above the said lay days at 40*l.* per running day, or *pro rata.* Clause 11 provided that detention by frost or ice from Braila down to Sulina should not count as lay days. When the steamship arrived at Sulina she was ordered to proceed to Braila to load a cargo of wheat. She arrived at Braila on the 7th Dec. 1921, and entered the dock there to load part of her cargo on the 10th Dec. She was to have completed the loading of the cargo by coming out of the dock and loading in the river ; but on the 12th Dec. the dock became frozen over and it became impossible for the ship to be moved. The result was that she had to remain in dock until the 8th March 1922, when the Danube became open for navigation, and for a further period during which she could not be loaded owing to the Roumanian Government's having prohibited the export of wheat until the 22nd March. After the 22nd March her loading was completed and she left Braila on the 8th April 1922. The owners, having claimed demurrage and damages for detention, were awarded 4166*l.* by the arbitrator, who stated a case for the opinion of the court. The charterers contended that clause 11 applied not only to detention by ice caused in transit between Braila and Sulina, but to detention caused in any part of the river between these two points. They also said that, the detention having taken place before they were in default, they were excused ; and, further, that as the ship was detained before the lay days had expired, the owners would have been unable to do anything with her even if they, the charterers, had not been in default, and that consequently the owners had not suffered any damage.

Rowlatt, J. held, that the exception as to detention by ice prevented the lay days from running for the whole period during which loading was rendered impossible by ice, and was not limited to detention while the vessel was in transit between Braila and Sulina. As, however, the charterers, although prevented by ice from loading in the dock, could have continued loading by alternative methods, the charterers could not avail themselves of the exception. As to the damages to which the owners were entitled, the onus was on the charterers to prove with absolute certainty that

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

the owners would have suffered the same damage had they carried out their contract. As the charterers had not discharged this onus, the owners were entitled to damages and the award must be upheld.

The charterers appealed.

Jowitt, K.C. and *C. T. Le Quesne* for the appellants.

Raeburn, K.C. and *S. L. Porter* for the respondents.

Bankes, L.J.—This appeal arises out of a dispute between shipowners and charterers in which the shipowners claimed a large sum for demurrage and damages for detention because they said that their vessel had been detained for something like 100 days in the late winter of 1921 and the early spring of 1922, and the charterers disputed their liability for any portion of the amount claimed. The matter went to arbitration, and the umpire took the shipowners' view and awarded a large sum, over 4000*l*., by way of demurrage and damages for detention, but he stated a special case for the opinion of the court.

The dispute between the parties raises question of fact and of law. So far as the matter turns upon questions of fact, we are bound by the finding of the umpire, and our only duty is to deal with the questions of law. They arise in this way. The vessel was chartered on a voyage to proceed to Braila, and there load a full cargo of wheat. She arrived there on the 7th Dec. 1921, and under the charter there was a fixed number of lay days and a certain number of days for demurrage. Her time commenced to count on the 7th Dec. 1921. Apparently at Braila there are three ways in which a vessel can be loaded with wheat. One way is for the vessel to enter the dock and take her cargo from silos. But it appears that there is only one wharf in the dock which can be used for that purpose. Vessels may also lie in the river, and be loaded from lighters in mid-stream. And there is also a place alongside the bank of the river where vessels may be loaded by hand labour. Those are the three ways in which a vessel may be loaded with a cargo of wheat in this port. It was apparently intended that this vessel should be loaded partly by one method and partly by another, because it was intended that she should go into the dock and there receive a comparatively small portion of her cargo and then proceed to a place in mid-stream where she would take the rest of it from lighters. The reason for adopting that method of loading was that being a vessel of some considerable size she could not load her whole cargo in the dock. It was better for her to go into the dock and receive a portion from the silo, if she was to receive any from the silo, and then to proceed to the river and load the rest. As I have said, she was an arrived ship on the 7th Dec., but no orders were given to her until Saturday, the 10th Dec., when she received orders to go into dock. The umpire has not found that that was an improper order in the sense that it was an order that must inevitably result in the vessel being detained for a long period. He has treated it as a legitimate order properly given. When the vessel went into dock on the 10th Dec. she could not get alongside this particular wharf because there was another vessel already lying there which had not completed her loading. Unfortunately, on the 12th Dec., the weather became so severe that the dock was frozen over, and from that date until a date at the commencement of March it was impossible, owing to ice, to move either of these two vessels or any of the other lighters which were in the dock on the 12th, when the water froze. It was in that state of things that the detention took place because the vessel could not get alongside the wharf to load in the dock until the 9th March 1922. Then she was detained owing to the action of the Roumanian Government, which it is not material to consider. She was not, in fact, able to commence loading until the 22nd March, and she did not actually complete her loading until the 2nd April, although, as I have said, she was an arrived ship on the 7th Dec. 1921.

It was in those circumstances that the shipowners made their claim. The answer of the charterers is this : We are excused by an exception in the charter-party which was introduced for our benefit and to which you agreed. The exception is contained in clause 11 of the charter-party which is in the following terms : "Except as herein provided, detention by frost and ice from Braila down to Sulina, also detention by quarantine, shall not count as lay days." The charterers' contention was, and is, that they were detained, within the meaning of this clause, by frost or ice, from loading over the whole period covered by the present claim. The umpire, a layman, who decided this matter in the first instance, put a construction upon this clause which would limit it to the vessel being detained while proceeding from Braila to Sulina ; but Rowlatt, J. did not accept that view, and I do not think that that view is now insisted upon. Rowlatt, J. took another view. He held that, there being these three methods of loading at the port of Braila, and it being proved that the prevention by ice only applied to a prevention of loading in the dock, and did not extend to a loading in the river or alongside the bank—as I understand, because, according to the evidence, the ice did not prevent loading at either of those places until the end of January—the risk was a risk of the charterers and not of the shipowners, and that the charterers were not entitled to rely upon the exception if the fact be that one or other or both of these other methods of loading were available to them although the one which they elected to adopt was not available.

The main question of law which we have to decide is whether that is the true conclusion of the clause. In my opinion it is not. I am not able, with respect to the learned judge, to take the same view of it. This is a clause which is found in the 1890 Danube

charter-party, and the substance of it has been in use for very many years, because we find that it was in use in 1867 when the case of *Hudson* v. *Ede* (5 Mar. Law Cas. (O.S.) 114; 16 L. T. Rep. 698; L. Rep. 2 Q. B. 566) was decided. The clause as it then ran was as follows: "Detention by ice and quarantine not to be reckoned as laying days." The clause so worded received in that case a clear construction in the judgment of Blackburn, J., which was the judgment of the whole court. This is what Blackburn, J. says, at p. 578: "Now the stipulation that detention by ice shall not be reckoned as laying days must be taken to mean that those days on which ice made it impossible to bring a cargo alongside to go on with the loading, should be excluded." In my opinion it is impossible any longer to say that that clause, as it then stood, was an ambiguous clause, because it has received a clear construction. The addition to the clause that has been made in the present form of charter is to add to the words which I have already read "detention by frost or ice," these words "from Braila down to Sulina." I think when one looks at the argument in *Hudson* v. *Ede* (*sup.*) one sees exactly why those words are added, and I think that when one has ascertained that, it is easy to put a construction upon that part of the clause. The facts in *Hudson* v. *Ede* (*sup.*) were that the vessel was to load at Sulina, where there were no warehouses and the cargo intended for the vessel had to come down the river from Galatz. The river was frozen over between Galatz and Sulina so that the cargo could not be brought down by river, and the contention was that the state of the river above Sulina was quite immaterial for the construction of the document which determined the rights of those parties. It was in the argument of that case that Mr. Mellish, as he then was, said this: "If this clause is to be construed so as to include detention by ice in the Danube, as grain comes from many places on the river, it would be uncertain how far up the Danube the exception would apply." In my opinion the words "from Braila down to Sulina" were clearly inserted for the purpose of defining the limits within which the question of detention by ice should be material, that is to say, it should define the portions or the length of river in respect of which the detention by ice should or might be included within the operation of the clause. It is quite true to say that although that was the reason why the exception was inserted in the charter-party, it is not so easy or so necessary to apply it where the place of loading is either Sulina or Braila. That may be so; none the less, in my opinion, if the ice which is said to have prevented the loading, is ice to be found within these limits, then it comes within the purview of the clause and the charterers are entitled to rely upon ice in the dock at Braila as being a preventing cause. Having regard to the construction put upon the clause by Blackburn, J. in the case of *Hudson* v. *Ede* (*sup.*) and to the explanation which I have endeavoured to give as to the restriction upon the portions of the river in regard to which ice is to be a material factor, I read this clause as providing that where there is a detention by ice within the defined limits which makes it impossible for the charterers, when performing the contract in accordance with its terms, to load by adopting any reasonable or practicable means, there is a prevention which excuses them within the meaning of the clause and prevents the lay days running. The contention put forward on behalf of the respondents is that the risk of adopting the one method of loading rather than the other is a risk which falls upon the charterers, and Mr. Raeburn disputes altogether that the principle of such a case as *Bulman* v. *Fenwick* (7 Asp. Mar. Law Cas. 388; 69 L. T. Rep. 651; (1894) 1 Q. B. 179) has to be applied to the place of loading within the port and must not be confined to a right to direct the vessel to any particular port. I cannot agree with that contention. It seems to me that the principle must apply equally to the place in the port to which the vessel is properly ordered by the charterers, just as much as it must apply to a particular port to which the vessel is ordered by the charterers. In this case it is not disputed that the vessel was properly ordered to Braila, and it cannot be disputed that when the vessel arrived at Braila she was, upon the findings of the umpire, properly ordered to load in the dock, and that order having been given it was one with which the shipowners were bound to comply. Under these circumstances it seems to me that the charterers were only exercising their rights under the charter-party. They were performing the charter-party in accordance with its terms; and while doing that, and as a consequence of doing that, the vessel proceeds into the dock and is there shut in by ice and cannot get out. It is therefore impossible for the charterers, having once made their election to order the vessel into the dock, to order her to come out again or to adopt any other means than such means as were available in the dock to load her.

That being my view upon the questions of law, there now comes the question of fact as to whether, with the vessel being shut in the dock as she was, there were any reasonable and practicable means by which the charterers could have loaded her while she was in that position. I quite agree that the umpire has not in terms covered that point, but I think he has inferentially covered it, because I think that his finding having regard to the language he uses must have been intended by him and must be accepted by us as a finding that it was not, to use the ordinary phrase, commercially possible to load the vessel once she was shut in by ice in the dock. I arrive at that conclusion partly from the force of the contention which was submitted to the umpire and partly from the language with which he deals with the contention. Contention 7 says: "It was commercially impossible and (or) impracticable

to load the *Matheos* while she was lying in the the ice in the dock, either by chutes extending from the silos, or by bagging the wheat at the silos and carrying it therefrom by manual labour over the *Valkenburg* and then over the ice, or by bagging the wheat on the lighters and carrying it therefrom by manual labour over the ice, or by any other means." What the umpire says in answer to that is : " No attempt was made to load the vessel, and although to do so in the position where she was might have been difficult and expensive, I am of opinion it would not have been physically impossible to do so." I understand him by that finding to be drawing a distinction between what is physically impossible and what is commercially impossible, and although he thinks that under the circumstances it would have been physically possible, it was not commercially possible. Under those circumstances, differing as I do from Rowlatt, J. on the question of law and accepting the finding of fact as I do of the umpire in the sense I have just indicated, this appeal, in my opinion, succeeds. It does not, therefore, become necessary to discuss the important and interesting question as to whether, assuming that the charterers could not claim the benefit of the exception dealing with ice, the shipowners would be entitled to any damage, after the expiration of the demurrage days, having regard to the fact that the vessel could not have got out of the ice and could not have proceeded on her voyage sooner than she did. Under these circumstances I think the appeal must be allowed with costs, and the answer to the special case must be that the shipowners have failed to make out their claim and that the appellants, therefore, must have the costs here and below.

SCRUTTON, L.J—I am of the same opinion, but as we are differing from the judge below, I think it right to express my view in my own words, and the more so because counsel for the respondents appears to be under the impression that our decision will be a revolutionary novelty, and it is therefore as well to explain why it does not seem to me to be either novel or revolutionary.

The claim is a claim for demurrage and damages for detention of a ship which, owing to ice setting in unexpectedly early in the Danube, was kept for some months at the port of Braila. The charterers rely upon an exception in the charter expressed in these terms. [His Lordship then read the clause.] The first question is what that means. If one had no light from previous decisions of the court, one would be a little puzzled to know exactly what it does mean. The umpire has taken a view which is very clearly expressed in his award in the next case, where he had to consider the meaning of the same clause. He says : " I hold that the said clause had reference only to the steamer, and referred to a passage or attempted passage of the river in proceeding from one loading port to another, or, having had part cargo in the Danube, in proceeding thence to Sulina to complete." That appears in this case as one of the numerous contentions of the owners. That view, I think, must be wrong quite apart from any decision. Passing down between Braila and Sulina would not be a matter as to which there could ever be a question of lay days. The vessel could not be engaged in loading, and time used in passing along her voyage is not part of her lay days. It seems to me pretty clear, therefore, that this clause, when it speaks of detention by ice, means detention of the ship because the charterer is prevented from loading by ice. One has the advantage of knowing that that is the view that has been put upon it by the Court of Exchequer Chamber, affirming the judgment of Blackburn, J. in the court below, and it must be taken to mean those days upon which ice makes it impossible to bring cargo alongside and to go on with the loading. That decision was given in 1867, and this clause has continued upon faith of that decision ever since. It is true that the words " from Braila down to Sulina " have been put in, but when one sees that the argument in *Hudson* v. *Ede* (*sup.*) was " if you are going to put this meaning upon it, how far up the Danube are you going ; would frost in higher reaches of the Danube stopping a barge be enough to bring the clause into operation ? " one understands why the words were put in that way " from Braila down to Sulina." The umpire's view of the clause is therefore erroneous. The learned judge arrived at the same conclusion as the umpire, but for a different reason. He accepted the view taken in *Hudson* v. *Ede* (*sup.*) that it meant prevention of the charterer loading the ship by ice, thus causing detention of the ship, but he took the view that if there were three ways in which, or three sets of places at which you load a ship in the port and you choose one in which you are prevented from loading by ice, whereas you would not be prevented by ice in the other two, you had not been prevented from loading by ice within the meaning of the clause ; you had been prevented by your own choice as to method and place of loading. I fancy that it is the possibility of any decision being given adverse to that view that induced counsel for the respondents to think that the revolution was upon him. He admits, however, and I think it is clear, first of all when there is an option to select a port at which to load, and you have selected a port at which you are detained by ice, it will be no possible answer to say that if you had selected another port you would not have been detained by ice ; the charterer is exercising the right he has under the charter to choose a particular port, and the exceptions will then apply to the port he has chosen, and I think one may go further and say that when, as in *Bulman* v. *Fenwick* (*sup.*), you had in the same port express power to select named places, there again the fact that at the place you selected you are prevented by an exception excuses you ; it will be of no use to say that if you had gone to one of the other places you would not have been prevented by the exception. That is the decision of this court in the case of

Bulman v. *Fenwick* (*sup.*) But counsel for the respondents suggest, as I understand it: "Yes it is quite true in those two cases, but there was in those two cases an express power in the charter, but there is nothing whatever in this charter about the charterers' option to choose a particular place in the port." It is quite true that that is so; but so far from it being revolutionary, I should have thought it was elementary that when you had a charter to go to a port where there were various places for loading, the charterer had the implied right to name the place to which the vessel should go, subject to this, that the lay days commenced, as was decided in the case of *Leonis Steamship Company Limited* v. *Rank Limited* (*No.* 1) (1908) 1 K. B. 499), when he had reached the place in the port at which ships loading cargoes usually lie. If the ship has laid there for some time, and then proceeds to the particular place in the port selected by the charterer, the whole period counts in his lay days. That is the decision in *The Felix* (3 Mar. Law Cas. (O.S.) 100; 18 L. T. Rep. 587; L. Rep. 2 A. & E. 273), which was approved by Kennedy, L.J. in *Leonis Steamship Company Limited* v. *Rank Limited* (*sup.*), where he expressly says, at p. 525, that the charterer "has only an implied right to choose for loading a spot or berth in a dock or port. This implied right *The Felix* (*sup.*) does indeed support." Therefore one is in the position that the charterer coming to Braila has the right to say in what place in Braila his ship shall be loaded. In this case the charterers named the usual place and said "proceed into the dock to load a small parcel." It appears from the umpire's award that the whole cargo could not have been loaded in the dock by reason of the depth of water. It is, therefore, customary at Braila to complete the loading outside the dock. The charterers ordered the vessel to go into the dock where, according to the umpire's finding, steamers are never loaded from lighters or elevators, but only alongside the quay from silos. The vessel was ordered into dock on the Saturday at noon. She went in but could not get to the quay where she was to be loaded by reason of the fact that another vessel was there which it had been arranged should move out in order to allow her to load her small cargo, and should go back again when she had finished. On the Sunday which was not a lay day, a blizzard sprang up and ice began to form, and by the Monday the vessel could not move, so that there was this vessel lying at the quay, and the other vessel lying off the quay with the result that this vessel never got to the place to which the charterers had ordered her. For the next two or three months the ice prevented the vessel from being moved at all, and stopped her from getting to the loading place in the dock, if by any possibility she might have been loaded there. The umpire does not find his facts with quite the precision I should have wished, but, like my Lord, I read the curious form he has adopted of finding the facts as to the possibility of loading this ship where she was lying as a finding that it was physically possible, but not commercially reasonable to load her there, and if at the place of loading, which the charterers have a right to select, they have been prevented by ice from loading their cargo upon the ship in the only commercially reasonable way, and they bring themselves within the exceptions contained in clause 11, then the period during which they are prevented by ice so that the ship is detained in loading, is not to count as lay days. For these reasons I am of opinion that the decision to which the umpire came upon one ground, and which the learned judge affirmed, on quite a different ground, that the shipowners are entitled to demurrage, must be reversed.

That renders it unnecessary to consider the further argument that the shipowners can have no demurrage in respect of the detention of the ship, because they could not have moved her if she had not been detained by the charterers. One reserves one's view about that as one has done before. When it is considered, one will have to see whether a charterer can keep a ship in his own service and decline to pay anything for keeping her in his own service upon the ground that the vessel would be of no use to the shipowner if he had had her. That argument will have to be considered when such a case arises.

SARGANT, L.J.—I am of the same opinion and I will indicate as briefly as possible my reasons for differing from the judgment of the learned judge. His judgment is founded upon this. He says that the charterers could not invoke that clause unless it applied to all the methods of loading which were three in number which were open to them at their option at Braila. He says: "It does not appear that the vessel could not have been loaded. The contrary appears: she could have been loaded otherwise than in the dock." He is there clearly referring to the finding of the umpire that there are three customary methods of loading grain at Braila, namely (1) from the quay at silos; (2) from lighters and elevators; and (3) from the shore on one side of the river. In support of that there was cited a case which no doubt the learned judge had in mind, namely, *Rodenacker* v. *May and Hassell Limited* (6 Com. Cas. 37), where Mathew, J., as he then was, says this at the close of his judgment: "Where there are alternative methods of discharge it is clear that the defendant must use all available methods and exhaust all efforts to effect the discharge," and, of course, loading stands on the same footing for the purpose as discharge. It seems to me that what the learned judge was speaking of in that case was the alternative methods of discharge at the time when the impossibility arose of going on with the method of discharge already selected by the charterer. In that case the charterer had been discharging, as was the usual custom, into railway trucks and he was prevented from doing so owing to the absence of trucks. In these circumstances it was held that it was his duty to discharge into lighters which was a

perfectly practicable course at the time when the impossibility arose of his pursuing the first alternative method. It seems to me that that case has no application at all to a case like the present, where there was at the commencement of the operation a choice of three alternative methods, and the charterers quite properly chose one of these alternatives, and then, after the alternative had been chosen, and while it was still in progress, circumstances arose which made it impossible not only to pursue that alternative but to pursue either of the other alternatives which had originally been open to them. It seems to me that in a case like this there is no subsequent default or lack of energy on the part of the charterers after the impossibility had arisen of pursuing the alternative they had first chosen, and, therefore, that there is not the liability resting upon them which might otherwise have been the case.

Appeal allowed.

Solicitors for the appellants, *Richards* and *Butler*.

Solicitors for the respondents, *Holman, Fenwick*, and *Willan*.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Dec. 5, 13, *and* 19, 1923.

(Before SANKEY and SWIFT, JJ.).

LAYTON (JOHN) AND CO. LIMITED v. GENERAL STEAM NAVIGATION COMPANY LIMITED. (a)

*Bill of lading—Exceptions clause—Carriage of goods by sea—Onus—*Ejusdem generis *rule—Ambiguity—Negligence—Liability of shipowners.*

In 1920, *the appellants, the General Steam Navigation Company Limited who were shipowners, received from the respondents,* 1775 *cases of dried eggs for carriage to Havre under a bill of lading dated the 28th Aug.* 1920. *Out of these* 1775 *cases so received by the appellants, only* 1767 *cases were delivered at Havre. The respondents claimed damages for the loss of the balance of eight cases. The bill of lading contained a large number of clauses printed in small print, and the appellants relied on* (inter alia) *clause* 3 *which provided* (inter alia) *that it was agreed the ship, her owners, charterers, or master, are not liable in any event "for any loss, breakage, damage or injury in respect of animals, coin, jewellery pictures, statuary, china, earthenware, glass, looking-glass, or glass ware of any description, plate, baggage, private effects and furniture, liquids, or any other goods packed in glass exceeding in value* 2*l. per dozen bottles and similar articles of value, nor for any other article, package or parcel exceeding* 10*l. in value, unless previous arrangements in writing have been made in which latter event the shipowners' and (or) charterers' liability if any, is not to exceed the proved market value of such goods, or* 10*l. per package or parcel at the shipowners' and (or) charterers' option. All glass, looking-glass and other heavy articles . . . . are only to be carried at shipper's risk." The shipowners (appellants) were held liable by the Common Serjeant in the Mayor's and City of London Court. On appeal, it was contended on their behalf that the parcels of eggs exceeded* 10*l. in value, and that no previous arrangements in writing had been made in regard to them, and that therefore they (the appellants) were not liable, The respondents' case was that the words "any other article, baggage, or parcel exceeding* 10*l. in value must be construed according to the* ejusdem generis *rule, and that these words only referred to the sort of articles which were mentioned before, namely, 'animals, coin, jewellery,' and so forth. It was contended that the eggs did not come within the clause at all, and that they were not in the class of goods to which the clause applied. The appellants also relied on clause* 1 *of the bill of lading which excepted 'The act of God, the King's enemies, pirates, robbers, restraint of princes, rulers and people . . . defects in hull, fittings, equipment, tackle, apparatus, machinery, boilers, or from perils of the sea . . . or from any act, neglect or default whatsoever, of the pilot, master, officers, engineers. . . .'"*

Held (1), *that the onus was on the appellants, the shipowners to show clearly that the words of clause* 3 *of the bill of lading applied to the circumstances of this case, and that having regard to the ambiguity of the language of clause* 3 *the appellants had failed to discharge that onus; and* (2) *that the appellants had also failed to prove that the loss of the eight cases of eggs was caused by one of the perils excepted by clause* 1 *of the bill of lading. They were, therefore, liable for the loss.*

APPEAL from the City of London Court.

The action was brought by the plaintiffs, Messrs. John Layton and Co. Limited to recover from the defendants the General Steam Navigation Company Limited damages for the loss of eight cases of dried eggs in course of transit to Havre. In Aug. 1920, the defendants received from the plaintiffs 1775 cases of dried eggs to be carried to Havre under a bill of lading dated the 28th Aug. 1920. Only 1767 cases were delivered at Havre and the plaintiffs claimed for the loss of the balance of eight cases.

The bill of lading contained a number of clauses in small print. Clause 1 of the bill of lading excepted

> the act of God, the King's enemies, pirates, robbers, restraint of princes, rulers and people . . . defects in hull, fittings, equipment, tackle, apparatus, machinery, boilers, or from perils of the sea . . . or from any act, neglect, or default whatsoever of the pilot, master, officers, engineers . . .

(a) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

Clause 3 provided (*inter alia*) that it was agreed that the ship, her owners, charterers, or master, are not liable in any event

For any loss, breakage, damage or injury in respect of animals, coin, jewellery, pictures, statuary, china, earthenware, glass, looking-glass, or glass ware of any description, plate, baggage, private effects, and furniture liquids, or any other goods packed in glass exceeding in value 2*l.* per dozen bottles, and similar articles of value, nor for any other article, package or parcel exceeding 10*l.* in value, unless previous arrangements in writing have been made in which latter event the shipowners' and (or) charterers' liability (if any) is not to exceed the proved market value of such goods, or 10*l.* per package or parcel at the shipowners' and (or) charterers' option. All glass, looking-glass, and other heavy articles . . . are only to be carried at shipper's risk.

The defendants relied on clauses 1 and 3. They said that the parcels of eggs exceeded 10*l.* in value and that no previous arrangements in writing had been made with regard to them.

The action was tried by the Common Serjeant and a jury. Some questions were left to the jury and on the jury's answers the learned Common Serjeant gave judgment for the plaintiffs.

The defendants appealed.

Wilfrid Lewis and *J. A. Stainton* for the appellants.—The judgment of the learned Common Serjeant is wrong. The appellants are protected by the bill of lading. Clause 1 excepted the defendants from liability for any "act, neglect, or default whatsoever, of the pilot, master, officers, engineers," etc., and by clause 3 the defendants are protected from liability "for any loss, breakage, damage or injury in respect of animals, coin, jewellery, pictures, statuary, china . . . nor for any other article, package or parcel exceeding 10*l.* in value, unless previous arrangements in writing have been made . . ."

In this case, it is admitted that the value of each package of eggs exceeded 10*l.* and that no previous arrangements in writing had been made. Therefore, the appellants are entirely protected by clause 3 of the bill of lading. The words "any other article, package or parcel . . ." should not be read *ejusdem generis* with the preceding words. If general words are followed by special words the latter do not curtail the meaning of the former. Clause 1 of the bill of lading protects the appellants against any act, neglect or default whatsoever. There is no evidence here how the eight cases of eggs were lost, and it is submitted that once it is proved against a carrier that the goods have been lost there is raised at most a presumption of negligence and it is immaterial if more than a presumption of negligence is raised the carrier is still protected by the words "neglect or default" in clause 1 of the bill of lading.

G. Granville Sharp (*S. P. J. Merlin* with him) for the respondents.—The bill of lading is *primâ facie* evidence of the receipt by the appellants of 1775 cases of eggs. The evidence showed a shortage in delivery. There was thus a case for the appellants to answer. The onus was on them to show that the loss took place in circumstances which relieved them of liability, in other words the onus lay on them to show that the cause of the loss was excepted by the bill of lading: (see *Smith* v. *Bedouin Steamship Company*, (1896) A. C. 70, 76). With regard to clause 3 of the bill of lading the *ejusdem generis* rule applies: (see *Thames Marine Insurance Company* v. *Hamilton, Fraser, and Co.* (6 Asp. Mar. Law Cas. 200; 57 L. T. Rep. 695; (1887) 12 App. Cas. 484, 488, 490). Having regard to the position of the commas in that clause, the words "similar articles of value" cannot refer to the whole of that class, but refer only to species of the genus "£2 per dozen bottles." The words "animals, coin, jewellery, pictures, statuary, china . . . plate . . . furniture, liquids and other goods packed in glass," are all different species of the same genus. Some of them have inherent vices. Furniture, and liquids are goods likely to get damaged. That is the genus that can be found in those articles: (see *Thorman* v. *Dowgate Steamship Company*, 11 Asp. Mar. Law Cas. 481; 102 L. T. Rep. 242; (1910) 1 K. B. 410, 422). General words may be restricted to the same meaning as the specific words which precede them. The genus is "goods difficult to carry safely." In the present case, the goods are goods which have a definite and ascertainable value, while the goods which are named in the bill of lading may be valued altogether apart on a basis not readily definable. A piece of furniture 6 feet long may come within a genus "goods with a value not definitely ascertainable." (*Price and Co.* v. *Union Lighterage Company*, 9 Asp. Mar. Law Cas. 398; 89 L. T. Rep. 731; (1904) 1 K. B. 412) was referred to. The shipowners are not entitled to have an ambiguity in a bill of lading construed in their favour, but the shippers are entitled to have such ambiguity construed against the shipowners, who must make their meaning clear and must be taken to know the force of the *ejusdem generis* rule. (*Knutsford Steamship Limited* v. *Tillmans*, 11 Asp. Mar. Law Cas. 105; 99 L. T. Rep. 399; (1908) A. C. 406; and *Larsen* v. *Sylvester and Co.*, 11 Asp. Mar. Law Cas. 78; 99 L. T. Rep. 94; (1908) A. C. 295, were referred to.) The appellants have failed to discharge the onus which lay on them of showing that the loss was caused by an excepted cause. There is no evidence of any kind to show how the loss occurred. The matter is left in doubt. The appellants therefore do not bring themselves within any exception and are liable: (see per Lush J. in *Taylor and others* v. *The Liverpool and Great Western Steam Company and another*, 2 Asp. Mar. Law Cas. 275; 30 L. T. Rep. 714; L. Rep. 9 Q. B. 546; and *Harrowing* v. *Katz and Co.*, 10 Times L. Rep. 400, 401).

Wilfrid Lewis replied.

Cur. adv. vult.

SANKEY, J. delivered the judgment of the court.

This is an appeal from the Mayor's and City of London Court in a case in which Messrs. John Layton and Co. Limited were the plaintiffs and the General Steam Navigation Company Limited were the defendants. In 1920 the defendants received from the plaintiffs 1775 cases of dried eggs to be carried to Havre under a bill of lading dated the 28th Aug. 1920. Out of those 1775 so received by the defendants, 1767 only were delivered at Havre, eight cases being —I will use a neutral term—lost. The plaintiffs claimed damages for the loss of those eight cases.

The case was tried before the learned Common Serjeant and a jury, and at the conclusion of the summing-up the jury were asked eleven questions, and upon those answers the learned judge gave judgment for the plaintiffs, and from that judgment the present appeal is brought on a notice containing only twenty-one grounds of appeal, but the learned counsel who appeared for the defendants somewhat mercifully grouped those grounds under four heads: Head 1, containing grounds 5 and 6 of the appeal, that the defendants were protected by clause 3 of the bill of lading; head 2, grounds 1, 2, 3, and 4 of the appeal, that the defendants were protected by clause 1 of the bill of lading; head 3, grounds 7 to 13 of the appeal, that the defendants were protected by clause 5 of the bill of lading; and head 4, ground 15 of the appeal that the defendants were protected by clause 17 of the bill of lading.

Before dealing with the specific points we desire to make some general remarks upon the law. The bill of lading in question is a very formidable document, it contains a very large number of clauses printed in the most small print—I will not say the smallest print possible —but printed so small that the learned counsel was good enough to have copies made of the bill of lading in order that the court, especially in these December days, would be able to read the various clauses in question. We think that in a case like the present the onus is upon the shipowner if he wishes to excuse himself under any of the clauses to satisfy the court that the clause does apply to the facts and is clear in excusing him, or exempting him from liability, the authority for that generally is the case of the *Nelson Line (Liverpool) Limited* v. *James Nelson and Sons Limited* (10 Asp. Mar. Law Cas. 581; 97 L. T. Rep. 812; (1908) A. C. 16). The headnote is somewhat severe, and I do not think that in its severity it is applicable to this bill of lading, but the headnote is: "A shipowner agreed to carry frozen meat by an agreement which was so ill thought out and ill expressed in contradictory sentences that it was impossible to feel sure what the parties intended to stipulate. Frozen meat shipped under this agreement arrived damaged owing to the unseaworthiness of the ship and the negligence of the shipowners' agent. Held, that there being no clear and expressed exemption, the owner was not relieved from his duty to provide a seaworthy ship and to take reasonable care." Lord Loreburn, the then Lord Chancellor, in giving judgment, said: "If I were obliged to affix a definite meaning to the disputed language, I should prefer the plaintiffs' construction, but in truth I think the clause taken as a whole so ill thought out and ill expressed, that it is not possible to feel sure what the parties intended to stipulate. The law imposes on shipowners a duty to provide a seaworthy ship and to use reasonable care. They may contract themselves out of those duties, but unless they prove such a contract the duties remain, and such a contract is not proved by producing language which may mean that and may mean something different. As Lord Macnaughten said in the *Elderslie Steamship Company* v. *Borthwick* (10 Asp. Mar. Law Cas. 121; 92 L. T. Rep. 274; (1905) A. C. 93, 96), 'an ambiguous document is no protection.' That is the ground upon which I rest my opinion."

Lord Halsbury made similar remarks. The same statement of the law is to be found in a case in the same year, namely, *Baxter's Leather Company* v. *The Royal Mail Steam Packet Company* (11 Asp. Mar. Law Cas. 98; 99 L. T. Rep. 286; (1908) 2 K. B. 626), where the President of the Probate and Divorce Court, a great lawyer, Sir Gorell Barnes, sitting as President of the Court of Appeal, said: "It is further established by a long series of decisions that if a shipowner wishes to exclude liability for negligence, he must do so in clear and express terms."

Now, those being the general remarks we wish to make, we turn to the special points made by learned counsel for the appellants. Head 1, that the defendants are excused by clause 3, I do not propose to read the whole of clause 3, it will be sufficient to read part of it in order to make clear our view: "It is agreed the ship, her owners, charterers, or master, are not liable in any event for any loss, breakage, damage or injury in respect of animals, coin, jewellery, pictures, statuary, china, earthenware, glass, looking-glass, or glass ware of any description, plate, baggage, private effects and furniture, liquids, or any other goods packed in glass, exceeding in value 2*l.* per dozen bottles, and similar articles of value, nor for any other article, package or parcel exceeding 10*l.* in value, unless previous arrangements in writing have been made, in which latter event the shipowners' and (or) charterers' liability, if any, is not to exceed the proved market value of such goods, or 10*l.* per package or parcel at the shipowners' and (or) charterers' option. All glass, looking-glass, and other heavy articles, and so forth, "are only to be carried at shipper's risk."

The defendant said these articles, these parcels of eggs exceeded 10*l.* in value and no previous arrangements in writing had been made in regard to them. That being so we are not liable in damages at all. On the other hand, the contention for the plaintiffs was this.

they said: "These words 'any other article, baggage or parcel exceeding 10*l.* in value' must be construed in accordance with the rule of *ejusdem generis*: and they only refer to these sort of articles which are mentioned before, namely, animals, coin, jewellery, and so forth; therefore, the eggs do not come within the clause at all, they are not in the class of goods to which the clause applies." That point was taken before the learned Common Serjeant and will be found at pp. 33 and 35 of the transcript of the shorthand note, which the parties handed up to us. He reads the clause and he says: "Is there any authority as to whether those words 'nor for any other article, package, or parcel' must be construed *ejusdem generis?* Those words come within a batch of things followed by another batch of things. Does that show, if you take that, that that was only to apply to things *ejusdem generis* that what goes before and what comes afterwards and does not apply to ordinary mercantile commodities?" At the bottom of p. 35 he says: "The words in the clause we are dealing with are 'nor for any other article, package or parcel exceeding 10*l.* in value.' The words here"—he goes on—"are very comprehensive 'nor for any other goods of whatever description.' Further than that I do not think it is insignificant, as I pointed out, that the words 'nor for any other article, package or parcel' are shoved in between two specific classes." I think the learned judge means inserted between two specific classes. He says: "I shall hold that that does not apply."

Those are the contentions on either side: the one party saying: "You must construe these words as *ejusdem generis* with the words preceding them;" the other party saying: "No they are a separate genus and entitle the shipowner to collect his charges."

We asked learned counsel who appeared on behalf of the respondents what he said the genus in this case was, and he said as follows: "That it referred to articles which were difficult to carry, or to articles of which it was difficult to ascertain a definite market value, or not ordinary commercial goods." I quote his exact words, "the genus is goods difficult to carry, goods which have not a definite market value, and does not apply to ordinary commercial goods."

Now we think that there is great force in that argument. Each learned counsel placed before the court at some considerable length what their contentions were, and I cannot help saying that a fair description of the result of their arguments would have been to say that the court could not make out what the clause really did mean. We have come to the conclusion that this is one of those cases where the onus upon the shipowner is to show clearly that the words of the exception clause applied to him. He has failed to do so. It is the duty of a shipowner in a case like this to satisfy the court, first of all, that the exception means what he says it means, and, secondly, that he comes within the exception. The matter here is so doubtful, it is so, as we think, ill expressed, that we rely for this point upon the judgment to which I have already referred of Lord Loreburn: "The law imposes on shipowners a duty to provide a sea-worthy ship and to use reasonable care. They may contract themselves out of those duties, but unless they prove such a contract the duties remain and such a contract is not proved by producing language which may mean that and may mean something else, an ambiguous document is no protection."

We, therefore, think, that the first point made by the learned counsel for the appellants cannot be allowed to prevail. The next head is head 2; that is that the defendants are protected by clause 1 of the bill of lading; it is a very long clause, it occupies the whole of a sheet of foolscap in ordinary type although it is comprised in rather a shorter space in the small printed bill of lading. It says:—and I am not sure whether I can read it from the original—"The following are the exceptions and conditions above referred to together with those on the back hereof." Now excepted. "The Act of God, the King's enemies, pirates, robbers, restraint of princes, rulers and people" and so on, "defects in hull, fittings, equipment, tackle, apparatus, machinery, boilers"—this is almost a dictionary of possibilities—"or from perils of the sea, ports, harbours, canals and rivers." I am now coming at last to the words in question "or from any act, neglect, or default whatsoever of the pilot, master, officers, engineers," and so forth. The defendants did not rely upon the word "act"—the exception from any act—but they relied upon those words, "neglect or default" and what their contention was is this. They said: "We received 1775" that is beyond question because the jury found it, "We only delivered 1767." There was some controversy as to whether the eight were left in the ship or not, and therefore, the eight were missing and that fact shows this that the cause of the goods being missed or lost, or whatever neutral word you like, must have been the neglect or default of the master or either ourselves, and we are therefore excused under clause 1. Mr. Wilfrid Lewis cited the case of *Phipps v. The New Claridge Hotel* (22 Times L. Rep. 49) and said: "Those facts raised a presumption of negligence." I think he rather referred to the case which I have already recited of Baxter, in which on somewhat similar facts Bigham, J. held that there was negligence; his mind not being directed to the question whether it did, or did not, raise a presumption, he said it was negligence. On the other hand, the learned counsel, who appeared on behalf of the respondents said: "Oh, there may have been other reasons than the neglect or default of the masters or officers of the crew which come outside neglect or default." He said the goods may have been stolen. A case of a somewhat extravagant nature was put during the argument as to whether in certain events, goods might have been consumed which were being carried on board the ship, and the learned counsel for the respondents said the shipowner

must show that the loss was due to neglect or default in order to claim advantage of the exceptions, and he has not proved his case.

The law upon that subject, I think, is best stated by Phillimore, L.J., as he then was, in the case of *Joseph Travers and Sons Limited* v. *Cooper* (111 L. T. Rep. 1088; (1915) 1 K. B., at p. 73), and the passage I refer to is on p. 97. I need not read the headnote—I do not want to make my judgment too long—but I can make it comprehensible, I hope, by merely referring to this passage. The learned Lord Justice says: "This gives rise to the question, on whom was the burden of proof. It is here that I differ from the learned judge. I think he has imposed the burden of proof on the wrong party. I think that when the bailee of goods has to admit that the goods have been damaged while in his custody and in the absence of the custodian, and it is found that the absence was improper and negligent and that very absence makes it difficult to determine what was the cause of the damage, and the owner can suggest a probable cause which the presence of the custodian might have prevented, the burden is upon the bailee to show that it was not the negligent absence that was the cause of the damage." The matter is summed up, if I may be allowed to refer to a text-book, but it seems to me to be perfectly accurately summed up in the latest edition of Scrutton, L.J.'s Charter Parties and Bills of Lading, 11th edit., at pp. 267 and 275, where the learned author says: "Onus of proof. If when loss or damage has occurred the goods owner proves facts as to the cause of the loss which are consistent with negligence on the part of the shipowner or his servants, but such evidence leaves it in doubt whether the actual cause of the loss or damage was such negligence, the onus is upon the shipowner to prove that the loss was not due to negligence." On p. 275, he says: "The shipowner must show that the cause of the loss was one of the excepted perils in the bill of lading, or that the goods were not shipped, in order to free himself."

We are of the opinion that the shipowner in this case has failed to discharge this onus. We agree with the argument of the learned counsel for the respondents, that it was for the shipowner to show that the goods were lost by the neglect or default of one of his servants if he wished to be excused under clause 1, and we do not think that he has shown that they were so lost.

With regard to point 3, that is that the defendants were protected by clause 5 of the Bill of lading, clause 5 is as follows: "The receiver of the goods mentioned in this bill of lading shall cause a proper tally to be kept of the same as they come out of the steamer and a receipt given to the officers of the ship for the goods before removing barges or goods from alongside. The captain and owners and charterers of the vessel shall not be liable"—these are the material words—"for any claim whatever, unless the same, or notice thereof be made or given in writing before the craft of the goods leave the ship's side, when in case of damage or dispute, a survey or recount may be held. The cost to be borne by whoever is found to be in error." The defendants in this case say: "We are not liable because you did not give that notice in writing before the goods left the ship's side." The reply to that, on behalf of the plaintiffs, was this: "You waived it, and, therefore, you are not entitled to rely upon it;" and the shippers say: "That will not do because by clause 13 of the bill of lading, there is a clause which says, that our servants have no right to waive any of the clauses of this bill of lading." How does that matter stand? The plaintiffs say in another part of the bill of lading: "You are prevented from relying upon that printed clause; there is a written clause put in upon the margin of the bill of lading, and the jury were asked about that clause, that is to say, about the facts which it was necessary to prove to make that clause operative, and they have decided the facts in our view. The clause in the margin is this: "Apply for delivery at Havre to La Société de Consignation Maritime Franco-Brittanique, 28 Rue de la Bourse, Le Havre." In effect the plaintiffs say that is what we did, and the effect of doing that was that those clauses upon which you, the defendants, rely are really inoperative because there is an expressed direction in the margin of the bill of lading to us to follow a certain course; we did it. The jury have found that we did it properly, and, therefore, these exceptions do not apply.

The findings of the jury are on Nos. 4, 8, and 9. Question 4 is: "Did the Franco-Brittanique act as agents of the defendants or plaintiffs, or both, in taking delivery at the ship's side and delivering the goods to consignees?" The answer was: "The Franco-Brittanique acted as the defendants' agents only." Question 8 was: "In the ordinary course of discharge of the ship at the port of Havre was it usual for a receipt to be given to the officers of the ship by the consignees for goods before removing them from alongside?" Answer: "No." Question 9 was: "Did the ship's representative at Havre in the ordinary course of discharge of the vessel at Havre, insist that delivery should be given to consignees in the shed and not alongside?" Answer: "Yes, in the shed only."

It was said that upon this point the learned judge misdirected the jury. If you regard his summing-up as a disentailing deed, there might be certain exceptions which you could take to it, but we can find no real evidence of misdirection upon this, or, indeed, upon any other point, and we have come to the conclusion that the argument of the respondents was right upon this point, and that is to say, that in this marginal clause of the bill of lading and the findings of the jury in respect thereof, the defendants cannot rely upon those two clauses 5 and 13, to which I have referred.

The final point was a point made that the defendants were protected by clause 17. Clause 17 is one of those lengthy clauses which it would take me some time to read through, I am not saying that it was wrong, because shipowners are perfectly entitled to protect themselves if they do so clearly ; but all I say is it is not necessary for me to read the whole of the clause. It begins in this way : "In cases of through carriage, or without land charge, shipping, landing, lighterage, &c., or transhipping is effected by or at the cost of the shipowners and (or) charterers whether acting as such, or as wharfingers, lighterman land-carriers, or otherwise, it is so done at the risk of the owners of the goods." That clause applies to those circumstances and those circumstances only, and we can see nothing on the evidence to show that this is one of the cases where that clause is applicable. There is no proof that the goods were landed by the shipowners as suggested.

The result of it is this. We have now dealt with all the clauses to which our attention was turned, and we come to the conclusion, for the reasons that I have endeavoured to give, that the appeal fails and that the verdict of the jury and the judgment consequent thereon should be upheld.

Appeal dismissed.

Solicitors for the appellants, *W. Batham* and *Sons*.

Solicitor for the respondent, *C. H. Wright*.

Dec. 17, 1923, *and Jan.* 14, 1924.

(Before AVORY, J.)

T. AND J. BROCKLEBANK LIMITED *v.* THE KING. (*a*)

Emergency legislation—Defence of the Realm—Shipping control—Sale of ship to foreigner—Licence to sell—Condition of licence—Percentage of purchase money to be paid to Shipping Controller—Legality of condition—Recovery of money paid—British ships (Transfer Restrictions) Act 1915 (5 *Geo.* 5, *c.* 21, *s.* 1)—*Indemnity Act* 1920 (10 *&* 11 *Geo.* 5, *c.* 48), *s.* 1, *sub-s.* 1 (b), *s.* 2, *sub-s.* 1 (b).

The suppliants claimed to recover 34,920*l. as money received to their use, which sum had been paid by them to the Ministry of Shipping in Feb.* 1920. *In* 1919 *the suppliants wished to sell a ship to a foreign purchaser, which could not then be done without the licence of the Shipping Controller, who declined to grant it unless* 15 *per cent. of the purchase price should be paid by the suppliants to the Ministry of Shipping. On the* 6*th Jan.* 1920, *notwithstanding objection raised by the suppliants, this condition was finally insisted upon. On the* 27*th Jan. the Shipping Controller gave his consent to the sale of the ship to an Italian firm, and the suppliants, on receipt of the purchase money, paid* 34,920*l. as directed to the Accountant-General of the Ministry of Shipping. The suppliants contended that this sum was paid in discharge of a demand illegally made under colour of his office by the Shipping Controller, and they claimed repayment of the money.*

Held, (1) *that the condition was* ultra vires *of the Shipping Controller and was a levying of money for the use of the Crown without grant of Parliament, and that the money was illegally exacted.* Attorney-General *v.* Wilts United Dairies Limited (1922, 127 *L. T. Rep.* 822) *applied ;* (2) *that the payment was compulsory and not voluntary ;* (3) *that this case was not a case where a claim for compensation could be brought under sect.* 2, *sub-sect.* 1 (b) *of the Indemnity Act* 1920, *but was, within the sub-sect.* 1 (b) *of sect.* 1, *a claim in respect of a right under a contract ;* (4) *that the recovery of the money could properly be made the subject of a petition of right. The suppliants, therefore, were entitled to recover the amount paid.*

PETITION of right heard before Avory, J.

The following statement of facts is in substance taken from the judgment of the learned judge :

In this case the suppliants claim to recover the sum of 34,920*l.* as money received to their use, which sum had been paid by them to the Accountant-General of the Ministry of Shipping on the 20th Feb. 1920, under the following circumstances. In Nov. and Dec. 1919, the suppliants were desirous of selling one of their steamships, the *Marwarri*, to a foreign purchaser. At that date such a transfer could not lawfully be carried out without the licence of the Shipping Controller : (see statutes 5 Geo. 5, c. 21, s. 1, and 6 & 7 Geo. 5, c. 42, s. 3, sub-s. 2, and 6 & 7 Geo. 5, c. 68).

Upon application being made by the suppliants for such licence, the Shipping Controller declined to grant the same except upon the condition, among others, that 15 per cent. of the purchase price should be paid by the suppliants to the Ministry of Shipping. On the 6th Jan. 1920, notwithstanding objection raised by the suppliants and their demand to know by what authority this condition was imposed, it was finally insisted upon. The suppliants then agreed to pay the 15 per cent., and on the 27th Jan. 1920 the Shipping Controller gave his consent to the sale of the said steamship to an Italian firm for the sum of 240,000*l.* Upon receipt of the purchase money the suppliants paid the said sum of 34,920*l.* as directed to the Accountant-General of the Ministry of Shipping.

The suppliants prayed (1) a declaration that the Shipping Controller was not entitled to demand payment of any sums as a condition of granting permission for the sale to a foreign owner of a British ship. (2) Repayment to them of the sum of 34,920*l.*

Sir John Simon, K.C. and *Hildesley*, for the suppliants.—The Shipping Controller had no right to insist on the condition that he should

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

receive a percentage of the purchase money (*Attorney-General* v. *Wilts United Dairies*, 127 L. T. Rep. 822). It was a levying of money without the authority of Parliament. Secondly, the payment was in reality a compulsory and not a voluntary payment (*Maskell* v. *Horner*, 113 L. T. Rep. 126 (1915) 3 K.B. 106). Thirdly, the present case does not fall within sub-sect. 1 (*b*) of sect. 2 of the Indemnity Act 1920, but within proviso (*b*) to sect. 1 (1), being a claim of a right under, or alleged breach of, contract, and the suppliants may proceed by petition of right, waiving the tort, and proceeding on the contract. A similar point was left open in *Marshall Shipping Company* v. *Board of Trade* (*ante*, p. 210 ; 129 L. T. Rep. 644 ; (1923) 2 K. B. 343).

Sir *Douglas Hogg* (A.-G.) and *Russell Davies*, for the Crown.—The case is distinguishable from the *Wilts United Dairies* case (*sup.*). The prohibition of the sale of British ships to a foreigner without the approval of the Shipping Controller was a statutory prohibition, namely, by the British Ships (Transfer Restriction) Act 1915. The Shipping Controller had power to forbid such sale altogether. Owing to the restrictions on the sale of British ships, a foreigner could offer a higher price, and all that the Shipping Controller did was to see that the excess went to the Crown. Secondly, the payment was voluntary and not compulsory. It was to the benefit of the suppliants to sell the ship and hand over a percentage to the Crown. They were not bound to sell, and the Controller was not bound to allow them to sell (*William Whiteley Limited* v. *The King* (1909) 101 L. T. Rep. 741). The suppliants were quite alive to the position, and preferred to sell on the condition presented. Further, the suppliants cannot proceed under proviso (*b*) to sect. 1 (1) of the Indemnity Act, as that refers to an express contract, and not to a claim for money had and received. The suppliants' proper remedy is under sect. 2 of the Act, and the procedure by petition of right is not maintainable.

Sir *John Simon*, K.C., in reply.—The suppliants acted under duress. The Shipping Controller had no right to insist on the condition, the suppliants could not sell without his consent, and consequently, in order to sell, they were compelled to pay to the Shipping Controller a sum which he had no right to demand from them. The parties were not on an equal footing within the language of Abbott, C.J. in *Morgan* v. *Palmer* (2 B. & C., at p. 735), and there was nothing voluntary in the payment of the percentage by the suppliants. The suppliants' case is within proviso (*b*) of sect. 1 (1) as the cause of action is the omission to return the money (*Umphelby* v. *M'Lean*, 1817, 1 B. & Ald. 42).

Cur. adv. vult.

Jan. 14.—Avory, J. read the following judgment. [After stating the facts, the learned judge continued :]

On behalf of the suppliants it is contended that the said sum was paid in discharge of a demand illegally made under colour of his office by the Shipping Controller, and the first question is whether there was any statutory or other authority for the imposition of this condition to the granting of the licence. On this point the Attorney-General referred to reg. 39 (*c*) (*c*) of the Defence of the Realm Regulations which applies only to purchasers of vessels and the conditions there referred to include, in my opinion, only such as could lawfully be imposed. In view of the decision of the Court of Appeal in *Attorney-General* v. *Wilts United Dairies Limited* (37 Times L. Rep. 884), affirmed in the House of Lords (127 L. T. Rep. 822), I come to the conclusion that the imposition of the condition in the present case was *ultra vires* the Shipping Controller and was a levying of money for the use of the Crown without grant of Parliament within the meaning of the Bill of Rights. The Attorney-General stated that the fifteen per cent. had been calculated on the basis of this being the extra price obtainable from a foreign purchaser on the sale of a British ship, but, however it was calculated, and although I do not doubt that the condition was imposed in perfect good faith and in the honest belief that it was in furtherance of the object of the British Ships (Transfer Restriction) Act 1915, I think the payment was exacted without authority and was therefore illegally exacted. The next question is whether the suppliants are entitled to recover this money so paid and whether from the Crown by this petition of right or whether, as the Attorney-General suggested, the Board of Trade is in any event the party to be sued. With regard to the liability of the Board of Trade, the Court of Appeal in *Marshal Shipping Company* v. *Board of Trade* (129 L. T. Rep. 644 ; (1923) 2 K. B. 343), in which the cause of action is based on facts like those of the present case, have left open the question whether the Board of Trade is liable to be sued, but it appears from the judgments that if the alleged tort is waived and the proceeds of that tort have been accounted for to the Government, the recovery of the money would properly be made the subject of a petition of right to the Crown.

I have now to consider whether the money in this case was paid under compulsion within the meaning of the authorities, or whether it was a voluntary payment as contended on behalf of the Crown. The case of *Maskell* v. *Horner*, which was relied on by the suppliants, does not in my opinion govern this case. The passage in the judgment of Lord Reading, C.J., in which he says : (113 L. T. Rep., at p. 128 ; (1915) 3 K. B., at p. 118) " If a person with knowledge of the facts pays money, which he is not in law bound to pay, and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it. Such a payment is in law like a gift, and the transaction cannot be reopened. If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as

money had and received. The money is paid not under duress in the strict sense of the term, as that implies duress of person, but under the pressure of seizure or detention of goods which is analogous to that of duress . . . The payment is made for the purpose of averting a threatened evil and is made not with the intention of giving up a right but under immediate necessity and with the intention of preserving the right to dispute the legality of the demand " must be read in connection with the facts of that case, which was decided on the ground that the tolls had been paid under threat of seizure of the plaintiffs' goods and to avert that threatened evil, and the judgments had no reference to the case of money extorted by a person *colore officii*. On behalf of the Crown it was contended that the payment in this case was not made under protest, and the judgment of Walton, J., in *Whiteley* v. *The King* (1909) 101 L. T. Rep. 741) was relied on ; but an express protest is not necessary if the compulsion is apparent from the circumstances of the case, *Maskell* v. *Horner* (*sup.*). The learned judge in *Whiteley's* case, while holding that money paid to the Commissioners of Inland Revenue under threat that if not paid proceedings would be taken for penalties was not recoverable as money paid under compulsion, was careful to distinguish the case of money extorted by a person for doing what he is legally bound to do without payment, and upon this point the case of *Morgan* v. *Palmer* (2 B. and C. 729) is a direct authority. It may be said that the Shipping Controller was not legally bound to grant a licence, but in granting or refusing it, he was bound, I think, to exercise a judicial discretion and not to impose a condition of payment which was unlawful. (*Rex* v. *Athay*, 1758, 2 Burr. 653, and *Parker* v. *Great Western Railway*, 1844, 7 M. & G. 292, 293). The money in the present case was not paid under any mistake of fact, nor was it, in my opinion, paid under any mistake of law, but in the words of Littledale, J., in *Morgan* v. *Palmer* 2 B. & C. at p. 739, " The suppliants were merely passive and submitted to pay the sum claimed as they could not otherwise procure the licence," and subject to the further point taken by the Attorney-General under the Indemnity Act (10 & 11 Geo. 5, c. 48), I think the suppliants would be entitled to recover the sum claimed as money received to their use.

The Attorney-General contended that even if the action of the Shipping Controller could not be justified, he nevertheless purported to be acting in the execution of his duty, and under those circumstances compensation would be payable under sect. 2 (1) (*b*) of the Indemnity Act, and no action or other legal proceeding would lie in respect thereof, but I doubt whether the suppliants can be said to have " incurred or sustained any direct loss or damage " within the meaning of that section particularly having regard to the terms of Part 2 of the Schedule to that Act, and to the suppliants' admission that the ship was not saleable to any British purchaser, to their own description of the ship in their letter of the 4th Dec. 1919, and to the fact that they possibly added on the 15 per cent. to the selling price, although there is no evidence as to this, and, therefore, I think this is not a case where a claim for compensation can be brought under sect. 2 of the Act, but is within proviso (*b*) to sect. 1, a claim in respect of a right under, or an alleged breach of contract, the cause of action being the non-return of the money. *Umphelby* v. *M'Lean* (1 B. and Ald. 42).

In the result, although no claim was made by the suppliants for the return of the money until after the decision in *Attorney-General* v. *Wilts United Dairies* in the House of Lords (127 L. T. Rep. 822), I come to the conclusion with some hesitation upon the authority of that case and of *Morgan* v. *Palmer* (*sup.*) that they are entitled to the declaration prayed for.

Judgment for the suppliants.

Solicitors for suppliants, *Rawle, Johnstone*, and *Co.*, for *Hill, Dickinson*, and *Co.*, Liverpool.

Solicitor for the Crown, *Solicitor to Board of Trade.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Jan. 22, 23, *and Feb.* 4, 1924.

(Before Sir HENRY DUKE, P.)

THE COAHOMA COUNTY. (*a*)

Bill of lading—" . . . steamer shall be entitled to commence discharging immediately after arrival . . . either into lighters or other craft or at the quay . . . "—Obligation upon the consignees to provide lighters, craft, or quay space—" The goods shall be taken from the ship's tackle by the consignees of goods directly on their coming to hand in discharge of the ship ; "—No berth available and discharge into lighters impractical—Timber discharged over ship's side into the water — Delay — Demurrage — Certificate of master to be conclusive as to demurrage.

Timber was consigned to the defendants upon the plaintiffs' steamer under bills of lading containing the following terms : " . . . steamer shall be entitled to commence discharging immediately after arrival . . . either into lighters or other craft or at the quay or at more than one berth and discharge continuously day and night also on Sunday from all hatches simultaneously without intermission all at the discretion of the master. . . . The goods shall be taken from the ship's tackle by the consignee of goods directly on their coming to hand in discharge of the ship. . . . If consignees fail to receive as above stated, and no facilities are available for discharging into craft or on wharf without delay to the steamer, receivers to pay demurrage at the

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

rate of 50c. per net registered ton per day. . . . The master's certificate shall be conclusive and binding both as to the extent of the delay in the receipt of the cargo and the amount payable by consignees hereunder in respect of such delay. . . . "

No berth was available at the port of discharge, and owing to the dimensions of the timber discharge in lighters was impossible. The cargo was therefore discharged over the ship's side into the water, where it was formed into rafts and removed by the defendants. The vessel occupied twelve and a half days discharging, and the master certified that six days' demurrage at 50c. per registered ton per day was due from the defendants, attributing the delay to the failure of the defendants to provide a berth or craft. The delay was in fact due to other causes for which the defendants were not responsible.

Held, that the words "the steamer shall be entitled to commence discharging immediately after arrival . . . either into lighters or other craft or at the quay" conferred a right, power, or liberty upon the carrier, but did not imply an undertaking on behalf of the consignee of the goods that facilities should be available whereby such right, power, or liberty should be made available to the carrier. The goods having been, in the business sense, taken from alongside directly on their coming to hand, there was no delay attributable to the defendants, and the plaintiffs were not entitled to recover demurrage.

Held, further, that, had there been a breach by failure of the defendants to take delivery as agreed, the master's certificate could not be accepted as a conclusive assessment of damages, since the delay which he assessed was not the delay in respect of which he was empowered by the bill of lading to certify for demurrage.

THE plaintiffs, the United States of America, represented by the United States Shipping Board, were the owners of the steamship *Coahoma County*, and the defendants, the Falmouth Works and Engineering Company, were indorsees and receivers of cargo under three bills of lading dated Mobile the 30th July 1921, and issued in respect of forty-three and 1126 pieces of pitch pine timber, and 382 pieces of pitch pine timber respectively.

By clause 8 of the bills of lading it was provided :

8. Also the steamer shall commence to discharge immediately after arrival (without reference to the state of the weather) either into lighters or other craft or at the quay or at more than one berth and discharge continuously day and night, also on Sunday from all hatches simultaneously, without intermission, all at the discretion of the master, any custom of the port to the contrary notwithstanding. The goods shall be taken from the ship's tackle by the consignee of goods directly on their coming to hand in discharge of the ship ; otherwise the master or ship's agent shall be at liberty to enter and land the goods, or put them into store, warehouse or craft, or on quay, at the receiver's risk and expense, without giving previous notice to consignees before weighing or counting, notwithstanding all regulations or customs of the port to the contrary. If consignees fail to receive as above stated, and no facilities are available for discharging into craft or on wharf without delay to steamer, receivers shall pay the steamer demurrage for such detention at the rate of 50c. per net registered ton per day of twenty-four hours for each day or part of day during which the goods shall not be received as above stipulated. The master's certificate shall be conclusive and binding both as to the extent of the delay in the receipt of the cargo and the amount payable by consignees thereunder, in respect of such delay . . . "

The *Coahoma County* arrived in Falmouth to discharge, on the 6th Sept. 1921, but no berth was available, and since it was not practical to discharge into lighters or craft, the timber was discharged overside into the sea by means of the ship's tackle. The discharge was not complete until 4.15 p.m. on the 20th Sept. The total time occupied in discharging was, therefore, twelve and a half days, and the plaintiffs claimed that the ship could have been discharged in six and a half days if craft or a berth had been available. They, therefore, claimed six days' demurrage at 50c. per registered ton per day, amounting to 2792*l.* 3*s.* 7*d.* On the 20th Sept. the master of the *Coahoma County* certified that this sum was payable by the receivers in respect of six days' demurrage. The defendants contended that they took the cargo immediately upon the cargo coming to hand, and that the delay was attributable to overstowing, replacing hatches over the part cargo of grain, and other causes.

Dunlop, K.C. and *G. P. Langton* for the plaintiffs.

W. Norman Raeburn, K.C. and *Pilcher* for the defendants.

Feb. 4.—Sir HENRY DUKE, P. read the following judgment :

This action is brought by the United States Shipping Board as owners of the steamship *Coahoma County*, to recover from the defendants, the Falmouth Docks and Engineering Company, 2792*l.*, which the plaintiffs allege to be due to them for demurrage on an assessment of demurrage by the ship's master pursuant to the terms of bills of lading, and, alternatively, for damages under three bills of lading issued by the plaintiffs' master and accepted by the defendants in respect of the carriage by sea of three consignments of timber and lumber from Mobile, U.S.A., to Falmouth.

The substantial questions in the case are whether the sum claimed is due and recoverable upon the certificate of the master of the *Coahoma County* as a conclusive assessment in pursuance of powers conferred on him by the bill of lading, and if the master's certificate is not conclusive against the defendants, whether upon the contract in the bill of lading a breach has been established in respect whereof damages at common law must be awarded by the court to the plaintiffs.

The defendants are proprietors of docks at Falmouth, and in July 1921, being in need of pitch pine timber for constructional works upon their property, they purchased from London merchants parcels consisting of forty-three pieces and 1126 pieces of pitch-pine timber, and 382 pieces of pitch-pine lumber. These parcels were shipped on the 30th July 1921, and the plaintiffs' vessel arrived at Falmouth on the 6th Sept. 1921. She had on board besides the consignments in question, timber cargo for London, and grain in bulk. Her discharge began in the afternoon of the 6th Sept. and was completed in the afternoon of the 20th Sept. The working days occupied were twelve and a half. Upon completion of the discharge, the master of the *Coahoma County* issued the certificate in question whereby he certified 2792*l*. to be due from the defendants in respect of six days' demurrage. He had previously on the same day notified the defendants by letter that he held them liable for demurrage on account of delays and slowness in discharging the cargo of his vessel.

The master's certificate, the validity of which is in question, purports to have been made in pursuance of clause 8 of the several bills of lading.

Mr. Dunlop claimed that, upon the true construction of the clause, the absence of facilities at Falmouth for discharge of the vessel by her owners in manner specified and the defendants' failure to receive with such facilities forthwith, involved the defendants in liability for such sums as should be certified by the master to be due to delay thereby caused. He contended also that the defendants must be held upon the true construction of the bill of lading to have warranted to the plaintiffs the availability at Falmouth of facilities such as are specified in clause 8, of such a character and extent as to enable the ship to make continuous discharge of cargo during such hours as the master at his discretion should think fit to require, and that the defendants had also come under an obligation to receive from the ship's tackle cargo so discharged at such a rate of discharge as the master in his discretion might direct and be able to make.

On behalf of the defendants it was contended that upon the true construction of the clause, the defendants had bound themselves to nothing more than an obligation to take delivery as fast as was reasonably practicable under the circumstances.

In order to apply the terms of the bill of lading to the transaction in question it is necessary to state certain facts. When the *Coahoma County* arrived at Falmouth on the 6th Sept. 1921, no deep water berth was available, and owing to the exceptional dimensions and in particular the exceptional lengths of the timber in the cargo, the use of lighters or other craft for the purpose of discharge was, save as to a small quantity of the goods, out of the question. No facilities were available by means whereof the master or ship's agent could land the timber or put the same into store, warehouse or craft, otherwise than as the same was in fact disposed of in course of the discharge of cargo as it took place between the 6th Sept. and the 20th Sept. Upon being notified of the ship's arrival the defendants named Garrack Roads in the harbour at Falmouth, about two miles from the shore, as a suitable place of discharge, and the master moored his vessel there and proceeded to discharge by delivery of the timber over the ship's side into the water, where it was received by the defendants' agents and formed into rafts and removed. This was on the 6th Sept. the only practicable mode of discharge of the Falmouth consignments. The fact was relied upon on behalf of the plaintiffs as conclusive evidence of the alleged breaches by the defendants of their obligations under the bill of lading.

The first question to be considered upon the construction of clause 8 is that of the effect of the first sentence therein: "The steamer shall be entitled to commence discharging immediately after arrival, without reference to the state of the weather either into lighters or other craft, or at the quay, or at more than one berth, and discharge continuously day and night, also on Sunday from all hatches simultaneously, without intermission, all at the discretion of the master, any custom of the port to the contrary notwithstanding." If the words "the steamer shall be entitled to commence discharging, &c., and discharge continuously, &c." impose obligations upon the receiver of cargo by implication, either of a warranty or otherwise, there has been a breach. In my opinion, however, this sentence in the clause must be held to confer a right, power, or liberty upon the carrier, but not to imply an undertaking on behalf of the consignee of the goods that facilities shall be available whereby such right, power, or liberty shall be made available to the carrier. The provisions in question would restrict the rights of the consignee upon the narrower of two alternative constructions, which I place upon them, and upon that construction, therefore, would not be inoperative. The wider construction contended for by the plaintiffs, if it can be arrived at at all, can only be arrived at by implication, and would import into the contract terms not merely oppressive as regards the consignee, but virtually impossible in a business sense to be carried out by him. It would not be in accordance with authority to import unreasonable terms into the bill of lading by implication. In the point of fact also, the master of the *Coahoma County* accepted the designated place of discharge as a proper place of discharge under the bill of lading. I hold that no breach of contract is made out under the conditions in the first sentence in clause 8.

The second sentence of clause 8 imposes a clear obligation upon the consignees to take the goods from the ship's tackle directly on their coming to hand. The liberty reserved to the master to enter and land the goods, &c., is immaterial in the events that have happened.

The one question to be determined with regard to the consignees' obligation under this part of the clause is one of fact—Did they receive the goods in manner agreed? No facilities were available for discharging into craft or on wharf without delay.

What is now to be done under clause 8 is to determine whether in point of fact the consignees failed to take their goods from the ship's tackle directly on their coming to hand, and whether demurrage at the specified rate is thereupon payable to the amount certified by the master. The question of fact goes to the root of the plaintiffs' alleged causes of action, whether demurrage or for damages. Mr. Dunlop contended that failure to receive under that part of the clause which I last mentioned must be found when it should appear that there were not the specified facilities, and that the goods were, at any rate, not taken from the ship's tackle at the rate specified, but for reasons I have indicated I am of opinion that the failure provided for is failure to take goods from the ship's tackle directly on their coming to hand.

There are facts in the case relevant to both the matters to be decided which would make the master's certificate oppressively erroneous if it be in fact conclusive. Three days of delay was caused by the exposed situation of the place of discharge. Some delay was caused by the battening down of the hatches to protect the part cargo of grain in bulk from damage by rain. Very serious delay was caused by the fact that the timber cargo for discharge at Falmouth was "overladen" by a considerable quantity of the timber cargo shipped for London. I accept the evidence of the defendants' witness Harold Wills as to the effect of these hindrances. There was delay also by the breakdown of a winch or winches.

The master allowed in his calculation of demurrage one and a half days for delay by "overloading," which was an inadequate allowance, and no allowance was made by the master for any of the other causes of delay.

Upon reference to the master's certificate, it appears that the delay of six working days in respect of which he assesses demurrage was attributed by him, as authorised assessor of demurrage under the bill of lading, to the situation of the place of actual discharge. What he states is this: "No berth alongside quay and no lighters or other craft were available, consequently I was obliged to anchor in mid-harbour and to discharge the cargo of timber into the sea. As a result continuous delay took place from the commencement until completion of discharge in consequence of the time occupied in lowering the timber into the water and holding it there until ship's tackle was released by the receivers. Moreover, on three days no effective progress in receiving timber from the ship was made on account of rough weather."

At the hearing the real cause of delay which was relied upon by the plaintiffs was the alleged failure of the defendants' men employed at the ship's side to receive the timber at the rate at which the ship was ready to discharge it. One of the plaintiffs' witnesses stated that a delay of about four minutes occurred in the unshackling of each log after it was put over the side. This is, I am sure, an unjustifiable statement. There was a strong conflict of evidence on this part of the case and the conclusion at which I have arrived is that neither the stevedores' gang who were employed on board the ship by the plaintiffs, nor the raftsmen who worked alongside for the defendants were able to handle the unusual lengths of timber as they would have done pieces of smaller dimensions, and that the discharge was therefore made at a slower rate than the normal.

There was no complaint during the discharge, and at the hearing it was not disputed that the raftsmen made the best dispatch in their power and were as good workmen as could have been obtained for the purpose. Such delay as occurred was mutual on the part of the stevedores' gang and the raftsmen and was unavoidable, and was of the kind alone which I have indicated.

I find that the goods were, in the business sense of the words, "taken from the ship's tackle by the consignee directly on their coming to hand in discharge of the ship."

The conclusions of law and findings of fact which I have stated dispose of the case. Had I found a breach by failure to take delivery as agreed I should have been unable to accept the master's certificate as a conclusive assessment of damages. His evidence shows that the delay he assessed was not the delay in respect of which he was empowered by the bill of lading to certify for demurrage. Moreover his figure of six days was arrived at by the application of an arbitrary and incorrect formula. Taking his normal rate of discharge as 300 pieces of timber per diem, he divided the number of pieces in the defendants' consignments by 300 and so determined that five days was the contract time for discharge. To the five days he added one and a half for time lost by "overloading" of the Falmouth cargo with London cargo. Six days out of twelve and a half remained, and for these he assessed demurrage. The certificate is bad on the face of it.

Had it been material to ascertain the apportionment of the time beyond five days spent in the discharge of timber at Falmouth, I should, so far as I can see, have found the delay by stormy weather to have been three working days, that caused by the mode of stowage of the London and Falmouth cargo two days, that caused by rain and the ship's management of the hatches for protection of grain cargo together with that caused by disablement of winches one day, and that attributable to slow handling caused by the character of the cargo and the circumstances of discharge, one and a half days.

Upon the findings I have stated the action fails.

Solicitors; for the plaintiffs, *Thomas Cooper and Co.*; for the defendants, *Deacon* and *Co.*

Jan. 31, *Feb.* 1, 2, 5, 6, *and* 13, 1924.
(Before Sir HENRY DUKE, P.)
THE TUBANTIA. (*a*)

Salvage—Submerged wreck—Vessel sunk and abandoned in the North Sea—Salvage operations subsequently commenced by a second set of salvors—Interference with operations of the first set of salvors—Possession—"Derelict"—Right of second salvors to carry on salvage operations—Trespass—Injunction—Damages.

The plaintiffs since 1922 *had been carrying on salvage operations on the wreck of a Dutch steamer lying in the North Sea. The steamer had been torpedoed and sunk in* 1916, *in the vicinity of the North Hinder light vessel, where she lay with her cargo in about twenty fathoms of water, on the bed of the sea, far outside any territorial waters. The plaintiffs worked, when tide and weather permitted, with divers and salvage apparatus, and had buoyed the wreck, entered at least one of the steamer's holds and made an artificial hole in her side, at a total expenditure of about* 40,000*l. More than one year after work had been begun by the plaintiffs the defendants, British subjects, appeared at the site of the wreck, and in July* 1923 *commenced independent salvage operations, sending down divers and otherwise interfering with the operations of the plaintiffs. The plaintiffs claimed an injunction restraining the defendants from interfering with their possession of the wreck, a declaration, and damages.*

Held, that the court had jurisdiction, since the Court of Admiralty had had jurisdiction in suits in respect of injurious acts done upon the high seas, and its jurisdiction had now passed to the Probate, Divorce, and Admiralty Division of the High Court. In the absence of any proof or presumption that the owners of the wreck or cargo had lost whatever rights they had originally enjoyed, the wreck and cargo were only derelict in the limited sense in which the expression is used in salvage actions, and the plaintiffs could assert over them the possession of salvors. Upon the facts, the plaintiffs, by buoying and marking the wreck, had established such possession, and in the circumstances they were entitled to an injunction restraining the defendants until further order from doing any acts at or near the wreck whereby they might be prevented from or hindered in carrying on salvage operations.

ACTION for damages for trespass and (or) for wrongful interference with the plaintiffs' salvage services on the wreck of the Dutch steamship *Tubantia* and her cargo.

The plaintiffs, Major Sippe and others, had, in April 1922, commenced salvage operations on the wreck of the *Tubantia*, which, since she was torpedoed sometime in 1916, had been lying on the bed of the North Sea, in some twenty fathoms of water, in the vicinity of the North Hinder light vessel. The plaintiffs had fitted out an expedition with salvage steamers and tugs, divers, and salvage experts. Throughout the summer and autumn of 1922 the defendants continued their operations, and in November they buoyed the wreck and left her until April 1923, when it was possible for them to return and continue their operations.

The defendants were Vincent Grech and Count Zanardi Landi, who were British subjects, and one Cecil Finlay Reed (who was added as a defendant by leave during the hearing, and who appeared to be a partner with the other two defendants in a partnership known as the British Semper Paratus Salvage Company) and the Ayeready Salvage and Towage Company. The plaintiffs did not pursue their claim against the last named defendants.

In July 1923 the defendants Grech, Landi, and Reed approached the wreck of the *Tubantia* in the salvage steamer *Semper Paratus*, which was registered as a British ship, and commenced independent salvage operations with dragging gear, divers, and other apparatus. Though requested to leave, the defendants refused to do so, and continued to drag, send down divers, and conduct operations, which the plaintiffs alleged interfered with their operations and endangered their divers.

The plaintiffs, thereupon, commenced the present action in which they claimed a declaration that they were entitled to the possession of the *Tubantia* and her cargo, an injunction to restrain the defendants from proceeding to, or remaining at, or interfering with, the *Tubantia* and (or) her cargo, damages and a reference to the registrar and merchants to assess the amount thereof. In July 1923 the plaintiffs obtained an *ex parte* injunction, but on the 31st July 1923, Hill, J. refused to continue it until the trial upon the defendants undertaking to bring into court anything recovered in the salvage operations, upon the ground that it did not then appear that the plaintiffs had such possession of the remains of the *Tubantia* or any part of her, or her cargo, as to confer upon them such legal rights as they were entitled to have protected by injunction (reported 156 L. T. Jour. 111). The Court of Appeal refused to grant the injunction upon the defendants by their counsel giving certain undertakings.

Sir *John Simon*, K.C., *Stranger*, and *C. A. Hopper* for the plaintiffs.—The court has jurisdiction because the wreck of the *Tubantia* and her cargo were lagan, and the Admiralty Court had jurisdiction over lagan: see Blackstone's Commentaries III., 106, and Comyn's Digest, Tit. "Admiralty" (see *Constable's* case; (1601) 5 Rep. 106a) In any event the Admiralty Court had jurisdiction over maritime wrongs committed on the high seas:

The Ruckers, 1801, 4 C. Rob. 73;
The Hercules, 1819, 2 Dods., 353, 368;
The Zeta, 7 Asp. Mar. Law Cas. 369; 69 L. T. Rep. 630; (1893) A. C. 468;

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

The court has clearly jurisdiction here as the defendants are British subjects and the *Semper Paratus* is a vessel of British registry. The plaintiffs by buoying and marking the wreck, &c., have obtained possession of it. They have obtained such possession as was possible in the circumstances. The *Tubantia* was *res derelicta*, and the first person who obtains possession is the owner. Reference was made to the following authorities :

Pollock and Wright : Posssession in the Common Law, pp. 28 seg. 124 ;
Lord Advocate v. *Young*, 1887, 12 App. Cas. 544, 556 ;
Brum v. *Malett*, 1848, 5 C. B. 599 ;
White v. *Crisp*, 1854, 10 Ex. 312, 322 ;
The Crystal, 7 Asp. Mar. Law Cas. 513 ; 71 L. T. Rep. 346 ; (1894) A. C. 508 ;
Banaclough v. *Brown*, 8 Asp. Mar. Law Cas. 290 : 76 L. T. Rep. 797 ; (1897) A. C. 615 ;
Bridges v. *Hawksworth*, 1851, 21 L. J. Q. B. 75 ;
The Winkfield, 9 Asp. Mar. Law Cas. 259 ; 85 L. T. Rep. 668 ; (1902) P. 42 ;
Digest. XLI. (2) (7) ;
Hogarth v. *Jackson*, 1827, Mod. & Mal. 58 ;
Skinner v. *Chapman*, 1827, Mod. & Mal. 59n ;
Young v. *Hichens*, 1844, 6 Q. B. 606 ;
Keeble v. *Hickeringill*, 1706 ; 11 East, 574n ;
Carrington v. *Taylor*, 1809, 11 East 571 ;
Ibbotson v. *Peat*, 1865, 12 L. T. Rep. 313; 3 H. & C. 644 ;
Jones v. *Chapman*, 1847, 2 Ex. 803

As to the attitude which the court takes towards second salvors unjustifiably attempting operations along with original salvors, see *The Charlotta* (3 Hagg. Adm. 361), *The Eugene* (3 Hagg. Adm. 156).

Dunlop, K.C. and *Speirs* for the defendant Count Landi.—If the wreck and her cargo is treasure trove found upon the high seas the plaintiffs cannot appropriate it to their use, for it belongs to the Crown :

Rex v. *Property Derelict*, 1 Hagg. Adm. 383 ;
The Aquila, 1 C. Rob. 37 ;
H.M.S. Thetis, 3. Hagg. Adm. 228.

The plaintiffs are only salvors, for the owners of the wreck and cargo are still entitled to their property. There is no authority that a salvor who has possession (assuming that the plaintiffs have possession) of a wreck on the high seas can maintain trespass against a second salvor : (see Dr. Phillimore in *The Clarissa*, Swa. 129, at p. 132). The absence of authority raises a presumption against such a proposition. The essence of salvage is the existence of danger. Danger constitutes an invitation to all the world to render a service. Salvors are in this sense licensees, and a licensee cannot maintain an action of trespass at common law :

Duke of Newcastle v. *Clark*, 8 Taunt. 602.
Pollock and Wright on Possession in Common Law, pp. 124, 125.

The second salvor superseding the first (even wrongfully) commits no trespass, because the rights of both are based upon an implied request by the owner :

Kennedy on Civil Salvage, pp. 16-19 and note, at p. 17 ;
Newman v. *Walters*, 3, Bos. & P. 612 ;
The Elton, 7 Asp. Mar. Law Cas. 66 ; 65 L. T. Rep. 232 ; (1891) P. 265 ;

The plaintiffs must therefore rely upon actual physical possession, since they cannot rely upon legal possession. The facts shew that they have no physical possession. The declaration prayed should not be granted, because the *Tubantia* is a foreign vessel outside the jurisdiction of the courts, and in dealing with foreign property a declaration should not be made : (see *British South Africa Company* v. *Compantua de Moçambique*, 69 L. T. Rep. 604 ; (1893) B. C. 602). The injunction should not be granted, because it may prejudice the rights of third parties who are not represented, and because the court has no means of enforcing the injunction and cannot supervise the place where the injunction is to be enforced. Moreover, the injunction, if granted, will remain in force whether the plaintiffs continue their operations or not, or if they conduct them intermittently.

Alfred Bucknill for the defendant Vincent Grech.—Assuming that there was wrongdoing it is not suggested that this defendant was personally a wrongdoer. The only suggestion against him is that the wrongful acts were done in the course of the partnership business. But no work was being done when the partnership deed was executed, and this defendant is not therefore liable : (see Partnership Act 1890, s. 10, and Lindley on Partnership, 8th edit., p. 158). When two persons agree to salve a cargo, wrongful interference with other earlier salvors cannot be said to have been done in the course of the partnership business. This defendant had no control over the defendant Landi, and is not liable for his acts : cf. *The Druid* (1 Wm. Rob. 391).

Sir *John Simon*, K.C. replied, and referred to Kennedy on Civil Salvage, 2nd. edit., p. 9 : *Grossman* v. *West* (6 Asp. Mar. Law Cas. 233 ; 1887, 58 L. T. Rep 122 ; 13 App. Cas. 160 : and *The Blenden Hall* (1 Dod. 414).

Cur. adv. vult.

Feb. 13.—Sir HENRY DUKE, P. read the following judgment :

The plaintiffs in this action—a British subject and four citizens of the French Republic—bring their action in respect of alleged wrongful acts of the defendants upon the high seas. The place in question is a point in the North Sea some fifty miles from our shores, and from twenty to twenty-seven miles from the coasts of France, Belgium, and Holland, where, at a depth of nineteen or twenty fathoms, lies so much as is now in being of the hull and cargo

of a Dutch steamer, the *Tubantia*, which was a vessel of 541ft. long and of 15,000 tons register. Alleged rights over the *Tubantia* and her cargo are the real subject matter of the controversy. The vessel was, as the parties say, sunk at the place in question in Jan. 1916, by a German warship. The plaintiffs assert possessory rights over the wreck and its contents and complain of trespasses thereon, and also of wrongful interference by the defendants and their servants with the lawful business of the plaintiffs. They claim a declaration to establish the possessory rights which they allege, an injunction to restrain interference by the defendants with their possession of or operations upon the *Tubantia*, and damages to be assessed by the registrar and merchants according to the practice of this division.

The defendants against whom the action has proceeded are Cecil Finlay Reed, Vincent Grech and C. Zanardi Landi, who constituted, as appears, the partnership called in the pleadings the Semper Paratus Salvage Company, and under that name added to the defendants in the cause. The steamship *Semper Paratus* was used by the defendants, as is alleged, in doing the acts complained of by the plaintiffs. She is of British register. The defendants deny the alleged possessory rights of the plaintiffs, and the alleged trespasses and molestations. The defendant Landi raises alternative defences which treat the plaintiffs as would-be salvors of the *Tubantia* who were unable to effect their salvage undertaking, and assert that the defendants were ready and willing to co-operate with the plaintiffs as salvors, and to bring into court any salved property. There was evidence at the hearing of a serious belief among the parties that the wreck of the *Tubantia* contains treasure of large value. A salvage agreement into which the three defendants entered for the purposes of their joint undertaking specifies a sum in gold of the German pre-war currency worth not less than two million pounds sterling.

The particulars I have stated show the controversy between the parties to be of an unusual kind, and the plaintiffs are invoking in respect of it powers of the court derived from the Judicature Acts which rarely come in question here. On the defendants' part one short answer which was made to the claims of the plaintiffs was that they are without precedent. The absence of specific authority no doubt necessitates caution in the consideration of the case. What is really to be decided, however, is whether in respect of the *Tubantia* and her cargo any rights of the plaintiffs have been infringed by the defendants, and, if so, what are the appropriate remedies. To some subjects of great juristic interest which were debated I shall refer only in passing. That the court has jurisdiction over the matters in question I cannot doubt. A suit in respect of injurious acts done upon the high seas was within the undisputed jurisdiction of the Court of Admiralty as appears upon reference to Comyn's Digest (Comyn's Digest Tit. "Admiralty" (E. 7), and to Blackstone's Commentaries (Blackstone's Commentaries III., 106), and this division now has the jurisdiction and powers defined, and in some cases conferred by the Judicature Acts. The property in a legal sense which is the subject of the activities of the parties is not for adjudication at this time. Whether the *Tubantia* and her cargo are things derelict in the sense in which the term *res derelicta* was used in Roman law I have not to decide; nor need I come to any conclusion as to the limits which international right may impose upon any claim under the prerogative of the British Crown to *bona vacantia* lying on the ocean floor in the North Sea. Sir John Nicholl explains in *The Thetis* (3 Hagg. Adm. 228) how property may be derelict on the seas without being a droit of Admiralty. The derelict in question there was treasure in silver bullion of the amount of 157,000*l.* recovered from deep water on the coast of South America, and as soon as it was proceeded against in the Admiralty on behalf of the Crown the owners appeared, and their claim was admitted, but subject to the rights of the salvors, who had reduced it into their possession under orders of British naval authorities. So far as the matter may be thought material I need only say there is here no proof or presumption sufficient to convince me that the owners of the wreck or the cargo in question have lost whatever rights they originally had. Without intention to abandon they would not have done so under Roman law (Digest Bk. XLI., 7, 1 (2), XLVII., 2, 43, ss. 10, 11; Institutes, II., 1, ss. 47, 48). Nor, so far as I am aware, would the ancient rule "Res nullius fit occupantis" be held to give property in the things in the courts of any of the States bordering on the North Sea. Some lengths of silk were produced before me. If they had been of value, and if property came in question, I must have seen that the Procurator-General had notice of the matter, and that lawful claimants were given an opportunity to appear. The things here in question are, as I find, derelict in the limited sense in which that term is constantly used here in cases of salvage—what Lord Stowell called "the legal sense" (*The Aquilla*, 1 C. Rob. 37, 40). They are not in the possession or control of any owner or person acting on behalf of an owner. The possession of a salvor in a ship or cargo, or wreck derelict in this sense is, however, as well known to the law as any other right of a salvor. It has often been asserted, and, indeed, vindicated in the Admiralty jurisdiction. Plaintiffs are, therefore, entitled to a decision as to whether they had in July, 1923, as they assert they had, possession by their agents of the wreck of the *Tubantia* and the cargo therein.

The facts on which the plaintiffs rely in support of their claim that they had possession in July 1923 are fully set forth in the statement of claim, and, in all material particulars, were proved at the hearing. Their operations began in April 1922, and for a long time were

discontinuous. Their controversy with the defendants arose in July 1923. They then had, and from that time to the hearing, they have kept craft and divers at the place in question. What had been done, and what was going on in July 1923, are matters in dispute, and must be stated in some detail. The plaintiffs, by employing during two seasons various vessels suitable for salvage work with competent crews, ascertained and marked out the area occupied by the *Tubantia*, and by means of buoys properly moored they were able to, and did keep in position, at and above the wreck, craft from which work could be carried on upon the hull, and in the holds. They established in July 1923, and were using, various buoyed moorings by which they had a direct access to the deck at various points. They cut out a hole in the ship's side fourteen feet by ten, which gave them access to hold No. 4 in which a great bulk of cargo appears to have been stowed, and by means of tackle fixed at the side of the hold their divers had a way of approach to and entry upon that hold. The various appliances to which I have referred were of the nature of fixed plant on and around the *Tubantia*, such that when the weather, and the state of the tide permitted, divers could by its use work in and upon the wreck and among the cargo. Two pairs of divers were so at work during May, June, and July 1923. They explored the wreck, removed obstructions, opened the approaches to and worked upon the cargo, and brought up parts of the structure and of the cargo. The possible working hours in each day, however, did not exceed two spells of one and three-quarter hours at a time, of which four minutes at a time were spent in the holds. The number of working days in 1923 seems not to have exceeded twenty-five, and the working plant was liable to be carried away or destroyed by the sea. Some of it sometimes was. The appliances I have mentioned, and the frequently interrupted access to the wreck which the plaintiffs had in the summer of 1922, are the evidences of possession at the dates in question in this case, on which the plaintiffs rely.

On the question whether in the state of facts I have described the plaintiffs could be found to have had possession of the *Tubantia* when the defendants appeared on the scene, counsel on both sides cited largely from Sir Frederick Pollock's well-known treatise on possession (Pollock and Wright, Possession in the Common Law). The questions suggested in this way I have sought to apply. They involve enquiries such as these : What are the kinds of physical control and use of which the things in question were practically capable ? Could physical control be applied to the res as a whole ? Was there a complete taking ? Had the plaintiffs' occupation sufficient for practical purposes to exclude strangers from interfering with the property ? Was there the *animus possidendi* ? I have also taken this to be a true proposition in English law—a thing taken by a person of his own motion and for himself and subject in his hands, or under his control, to the uses of which it is capable, is in that person's possession. *Omnia ut dominum gessesse* is, Sir Frederick Pollock says a good working synonym for *in possessione esse*, and I cannot doubt that if the owners of the *Tubantia* in 1916 had put themselves, in 1923, in the position in which the plaintiffs put themselves they would be held to have been in actual possession. It would not be safe, though, to rely on this, for there is a presumption in law which aids the operative effect of the possessery acts of an owner. To illustrate my meaning, I am told that Trinity House commonly holds possession of the wreck of a ship by mooring upon it a single buoy. I had the advantage of the assistance of the Elder Brethren at the hearing, and I have consulted them as to the practical aspects of the matters in question. They advise me that by reason of the great depth at which the wreck lies the difficulties involved in the work of the plaintiffs are formidable, but that, if I accept the plaintiffs' evidence, they were in effective control of the wreck as a whole ; that they were in a position to prevent any useful work by newcomers ; that while the plaintiffs' people remained in the position they claimed to have taken up no newcomer could, without violence, have exercised upon the wreck the kind of control the plaintiffs had, or could have made any valuable use of the wreck. They advise me that what the plaintiffs did upon the wreck was what a prudent owner would probably have done assuming he did not know how the holds of the *Tubantia* were stowed and desired to inform himself fully as to the situation on the wreck before employing larger craft or more powerful appliances than the plaintiffs were employing. These opinions entirely commend themselves to my judgment and I have come to certain conclusions which I will now state.

There was *animus possidendi* in the plaintiffs. There was the use and occupation of which the subject matter was capable. There was power to exclude strangers from interfering if they did not use unlawful force. The plaintiffs did with the wreck what a purchaser could prudently have done. Unwieldy as the wreck was, they were dealing with it as a whole. The fact on the other side, which is outstanding, is the difficulty of possessing things which lie in very deep water and can only be entered upon by workmen in fine weather and for short periods of time. Must it be said that because the work of the plainiffs' divers was that of only one pair at a time, in short spells with long interruptions, and because access to the holds of the *Tubantia* was often prevented altogether by stress of weather, therefore the vessel and her cargo were incapable of possession ? To my mind this would be an unfortunate conclusion, very discouraging to salvage enterprise at a time when salvage, by means of bold and costly work, is of great public importance. I do not feel bound to come to it. I hold that the plaintiffs had, in July 1923,

the possession of the *Tubantia* and her cargo, which they allege.

Did the defendants then trepass upon the possession of the plaintiffs ? The acts which are complained of occurred during some eight days in July. They are described in very moderate terms in the statement of claim. The defendants came upon the scene with their vessel the *Semper Paratus*, a powerful and well-equipped ship, together with a motor launch equipped for dredging. They came to find the *Tubantia* and take possession. The defendant Landi, who was in charge, recognised when he arrived that the defendants had been forestalled, but deemed himself entitled to thrust in upon the plaintiffs, and if not to prevent further work by them, to establish himself with them in concurrent occupation. Seeing how the plaintiffs had laid out the ground, and the method of their work, the defendants' party dredged with loaded lines and grapnels to find the hull and the plaintiffs' moorings. They searched with dragging appliances among and about the bouys and moorings and working places of the plaintiffs, and carried on the process so thoroughly that the experienced divers whom the plaintiffs employed became justifiably alarmed and altered their mode of working after they descended. Instead of attaching their line and pipe at the entrance to the ship's hold, as they had previously done, and working together upon the cargo in the hold, one of them attended upon the line and pipe, while the other worked in the hold.

I say nothing in detail of the action of the defendants' representatives in mooring the *Semper Paratus* across the tide ahead of the wreck in a position which threatened the safety of the plaintiffs' ship and people. Besides doing the acts I have mentioned the defendants fouled the plaintiffs' moorings ; they took a mooring upon the wreck, they sent down a diver who entered upon the wreck. These acts were done with the intention of hampering the plaintiffs and depriving them of any advantage they had gained by their work upon and possession of the wreck, and of securing possession for the defendants. Some of the things complained of were trespasses to goods ; all were intentional interferences with and molestation of the plaintiffs' workmen in their work.

The contention raised by the defendant Landi that in the circumstances of the plaintiffs' salvage undertaking the defendants were entitled, as would-be salvors, to do what was in fact done under this defendant's direction, raises a question to which I ought to refer. It is based upon assertions that the plaintiffs were not in possession and they either were not able to effect salvage, or would be better able to effect it with the defendants' help. Mr. Dunlop contended for the right on the part of any number of persons who may desire to join in a salvage undertaking which is in progress to participate upon even terms with all other salvors, and salvage is no doubt an undertaking in which many parties often concur. That the plaintiffs were in possession is, however, the governing factor in the present case. The principle of law which applies under such circumstances is that stated in the judgment of Lord Stowell in *The Blenden Hall* (1 Dod. 414, at 416) and also the judgment of the Privy Council in *Cossman* v. *West* (6 Asp. Mar. Law Cas. 233 ; 58 L. T. 122 ; 13 App. Cas. 160). Lord Stowell in *The Blenden Hall* laid down that those who have obtained possession of a ship as salvors have the legal interest which cannot be divested before adjudication takes place in a court of competent authority.

The Privy Council in *Cossman* v. *West* (*sup.*) held that : " In the case of a derelict the salvors who take possession have not only a maritime lien on the ship for salvage services, but they have the entire and absolute possession and control of the vessel, and no one can interfere with them except in the case of manifest incompetence." There was no manifest incompetence on the part of the plaintiffs and their servants. The Elder Brethren advise me that the work done appears to them to have been done efficiently and well, well directed, and so planned as to secure the best practicable results in salvage. The special defence of the defendant Landi fails, and I must add that if the plaintiffs had only begun the salvage undertaking and had had no possession, and if the salvors might lawfully have joined in the enterprise, what was in fact done by the defendants' representatives would still seem to me unjustifiable.

What follows from the findings I have stated is that the defendants personally, or by their servants or agents, have trespassed upon the plaintiffs' possession and wilfully and wrongfully interrupted and molested them in their lawful undertaking. Molestation such as that of which the plaintiffs complain is, in my opinion, actionable where it causes damage. The decisions in cases like *Hogarth* v. *Jackson* (Moo. & Mal. 58) and *Young* v. *Hichens* (6 Q. B. 606), on the one hand, and *Keble* v. *Hickeringill* (11 East. 574*n*) and *Carrington* v. *Taylor* (11 East. 571), on the other, were cited in the argument upon this part of the case. It is worth while, perhaps, to refer also to dicta of the learned judges in *Young* v. *Hichens* and of other judges in *Skinner* v. *Chapman* (Moo. & Mal. 59*n*) as to the question whether in a properly framed action damages may be recoverable for wilful prevention of the completion of an enterprise capable of producing profit. I know no reason for supposing it to be other than wrongful to obstruct a salvor in the course of his enterprise so as to prevent his carrying it on even if the obstruction is practised by one who is entitled himself to be a salvor.

Upon leave granted personally in the course of the hearing the plaintiffs added words to their statement of claim which somewhat elaborated their allegation in respect of molestation. Whereupon amended defences were delivered, and on behalf of one defendant it was then contended, if wrongs were committed,

they were personal torts of the defendant Landi, in respect of which no liability could attach to his partners. I am inclined to think the amendment does not introduce any new cause of action, but this is not material. The whole matter had been raised and tried out before I suggested it. As to the acts in question, they are, as I find, done in the course of the enterprise of which the defendants entrusted the management to Count Landi to the utmost of his power, and in assertion of the supposed right of the defendants, and so, for the purposes of their enterprise, the defendants therefore are collectively liable to the plaintiffs.

As to the relief claimed by the plaintiffs I have felt some difficulty. A possessory right is of a limited, and perhaps transitory, kind, and I am not minded to make a declaration which might be misconstrued as evidence of some other than a possessory right. An injunction is properly claimed when there is the threat or danger of repetition of the wrongs complained of, especially when they affect material interests, though it is to be strictly limited so as not to enlarge the rights of the one party or to infringe the rights of the other. The defendants' interference with the plaintiffs, however, was high-handed and deliberate, and, unless restrained, they may repeat it. I propose, therefore, to restrain the defendants, their servants or agents, until further order of the court from doing any acts at or near the wreck of the *Tubantia*, whereby the plaintiffs may be prevented from or hindered in carrying on salvage operations thereon. My judgment to this effect must be with costs against the defendants. There is a claim for damages and some evidence of damage in loss of time of divers. If the plaintiffs desire a reference they must have it, reserving the question of costs.

Solicitors for the plaintiffs, *J. D. Langton* and *Passmore*.

Solicitors for the defendant Count Landi, *William A. Crump* and *Son*.

Solicitors for the defendant Vincent Grech, *Botterell* and *Roche*.

House of Lords.

Feb. 19, 21, 22, *and March* 18, 1924.

(Before Lords Cave, Finlay, Dunedin, Sumner, and Carson.)

Elder Dempster and Co. Limited and others *v.* Paterson Zochonis and Co. Limited. (*a*)

On appeal from the Court of Appeal in England.

Bill of lading—Damage to cargo—Bad stowage or unseaworthiness—Unsuitability of ship for particular cargo—Exemptions in bill of lading—Liability of shipowner.

A steamer had been chartered for the purpose of carrying palm oil and other produce from West Africa to the United Kingdom. She had no 'tween decks or any appliance for laying a temporary 'tween deck. Her hold was 24ft. deep. The butts and casks containing the palm oil were stowed at the bottom of the hold, and the space above them was filled with bags of kernels which were laid without any effective protection upon the butts or casks, with the result that many of the butts or casks were crushed and much of the oil was lost. The bills of lading exempted the charterers, inter alia, *from liability for loss, injury, or damage arising from a leakage or breakage, or for damage arising from other goods by stowage or for loss or damage arising from collision, straining, or any other peril of the sea, "whether any perils, causes or things, in this clause mentioned, are due to . . . the wrongful act, omission or error in judgment or negligence of the company's pilot, master, officer, engineer, crew, stevedore, or any person whomsoever in the service of the company . . . or not . . . and whether due to or arising directly or indirectly from unseaworthiness of the ship . . . provided in case of any loss, injury or damage arising from or due to unseaworthiness of the ship at the beginning of the voyage all reasonable means shall have been taken to provide against such unseaworthiness. The company may entrust to experienced or qualified officers . . . the duty of providing against unseaworthiness, and shall then be deemed to have fulfilled its obligation hereunder. This clause shall be construed as in addition to and not in derogation of or in substitution for any statutory exemption or provision in favour of the company."*

In an action by the owners of the goods against the charterers and the owners of the ship,

Held (Lord Finlay dissenting), (1) that the damage complained of was due, not to unseaworthiness, but to improper stowage; and (2) that as the shipowners took the goods on behalf of and as agents for the charterers, they were entitled to the protection afforded by the bill of lading exempting them from liability for damage arising from stowage.

Decision of the Court of Appeal (ante, p. 68; 128 *L. T. Rep.* 577; (1923) 1 *K. B.* 420) *reversed.*

Appeal by the defendants from the decision of the Court of Appeal (Bankes, L.J. and Eve, J.; Scrutton, L.J. dissenting, reported *ante*, p. 68; 128 L. T. Rep. 577; (1923) 1 K. B. 420) affirming the judgment of Rowlatt, J. in an action tried by him without a jury.

The plaintiffs' claim was for damages to a quantity of palm oil in casks and butts while being conveyed on the steamship *Grelwen* from ports on the west coast of Africa to Hull. The total number of casks and butts shipped was 437 of which 299 casks were shipped at Sherbro, in West Africa, and 138 butts at Conakry, in French Guinea. On arrival in Hull it was found in many instances that the casks had

(*a*) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

been crushed or flattened by the weight which had been placed upon them and a large quantity of oil had escaped into the holds and bilges of the vessel. The goods were carried under bills of lading issued by Elder Dempster and Co. Limited, the African Steamship Company, and the British and African Steam Navigation Company Limited, all of Liverpool, of whom Elder Dempster and Co. were the time charterers of the vessel.

The plaintiffs, who were the indorsees of the bills of lading of the goods, claimed damages from the Griffith Lewis Steam Navigation Company as owners of the vessel and from the other defendants as the persons liable upon the bills of lading.

The Court of Appeal (Bankes, L.J. and Eve, J.; Scrutton, L.J. dissenting) held, (1) that the ship was unseaworthy inasmuch as she was wanting in the necessary equipment to carry the plaintiffs' oil; and (2) that the charterers were not exempted from liability for breach of their implied warranty that the vessel was seaworthy when she started; that they and the owners of of the ship were liable for the loss.

The defendants appealed.

The facts, which are sufficiently summarised above, appear fully from the judgments.

R. A. Wright, K.C. and *Pritt* for Elder Dempster and Co., the charterers.

Neilson, K.C. and *Clement Davies* for the Griffith Lewis Steam Navigation Company, the owners.

Jowitt, K.C. and *Le Quesne* for the respondents.

The following cases were cited:

Bank of Australasia v. *Clan Line Steamers Limited*, 13 Asp. Mar. Law Cas. 99; 113 L. T. Rep. 261; (1916) 1 K. B. 39;
Morris v. *Oceanic Steam Navigation Company*, 16 Times L. Rep. 533;
Queensland National Bank Limited v. *The Peninsular and Oriental Steam Navigation Company*, 8 Asp. Mar. Law Cas. 338; 78 L. T. Rep. 67; (1898) 1 Q. B. 567;
Stanton v. *Richardson*, 3 Asp. Mar. Law Cas. 23; 33 L. T. Rep. 193;
Bond, Connolly, and Co. and Woodall and Co. v. *Federal Steam Navigation Company*, 21 Times L. Rep. 438; 22 Times L. Rep. 685;
Foulkes v. *The Metropolitan District Railway Company*, 42 L. T. Rep. 345; 5 C. P. Div. 157;
Kopitoff v. *Wilson*, 3 Asp. Mar. Law Cas. 163; 34 L. T. Rep. 677; 1 Q. B. Div. 377;
Hogarth and Co. v. *Walker*, 82 L. T. Rep. 744; (1900) 2 Q. B. 283;
The Thorsa, 13 Asp. Mar. Law Cas. 592; 116 L. T. Rep. 300; (1916) P. 257;
Tattersall v. *National Steamship Company Limited*, 50 L. T. Rep. 299; 12 Q. B. Div. 297;
Ingram and Royle Limited v. *Services Maritimes du Tréport Limited*, 12 Asp. Mar. Law Cas. 295; 108 L. T. Rep. 304; (1913) 1 K. B. 538;
Hayn, Roman, and Co. v. *Culliford and Clark*, 40 L. T. Rep. 536; 4 C. P. Div. 182;
Wiener and Co. v. *Wilsons' and Furness-Leyland Line Limited*, 11 Asp. Mar. Law Cas. 413; 103 L. T. Rep. 168;
Upperton and Wife v. *Union Castle Mail Steamship Company Limited*, 9 Asp. Mar. Law Cas. 475; 89 L. T. Rep. 289;
The Okehampton, 12 Asp. Mar. Law Cas. 428; 110 L. T. Rep. 130; (1913) P. 173;
The Termagant (cargo owners) v. *Page, Son, and East (Limited)*, 19 Com. Cas. 239;
The owners of cargo on board the steamship Maori King v. *Hughes and another*, 8 Asp. Mar. Law Cas. 68; 73 L. T. Rep. 141; (1895) 2 Q. B. 550;
Ciampa v. *British India Steam Navigation Company Limited*, (1915) 2 K. B. 774;
Wade v. *Cockerline*, 10 Com. Cas. 115;
Kruger and Co. v. *Moel Tryfan Ship Company*, 10 Asp. Mar. Law Cas. 465; 97 L. T. Rep. 143; (1907) A. C. 272;
Lyon v. *Mells*, 5 East 428;
The Europa; Tolme Runge v. *Owners of the Europa*, 11 Asp. Mar. Law Cas. 19; 98 L. T. Rep. 246; (1908) P. 84;
Gilroy v. *Price*, 7 Asp. Mar. Law Cas. 314; 68 L. T. Rep. 302; (1893) A. C. 56;
Steel v. *State Line Steamship Company*, 3 Asp. Mar. Law Cas. 516; 37 L. T. Rep. 333; 3 App Cas. 72;
Calcutta Steamship Company Limited v. *Andrew Weir and Co.*, 11 Asp. Mar. Law Cas. 395; 102 L. T. Rep. 428; (1910) 1 K. B. 759;
Kish and another v. *Taylor, Sons, and Co.*, 12 Asp. Mar. Law Cas. 217; 106 L. T. Rep. 900; (1912) A. C. 604;
Marshall v. *York, Newcastle, and Berwick Railway Company*, 11 C. B. 655;
McFadden Brothers and Co. v. *Blue Star Line Limited*, 93 L. T. Rep. 52; (1905) 1 K. B. 697;
Cohn v. *Davidson*, 36 L. T. Rep. 244; 2 Q. B. Div. 455;
Hedley v. *The Pinkney and Sons Steamship Company Limited*, 66 L. T. Rep. 71; (1894) A. C. 222;
Martin v. *The Great Indian Peninsular Railway Company*, 17 L. T. Rep. 349; L. Rep. 3 Ex. 9;
Meux v. *The Great Eastern Railway Company*, 73 L. T. Rep. 247; (1895) 2 Q. B. 387;
Abram Lyle and Sons v. *Owners of steamship Schwan*, 101 L. T. Rep. 289; (1909) A. C. 450;
Redhead v. *The Midland Railway Company*, 20 L. T. Rep. 628; L. Rep. 4 Q. B. 379;
Delaurier v. *Wyllie*, 17 R. 167;

Atlantic Shipping and Trading Company Limited v. *Louis Dreyfus and Co.*, (First Appeal), 127 L. T. Rep. 411 ; (1922) 2 A. C. 250 ;

Bristol and Exeter Railway v. *Collins*, 7 H. L. Cas. 194.

The House took time for consideration.

Lord Cave.—The appellants, Elder Dempster and Co. Limited, who are managers for the appellants, the African Steam Ship Company and the British and African Steam Navigation Company Limited, run to the West African ports a line of cargo steamers which carry West African produce. These vessels have their holds fitted with 'tween decks, so that goods stored in the lower part of the hold may be relieved from the weight of those stored in the upper part. The appellants, Elder Dempster and Co., requiring an additional vessel for their West African trade, chartered from the appellants the Griffiths Lewis Steam Navigation Company Limited (whom I will refer to as the owners), the steamship *Grelwen*, a ship of the *Isherwood* type, containing deep holds but no 'tween decks. The *Grelwen* proceeded to the Sherbro River where she loaded from the respondents, Paterson Zochonis and Co. Limited, 297 casks or butts of palm oil, which were stowed in two or three tiers at the bottom of holds 2, 3, and 4. She also loaded there from the respondents and other shippers about 51,800 bags of palm kernels, which were stowed partly over the casks of palm oil in holds 2 and 4 (thus completely filling those holds) and partly in other parts of the ship. The vessel then proceeded to the port of Konakry, where she loaded from the respondents a further 147 butts of palm oil which were stowed at the bottom of No. 3 hold, and also loaded from the respondents and others about 11,400 more bags of palm kernels, which were stowed partly over the palm oil in No. 3 hold (thus filling that hold) and partly elsewhere. She also loaded some piassava and other miscellaneous produce which was stowed in the space between the main and shelter decks.

When the vessel arrived at Hull, which was her destination, it was found that the casks and butts of palm oil in holds 2, 3, and 4 had been crushed by the palm kernels stored above them, which were very heavy—it was stated in evidence that each cask had to carry sixty-four bags of palm kernels or nearly six tons in weight—and the greater part of the oil was lost or damaged. The casks must have begun to give way immediately after the palm kernels were stowed above them ; for the log shows that before the vessel left the Sherbro River she had 3ft. of palm oil in the bilge well of No. 2 hold, and that before she left Konakry the same thing had happened in hold No. 3 ; but it is possible that the leakage continued after the vessel left port and was intensified by the rolling of the ship.

The respondents accordingly commenced this action against the appellants, claiming damages for breach of the contract entered into by the bills of lading under which the palm oil was shipped, or alternatively for negligence or breach of duty. The defendants at the trial attempted to prove that the casks and butts were frail or leaky ; but this attempt failed, and it is not now denied that the damage was caused by the altogether unreasonable and excessive weight placed upon the casks. This being so, the contest resolved itself into the question whether the damage was due to bad stowage, or to the fact that the vessel was structurally unfit or unseaworthy for the carriage of the palm oil by reason of the depth of her holds and the absence of 'tween decks. It was not denied that if the damage was due to bad stowage the charterers are protected against liability by the conditions contained in the bills of lading ; but if it was due to unseaworthiness, then it was contended (and I think rightly) that the charterers were not protected by any of the conditions of the bills of lading and were liable to make good the damage.

The action was tried by Rowlatt, J., who held that, while the ship was well found for the purpose of traversing the sea, she was " not a ship, in the way she was prepared for this voyage, proper to carry these casks of palm oil " ; and he added : " This was a ship which was not a 'tween deck ship. It had a deep hold of a depth of 25ft., and you cannot safely get in at the bottom of that hold casks of palm oil with any sort of a cargo of dead weight or approaching dead weight of gravity on the top of it, and therefore it is a hold which you cannot put those casks in at the bottom, which is the place to put them. It could have been made proper for the stowage of such a cargo by the erection of what has been called a temporary 'tween deck or a platform, by the erection of something (to use perfectly plain and popular language) which would tend to keep the weight of the superincumbent cargo off the bilges of the barrels. That could have been done, and then the hold would have been fit to receive this cargo. That seems to me a fault which goes to the hold. It is not a fault which goes to the stowage as stowage. It is a fault which goes to the appliances for shipping the cargo safely and makes the ship unseaworthy for the purpose of carrying this cargo on this voyage." He accordingly gave judgment against all the defendants for damages, and ordered an inquiry. On appeal the decision of the trial judge was affirmed by a majority of the Court of Appeal, consisting of Bankes, L.J., and Eve, J., but Scrutton, L.J. dissented, holding that the damage was due to bad stowage. Scrutton, L.J. stated the principle as follows : " The ship must be fit at loading to carry the cargo the subject of the particular contract. If she is so fit and the cargo when loaded does not make her unseaworthy, . . . the fact that other cargo is stowed so as to endanger the contract cargo is bad stowage on a seaworthy ship, not stowage of the contract cargo on an unseaworthy ship." Thereupon the present appeal was brought.

It was contended on behalf of the respondents that the finding of the trial judge was one of fact, and that as there was evidence to support that finding it should not now be disturbed. I do not think that this position can be maintained. The facts are not now seriously in dispute, and the question is substantially one of law—namely, what on those facts is the liability of the charterers and owners? or, at least, it is one of mixed fact and law. I think, therefore, that the decision is open to review.

The general principles which should govern the decision are not in doubt. It is well settled that a shipowner or charterer who contracts to carry goods by sea thereby warrants not only that the ship in which he proposes to carry them shall be seaworthy in the ordinary sense of the word—that is to say, that she shall be tight, staunch, and strong, and reasonably fit to encounter whatever perils which may be expected on the voyage—but also that both the ship and the furniture and equipment shall be reasonably fit for receiving the contract cargo and carrying it across the sea. The latter obligation, which is sometimes referred to as a warranty of seaworthiness for the cargo, was formulated by Lord Ellenborough in the year 1804 (see *Lyon* v. *Mells*, *sup.*), and was affirmed by this House in *Steel* v. *State Line Steamship Company* (*sup.*) and *Gilroy* v. *Price* (*sup.*). The rule, as it applies to equipment, is well illustrated by such cases as *The Owners of Cargo on board the Steamship Maori King* v. *Hughes and another* (*sup.*) where a ship with defective refrigerating machinery was held "unseaworthy" for a cargo of frozen meat; and *Queensland National Bank Limited* v. *The Peninsular and Oriental Steam Navigation Company* (*sup.*), where a ship with a bullion room not reasonably fit to resist thieves was held "unseaworthy" for a consignment of bullion. Reference may also be made to *Hogarth and Co.* v. *Walker* (*sup.*), where it was said by Bigham, J. and A. L. Smith, L.J. that a ship without dunnage mats (which are usually laid on the floor of a grain ship to protect the grain from being damaged by wet) was unseaworthy for the carriage of a cargo of wheat. It is hardly necessary to add that unseaworthiness and bad stowage are two different things. There are cases (such as *Kopitoff* v. *Wilson*, *sup.*), where, a ship having been injured in consequence of bad stowage, the warranty of seaworthiness of the ship has been held to be broken; but in such cases it is the unseaworthiness and not the bad stowage which constitutes the breach of warranty. There is no rule that, if two parcels of cargo are so stowed that one can injure the other during the course of the voyage, the ship is unseaworthy (per Swinfen Eady, L.J. in *The Thorsa*, *sup.*).

Applying these principles to the present case, I have come to the conclusion that the damage complained of was not due to unseaworthiness but to improper stowage. If the fitness or unfitness of the ship is to be ascertained (as was held in *McFadden Brothers and Co.* v. *Blue Star Line Limited*, *sup.*) at the time of loading, there can be no doubt about the matter. At the moment when the palm oil was loaded the *Grelwen* was unquestionably fit to receive and carry it. She was a well-built and well-found ship, and lacked no equipment necessary for the carriage of palm oil, and if damage arose, it was due to the fact that after the casks had been stowed in the holds the master placed upon them a weight which no casks could be expected to bear. Whether he could have stowed the cargo in a different way without endangering the safety of the ship is a matter upon which the evidence is conflicting; but if that was impossible, he could have refused to accept some part of the kernels and the oil would then have travelled safely. No doubt that course might have rendered the voyage less profitable to the charterers, but that appears to me for present purposes to be immaterial The important thing is that at the time of loading the palm oil the ship was fit to receive and carry it without injury; and if she did not do so this was due not to any unfitness in the ship or her equipment, but to another cause.

But it was argued that an owner or charterer loading cargo is to be deemed to warrant the fitness of his ship to receive and carry it, not only at the moment of loading but also at the time when she sails from the port, and that at the moment when the *Grelwen* left each of her ports of departure she was unfit without 'tween decks to carry the cargo which had then been placed in her holds. I think there is some authority for the proposition that the implied warranty of "seaworthiness for the cargo" extends to fitness for the cargo not only at the time of loading but also at the time of sailing (see *Cohn* v. *Davidson*, *sup.*) and the observations of Phillimore, L.J. in *The Thorsa*, *sup.*). But it is unnecessary to pursue the point, for the proposition if established will not avail the present respondents. The evidence of the log is conclusive to show that the injury to the casks was caused at or immediately after the time when the cargo was loaded and before the ship sailed, and accordingly that it was not due to any unseaworthiness at the time of sailing. And in any case nothing occurred between the time when the oil was loaded and the time when the ship sailed to make the ship structurally less fit to carry the oil; and it is with reference to the contract cargo—namely, the oil—that the question of fitness must be considered.

It was further argued that, as all the charterers' own ships engaged in the West African trade were fitted with 'tween decks, that equipment must be considered to be reasonably necessary for any vessel engaged in that trade. I do not think that any such universal rule can be properly laid down. It cannot be assumed that every ship running to the West African coast will bring back a cargo of palm oil and palm kernels, or that if she does so it will always be necessary to stow them together in one hold. The *Grelwen*, though without 'tween decks, could have carried a full cargo of West African goods without the oil, or could have carried the oil without the heavy cargo laid upon it. If the

oil could not be stowed anywhere except at the bottom of the holds, the master could (as the evidence shows) have stowed four tiers of casks in each hold, and could have utilized the space above them for light cargo or could have left it empty ; and the fact that he did not choose to take either of these courses is not sufficient to condemn the ship as unseaworthy.

On this view it becomes unnecessary to consider whether, in the event of unseaworthiness being found, the conditions of the bills of lading would have been sufficient to protect the charterers from liability. It is enough to say that, in my opinion, they are not sufficient for that purpose, the requirements of the proviso to condition 2 not having been satisfied.

There remains a further question, which arises between the shippers and the shipowners, the Griffiths Lewis Steam Navigation Company. It is contended on behalf of the respondents that, assuming their loss to be due to bad stowage on the part of the master of the ship, the owners are not protected by the conditions of the bill of lading, to which they were not parties, and are accordingly liable in tort for the master's negligence. In support of this contention the respondents rely on such cases as *Martin* v. *The Great Indian Peninsular Railway Company* (*sup.*), *Hayn, Roman, and Co.* v. *Culliford and Clark* (*sup.*), and *Meux* v. *The Great Eastern Railway Company* (*sup.*). I do not think that this argument should prevail. It was stipulated in the bills of lading that " the shipowners " should not be liable for any damage arising from other goods by stowage or contact with the goods shipped under the bills of lading ; and it appears to me that this was intended to be a stipulation on behalf of all the persons interested in the ship—that is to say, charterers and owners alike. It may be that the owners were not directly parties to the contract ; but they took possession of the goods (as Scrutton, L.J. says) on behalf of and as the agents of the charterers, and so can claim the same protection as their principals.

For the above reasons I am of opinion that this appeal succeeds, and that the orders of Rowlatt, J. and the Court of Appeal should be set aside and the action dismissed with costs in both courts and in this House.

Lord FINLAY.—In this case the action was brought by the respondents, the consignees of casks and butts of palm oil shipped at Sherbro and Konakry in West Africa for carriage to the United Kingdom. The defendants, Elder Dempster and Co., are the managers of the African Steamship Company and the British and African Steam Navigation Company, who are also joined as defendants, and these two companies had a charter from the Griffiths Lewis Steam Navigation Company, owners of the *Grelwen* steamship, who are also defendants. The action was brought to recover damages for loss and damage in respect of palm oil in transit by the *Grelwen* steamship. The plaintiffs alleged that this was caused by the fact that bags of palm kernels had been stowed 16ft. to 20ft. high on the top of the butts and casks, and that in consequence of the weight thus placed upon them many of the butts and casks were crushed and collapsed. The defendants' case was that the conditions of the bill of lading exempted the defendants from liability for bad stowage and that it was bad stowage that had caused the loss, if any. The plaintiffs, on the other hand, alleged that the vessel was structurally unfit for the carriage of the goods in respect of the fact that there was no 'tween decks or substitute for a 'tween deck to bear the weight of the bags of palm kernels and prevent their pressure upon the butts and casks, and that this constituted unseaworthiness, from liability for which they were not exempted by the bill of lading.

The substantial issue in the case is whether the absence of such a 'tween deck made the vessel unseaworthy in the sense that it was not structurally fitted for the West African trade, in which it is usual to carry cargo consisting partly of palm oil and partly of bags of palm kernels, and whether the loss was due to this unseaworthiness.

The case was tried by Rowlatt, J. without a jury. He found that the vessel was not fit for the carriage of West African cargoes on the ground that she had no 'tween decks or substitute therefor, and gave judgment for the plaintiffs, the present respondents. His decision was affirmed by the Court of Appeal, Scrutton, L.J. dissenting, on the ground that in his opinion the damage was the result of bad stowage, and that the bill of lading exempted the defendants from liability on this ground.

The law as to seaworthiness was discussed by Lord Cairns and by Lord Blackburn in the case of *Steel* v. *State Line Steamship Company* (*sup.*). Lord Blackburn expressed himself at p. 86 as follows : " I take it, my Lords, to be quite clear, both in England and in Scotland, that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy ; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a ' warranty,' not merely that they should do their best to make the ship fit, but that the ship should really be fit. I think it is impossible to read the opinion of Lord Tenterden, as early as the first edition of Abbott on Shipping, at the very beginning of this century, of Lord Ellenborough, following him, and of Baron Parke, also in the case of *Gibson* v. *Small*, without seeing that these three great masters of marine law all concurred in that ; and their opinions are spread over a period of about forty or fifty years. I think, therefore, that it may be fairly said that it is clear that there is such a warranty or such an obligation in the case of a contract to carry on board ship."

For any loss or damage caused by unseaworthiness the shipowner is liable, but the mere fact that the ship was unseaworthy does not make the shipowner liable unless the loss was caused by the unseaworthiness (*The Europa ; Tolme Runge* v. *Owners of the Europa*, *sup.*, and *Kish and another* v. *Taylor, Sons, and Co.*, *sup.*). Bad stowage does not, in itself, constitute unseaworthiness, but it may be such as to render the vessel unseaworthy (*Kopitoff* v. *Wilson*, *sup.*, and *The Thorsa*, *sup.*). The vessel is considered unseaworthy for this purpose if she has some defect which renders her unsuitable for the reception and carriage of particular goods in question. For instance, the absence of a bullion room properly equipped for the carriage of bullion makes the vessel unseaworthy for the carriage of bullion (*Queensland National Bank Limited* v. *Peninsular and Oriental Steam Navigation Company*, *sup.*), and so if the room provided for the carriage of passengers' luggage is unfit for the purpose (*Upperton and wife* v. *Union Castle Mail Steamship Company Limited*, *sup.*). Where the vessel is infectious from the carriage on a previous voyage of sheep suffering from foot-and-mouth disease, she is unseaworthy for the purpose of the carriage of other sheep (*Tattersall* v. *National Steamship Company Limited*, *sup.*). Many other illustrations of the application of the principle are to be found in the books.

The question in the present case is whether the *Grelwen* was unfit for the carriage of the palm oil and kernels owing to some structural defect which caused the damage, or whether the damage was merely the result of bad stowage. The *Grelwen* steamship was let on charter by her owners, the Griffiths Lewis Company, to Messrs. Elder Dempster and Co., who took the charter on behalf of the African Steamship Company and the British and African Steam Navigation Company Limited. The charter was for twelve months, the owners providing captain and crew, and clause 10 of the charter provided that the captain, though appointed by the owners, should be under the charterers' orders as regards employment, &c.—the charterers to indemnify owners against any liabilities arising from the captain signing bills of lading. The vessel was sent under the charter-party to Sherbro and Konakry, on the West African coast, and there took on board the palm oil in respect of which this action is brought. The butts and casks containing the oil were, according to invariable practice in this trade, stowed at the bottom of the holds in tiers one above the other ; there were not more than three of these tiers and in some places not more than two. It was shown in evidence that it would have been safe to have had four tiers. Planks were laid on the top of the barrels, and over these planks there were stowed a large quantity of bags containing palm kernels, the weight of which must, as the event showed, have exceeded what would have been the weight of a fourth tier of barrels, and it was this which caused the collapse.

Bills of lading were given at Sherbro and Konakry which for the present purpose are in substantially the same terms. The most material clause is the second. It contains a provision that "The Company shall not be liable . . . for any damage arising from other goods by stowage or contact with the goods shipped hereunder." Both courts below have held, and rightly, that this provision would exempt the defendants from liability in the present case if it were merely a case of loss by bad stowage by putting on the barrels a weight in excess of that which they could safely bear. The contest in the case has been whether the loss was due to unseaworthiness in the sense that the vessel was structurally unfit for the reception of mixed cargoes of palm oil and palm kernels such as are usual in the West African trade, and if so whether this clause No. 2 exempts the charterers and owners from liability for loss arising from such unseaworthiness.

All the vessels regularly employed in this West African trade are provided with 'tween decks. The African Steamship Company and the British and African Steam Navigation Company wanted a vessel in addition to their own fleet, and for this purpose, through Elder Dempster and Co., took on charter the *Grelwen*. The case made for the plaintiffs, which was accepted by Rowlatt, J. and by the majority of the Court of Appeal, was that for the West African trade a 'tween deck or some efficient substitute is an essential part of the equipment of the vessel, and that without it a vessel is not seaworthy for the purposes of the trade there carried on. The barrels containing the palm oil are stored at the bottom of the hold, and the plaintiffs urged that if the hold is to be filled up with superincumbent goods there must be 'tween decks to prevent the pressure upon the barrels below, as otherwise they may be crushed whenever the superincumbent weight exceeds what would have been the weight of a fourth tier of barrels, which is the limit of safety. Of course, light goods may be safely stowed over the barrels, but the palm kernels which are very commonly shipped from West Africa are dead-weight goods, and it was urged that without 'tween decks the vessel was not fit to receive and carry composite cargoes of palm oil and kernels, such as are usual in this trade.

In my opinion the contention of the plaintiffs on this point is made good by the evidence. The existence of 'tween decks would have prevented the danger which caused the damage in the present case. The captain stated in his evidence that he was told by the representative of Elder Dempster and Co. what to load. It would, of course, have been possible for him to refuse to load all the bags of palm kernels sent down for shipment, on the ground that the weight upon the barrels would in his opinion be excessive, and to leave the bags of palm kernels behind. It is, however, obvious that the absence of any provision in the ship for relieving the barrels of palm oil from pressure

of the superincumbent cargo must be a source of danger and that it puts the captain into a very awkward position. The captain will be naturally desirous not to leave behind goods which have been sent down for shipment, and the question whether the weight is too great or not will be in every case a matter of estimate—and the captain's estimate may be wrong. As the practice of the trade involves the superimposition over the palm oil barrels of bags of palm kernels, it is only reasonable that there should be 'tween decks which will relieve the barrels from the superincumbent pressure and enable the ship to take a full cargo with safety. I think that for the purpose of this particular trade, involving the carriage of cargoes consisting of barrels of palm oil and bags of palm kernels, a vessel without 'tween decks would not be properly equipped. For safe stowage of such a cargo 'tween decks or some efficient substitute will be necessary, and without such equipment the vessel is not seaworthy, as this term is used to denote not merely fitness of the ship itself to encounter perils of the sea, but also fitness of the ship to receive and carry the cargo in port and upon the voyage. If the ship is not fitted with all appliances which are reasonably necessary for safe stowage she is not seaworthy. All ships regularly engaged in this trade have 'tween decks, and if a vessel without 'tween decks is put upon such service she ought to be provided with a temporary substitute. If the *Grelwen* had been so provided the loss in the present case would not have occurred.

Seaworthiness, in its proper sense, relates to the condition of the vessel as regards its capacity to perform the voyage with safety to itself and the goods and persons on board. Is the vessel fit to cope with the perils of the seas? The "seaworthiness" which is in question in the present case, is of a totally different nature, and relates to the fitness of the vessel for the reception of particular goods, and the absence of such fitness is described as "unseaworthiness." It is unfortunate that for this purpose no more suitable term has been devised, as the use of the term "unseaworthiness" in this connection is apt to lead to confusion. The term "unseaworthy" is not apt to describe the unfitness of the vessel for the carriage of particular goods. For instance, a vessel which has no strong room for the carriage of bullion is described as unseaworthy for the purposes of bullion, and a vessel which has carried sheep suffering from foot and mouth disease without being disinfected at the close of that voyage is described as unseaworthy for the carriage of another cargo of sheep. The expression is at once awkward and misleading. The unseaworthiness alleged in the present case is the absence of a 'tween deck. The *Grelwen* was of the Isherwood type, and vessels of the Isherwood type have not the ordinary 'tween deck. For work of many kinds such a type of vessel may be as good as or better than a type involving the use of 'tween decks, and certainly the Isherwood type is extensively used. In the course of the present case it has been said more than once that it cannot be supposed that the Isherwood type involves unseaworthiness. This is really a play upon words. What is urged for the respondents is that, with all its excellencies, the Isherwood type makes a vessel unsuitable for the reception of cargoes of the special type common in the West African trade. This contention involves no aspersion whatever upon the Isherwood type; it is merely a statement that such a type of vessel is not suitable for use in this particular trade, because the composite cargo there carried—palm oil and kernels—makes a 'tween deck necessary. The casks of palm oil are stowed at the bottom of the hold; in the absence of a 'tween deck they are liable to be damaged by the pressure of superincumbent kernels.

On the part of the respondents, one argument was greatly insisted on. It was said that the contract of carriage sued on in the present case related to the palm oil, and it is urged that under these circumstances the only question is whether the vessel was seaworthy for the carriage of the palm oil taken by itself. To put the question in this form involves a misconception of the real point of the case. The fact that a vessel may be perfectly safe to carry barrels of palm oil, if that were the only cargo, is for the purposes of the present case immaterial. The unfitness of the vessel alleged is unfitness to receive a composite cargo of palm oil and kernels. Such a cargo is the common cargo from West Africa, and the cargo to be carried on the present occasion was such a composite cargo. In dealing with the case, you cannot stop when the palm oil has been put on board and say that the case is at an end, as the warranty of unseaworthiness must be with reference merely to the palm oil. This would involve ignoring the real issue. It was perfectly well known that in this trade the palm oil is not carried alone, but in company with kernels. The palm oil must be put at the bottom of the hold and the kernels above. It is for this reason that the 'tween deck is wanted, and, therefore, all the vessels regularly engaged in the West African trade are fitted with 'tween decks. The essence of the case is that the cargo was to be composite, as the bill of lading shows, and as is universally the case in this trade. Was the *Grelwen* fit for the reception of such a cargo? In my opinion she was not.

But then it was said that the stowage was bad and that this was the real cause of the damage.

In the first place, suggestions were made at the Bar as to other plans of stowage which it was said would have accommodated all the goods without difficulty. None of these plans were put forward at the trial, when they could have been tested by evidence, and they cannot be put forward now. The same attempt to suggest other schemes of stowage for this vessel seems to have been made in the Court of Appeal, and it was with reference to such suggestions that Bankes, L.J. made, with great justice, the following observations: "In dealing with this

case I do not think that the court is at liberty to take the stowage plan and endeavour to stow the cargo so that damage could have been avoided. No one has suggested that it would have been possible and the court has no evidence on which to act." I think that in the result the appellants' counsel did not press the point that another scheme of stowage should have been adopted, but confined themselves to the assertion that the captain ought to have realised that to put the kernels on the top of the palm-oil barrels would be dangerous, and should, therefore, have refused to load the kernels and left them behind him at Sherbro and Konakry. In my opinion, this form of dealing with the stowage does some injustice to the captain and is based on an imperfect appreciation of the facts. It appears that the captain had never been engaged in the West African trade before. He was directed by Mr. Ward, the representative of Elder Dempster and Co. at Sherbro, to load the kernels, which had been brought down for the purpose. Mr. Ward met the ship on her arrival there, stayed on board and told the captain what to load.

Messrs. Elder Dempster and Co. are, of course, quite entitled, in point of law, to urge that if the real efficient cause of the damage was negligent stowage in putting on the barrels of palm oil a weight which they could not bear, they are not liable, as the exemption in the bill of lading, whether this negligence was on the part of the captain or of their own representatives at the port of loading or of both together, would protect them. But an examination of the evidence, I think, shows that it is not possible to regard such negligence as the sole cause of the damage, and that it was largely contributed to by the want of 'tween decks in the vessel.

The evidence is clear and uncontradicted that all ships regularly engaged in the trade have a 'tween deck. A 'tween deck is necessary where palm oil and kernels have to be carried in order to ensure that a full cargo can be carried. It is further necessary, in order to avoid the danger of mistake in calculating what quantity of kernels may with safety be put on the top of the palm-oil barrels. If there is a 'tween deck, no calculation is necessary on this point, as the 'tween deck relieves the barrels of palm oil from all pressure by the superincumbent kernels. But without a 'tween deck it is necessarily left to the estimate of the person superintending the loading what amount of kernels may be safely stowed. There may be mistakes in making this calculation in one of two ways : the person superintending the loading may erroneously think that the palm-oil barrels will bear an amount of pressure which in fact is beyond their capacity. Or, on the other hand, in his anxiety to secure safety, he may stop the stowage of the kernels too soon and may refuse to put on board kernels which might with safety have been there stowed. Mistakes are certain to be made from time to time in the absence of a 'tween deck. The presence of a 'tween deck, of course, dispenses with all the necessity for any such calculations. If the mistake made is such as that which, it is alleged, the captain here made, putting on more weight than the palm-oil barrels will bear, the results may be disastrous, as the history of the present case proves. If, on the other hand, in his anxiety to be on the safe side the kernels which could have been carried are left behind, the ship sails with an insufficient cargo. From whatever point of view the matter is looked at, for a trade of this description the 'tween deck is necessary, and this is recognised by the constant practice of having 'tween decks in this trade. In the present case its absence was accidental as this vessel had been specially called in to supply a temporary deficiency in the fleet of the West African Company. According to the plaintiffs, the *Grelwen* ought, in the present case, to have sailed away with little more than half a cargo, owing to the absence of a 'tween deck and the danger of crushing the palm-oil barrels by putting the kernels upon them. It appears to me, that a type of vessel which entails such results cannot be regarded as suitable for receiving on board such composite cargo as forms a staple of the West African trade.

It is said that the captain ought to have refused to take the kernels on board. Judging by the result, it appears that it would have been more prudent to have done so, but I do not think that the difficulty of the situation in which the captain was placed has been adequately appreciated by the appellants. The kernels had been sent down to be put on board, the captain had been told by the representative on the spot of Messrs. Elder Dempster and Co. to put them on board, and very difficult questions might have arisen if he had left the kernels at the port. It would no doubt have been alleged that they had been left behind without any adequate reason, and this would have been as strongly urged as it is now urged by the light of what afterwards happened, that the captain committed an error of judgment in taking the kernels on board.

The case is a very good illustration of the propriety and, indeed, the necessity of having in vessels in this trade a 'tween deck. Where the 'tween deck is provided no difficulty whatever of this nature can arise ; the want of it puts all concerned in a very difficult position with great risk of disaster.

A good deal of argument was directed in the course of the case on behalf of the appellants to the effect that it would be difficult or impossible to rig up a temporary 'tween deck on the west coast of Africa. It has also been urged that it is not usual for vessels to carry beams for the purpose of putting up a temporary 'tween deck. Both these contentions appear to me rather to miss the point of the case. It is very probable to my mind that it would be difficult to provide beams and other appliances on the West African coast. I doubt whether it could be said that there would be much difficulty in carrying beams from England, and if the necessity for them had been realised, I

have no doubt that this would have been done. The truth is that the point was overlooked and Messrs. Elder Dempster and Co. sent this vessel out to Africa without in the least realising what the results of sending a vessel of the Isherwood type, for the purposes of the trade on this coast, were likely to be. If the subject had been considered, a vessel of another type would have been sent; the *Grelwen* was obviously unfit for this trade, and the case made is, indeed, that safety should have been secured by leaving a great deal of the proposed cargo on the beach at Sherbro and Konakry.

But assuming that the loss was the result of unseaworthiness as above explained, the question remains whether the bill of lading exempts the charterers from liability. For this purpose the second clause must be examined in detail.

That clause concludes with the general provision that it is to be in addition to and not in derogation of or in substitution for any statutory exemption or provision in favour of the company. This particular provision is applicable to the whole of clause 2. Apart from this last provision, clause 2 consists of three portions, each of which begins with the words "The Company shall not be liable for," and enumerates under each head the matters liability for which is excluded.

The first head begins with the initial words of the clause itself, "The Company shall not be liable for" and ends with the words "or evaporation from such goods or any other goods." It provides against liability for the act of God, the King's enemies, &c., barratry, restraints of rulers, &c., the effects of disinfection, &c., the effects of climate, fire, &c., damage arising from other goods by stowage, &c., sweating, evaporation, &c. This first head forms one sentence with a full stop at the end.

The second head begins likewise with the words "The Company shall not be liable for" and enumerates lighterage, &c., storage, transhipment, loss from explosion, fire, boilers, &c., damage to or defect in hull, &c., fuel, machinery, &c. Like the first head it consists of one sentence only and it ends with the words "or other appurtenances," after which follows the full stop.

The third head is as follows:—

> The Company shall not be liable for or for any loss or damage arising from or due to collision, stranding, straining, jettison or any other peril of the sea, rivers, navigation, or land transit, of whatsoever nature or kind; whether any perils, causes or things, in this clause mentioned, are due to, or arise directly or indirectly from the wrongful act, omission or error in judgment or negligence of the Company's pilot, master, officer, engineer, crew, stevedore, or any person whomsoever in the service of the Company, or any person or persons or company for whose acts the Company would otherwise be liable, or not, and whether on the ship carrying these goods or not; and whether due to or arising directly or indirectly from unseaworthiness of the ship, vessel, craft or lighter at the commencement of the carriage or during the carriage or any part thereof; provided in case of any loss, injury or damage arising from or due to unseaworthiness of the ship at the beginning of the voyage all reasonable means shall have been taken to provide against such unseaworthiness. The Company may entrust to experienced or qualified officers, servants or agents the duty of providing against unseaworthiness, and shall then be deemed to have fulfilled its obligation hereunder.

It should be observed that the initial words of this third head exempt from liability "for loss or damage arising from or due to collision, stranding, straining, jettison or any other peril of the sea, rivers, navigation, or land transit of whatsoever nature or kind." After this word "kind" there is a semicolon, which is followed by the words "whether any perils, causes or things in this clause mentioned are due to, or arise directly or indirectly" from negligence of master, crew, &c. Then after another semicolon follow the words "and whether due to or arising directly or indirectly from unseaworthiness." Then after another semicolon follow words containing the proviso that in case of loss or unseaworthiness of the ship "at the beginning of the voyage all reasonable means shall have been taken to provide against such unseaworthiness." Then follows in a separate sentence the provision that the company may entrust to qualified officers, &c., the duty of providing against unseaworthiness "and shall then be deemed to have fulfilled its obligation hereunder."

The appellants contend that the effect of this third head of clause 2 is to exempt them from liability for the consequences of unseaworthiness.

In my opinion this contention fails for two reasons.

In the first place the words as to unseaworthiness in this head relate only to a loss or damage from the causes to which this head 3 of the clause relates. The sentence provides that the company shall not be liable for consequences of certain perils whether due to or arising from unseaworthiness or not. It is quite impossible to apply this provision as to unseaworthiness except to the perils dealt with by the sentence in which the provision itself occurs. These words cannot apply to the damage arising from stowage mentioned under the first head in the clause. So to apply them would be to disregard not merely the punctuation but the whole structure of clause 2 and the plain meaning of the sentence in which the provision occurs. The words as to unseaworthiness qualify only the provisions under head 3 itself.

In the second place, the exemption from liability for unseaworthiness is not absolute, but subject to the condition that all reasonable means were taken to provide against such unseaworthiness. The appellants have entirely failed to show that this condition was fulfilled; in fact, it is clear that it was not. The provision that the company may entrust to qualified officers the duty of providing against unseaworthiness and shall be thereby deemed to have fulfilled its obligation under the clause has no application to the present case. The company never entrusted to anyone the duty of providing 'tween decks for the *Grelwen;* the

necessity for providing them was entirely overlooked.

It was urged for the plaintiffs that, even if their case against Elder Dempster and Co. failed on account of the terms of the bill of lading, they ought to succeed against the owners, Griffiths Lewis Steamship Navigation Company Limited.

It was said that the master and crew were in the service of this company as owners, and that their conduct in putting an excessive weight on the palm-oil barrels amounted to a tort, for which the owners were liable, as having been committed by their servants. The case on which the appellants principally relied on this point was that of *Hayn, Roman, and Co.* v. *Culliford and Clark* (*sup.*) ; they laid particular stress on the judgment of Bramwell, L.J. in that case.

It appears to me, that if the plaintiffs are to succeed it must be upon the bill of lading. The owners of the goods put them on board the *Grelwen* to be carried on the terms of the bill of lading. It is said that the imposition of the weight of the kernels on the top of the palm-oil barrels was a wrongful act, resulting in the destruction of the barrels and the loss of the oil, and that for this wrongful act, committed by their servants, the shipowners are liable, apart from contract altogether, so that the plaintiffs, in claiming from the shipowners, would not be hampered by the conditions of the bill of lading. This contention seems to me to overlook the fact that the act complained of was done in the course of the stowage under the bill of lading, and that the bill of lading provided that the owners are not to be liable for bad stowage. If the act complained of had been an independent tort unconnected with the performance of the contract evidenced by the bill of lading, the case would have been different. But when the act is done in the course of rendering the very services provided for in the bill of lading, the limitation on liability therein contained must attach, whatever the form of the action and whether owner or charterer be sued. It would be absurd that the owner of the goods could get rid of the protective clauses of the bill of lading, in respect of all stowage, by suing the owner of the ship in tort. The Court of Appeal were, in my opinion, right in rejecting this contention, which would lead to results so extraordinary as those referred to by Scrutton, L.J. in his judgment.

I agree with Rowlatt, J. and the majority of the Court of Appeal in thinking that the appellants are liable on the ground that the vessel was unseaworthy in being improperly equipped for the service in which she was sent under the charter-party and that the loss resulted from this defective equipment.

In my opinion the appeal should be dismissed.

Lord Dunedin.—I have had the advantage of reading the opinion of my noble and learned friend Lord Sumner. That opinion expresses so conclusively and fully the result at which I have myself arrived that I find it unnecessary on my own part to add anything.

Lord Sumner.—This case is now reduced to a question of unseaworthiness. The contract of carriage excepts liability for damage by improper stowage, but, if there was a breach of the implied warranty of seaworthiness, which there is nothing in the contract to limit or to oust, none of the exceptions or limitations contained in the bill of lading avail to prevent the cargo owner from recovering.

Two things must, therefore, be shown (1) that the ship was unseaworthy in the sense of the words established by the decisions, and (2) that the damage complained of was caused thereby and would not have arisen but for that unseaworthiness. For my part I neither think that the alleged defects in the ship and her equipments amount in law to unseaworthiness, nor that the damage to the puncheons of oil was due to them. No structural defect in the *Grelwen* caused this damage, nor was her equipment defective. In fact, the ship was at all times reasonably fit to load and carry the puncheons, but the puncheons were not able to carry the palm kernels. The casks were as directly and as promptly stove in, as if the Krooboys, who had loaded them, had attacked them with crowbars. I think that the ship's design, with her peculiarities and, if you will, her defects, was no more than a *causa sine qua non*.

The proof of this is easy. It is to be found in the ship's log. The plaintiff's Sherbro cargo and Konakry cargo, being loaded at separate ports and carried under separate bills of lading, may, for present purposes, be considered as independent adventures. The ship loaded at three anchorages in the Sherbro River, so near together that she was never under way while shifting anchorage for so much as an hour and a half at a time. Once she took the ground for about ninety-five minutes, but she got off under her own steam without damage, and, except for a little squally weather at the Bomplake anchorage, she was uniformly fortunate in her weather. She was at all times in sheltered waters and there is no suggestion of any marine peril that affected her cargo.

In No. 2 hold she took in palm oil at the bottom, afterwards stowing palm kernels in bags above. Before she had left the third anchorage to proceed out of the Sherbro River to sea, she had 3ft. of palm oil in the bilge well of No. 2 hold. As this is the first log entry about the bilges one way or the other and it is impossible to be sure from the entries when palm kernels first were stowed on the palm-oil puncheons, I cannot tell how short a time had passed before the superincumbent weight crushed the puncheons, but at any rate they were crushed in directly and solely by that weight before the ship could get to sea and their subsequent total collapse was inevitable. Thus it was not in the course of the voyage that the mischief was done but before ever the voyage began.

The same thing happened at Konakry. 229 casks or barrels of palm oil had already been loaded in No. 3 hold at Sherbro. In less than

thirty-six hours from the commencement of further loading of oil in this hold at Konakry the log records 2ft. 8in. of oil in one bilge in No. 3 and 3ft. 5in. in the other, and this continued with some little variation till the ship went to sea. At the time when the discovery of this amount of leakage is recorded, loading cargo had finished for the day, and not only had enough puncheons been taken in to complete the oil stowed in that hold, but 1095 bags of kernels as well, though whether all of them went into that hold is not quite certain. Deep holds, however, would naturally be proceeded with before shelter deck spaces were filled up. Before the ship left port and shifted to the outer anchorage the oil in No. 3 port bilge had risen to 4ft. 2in., though the loading of cargo in that hold had not yet finished. In this state she proceeded to sea in perfectly fine weather. This is an explicit record of bad stowage. After that, whether the ship took a list or not and whether she ran into bad weather or not, the oil cargo was ruined and such occurrences could make no difference. I will only add that the log makes no mention of what happened in No. 4 hold, the remaining hold containing oil, but, as the ultimate condition was found to be the same on arrival, there is no reason to doubt that the beginning of it was the same also.

A simple calculation will show that the damage caused by the improper stowage can only be remotely connected with the unseaworthiness alleged. The plaintiffs' expert, Captain Cockrill, to whom is due the theory that the ship ought to have had a 'tween deck, original or temporary, in order to make her fit to take this cargo, gives the following figures. If they cannot be accepted, for other witnesses vary them somewhat, then his whole expert evidence is unworthy of credit. The puncheons are 2ft. 10in. in diameter. No more than three tiers, he says, should be stowed, and no other cargo should be stowed upon them. Thus we get a maximum safe height of oil casks of 8ft. 6in. Now, No. 2 hold is 25ft. deep. In this hold, therefore, dividing its total depth, within reasonable variations, between the upper and lower space, 'tween decks could not be so laid that there would not remain, either in the upper or the lower hold, 3ft. to 4ft. of empty space above any oil cargo that could be safely stowed there, for I put aside as fantastic the idea of a lower hold 9ft. deep and a 'tween deck of 16ft. above it and the whole evidence assumes that the proper place for oil casks is at the very bottom of the ship. If so, the safety of the oil cargo, even in a ship so equipped, must still depend, and directly depend, on the stowage. If other cargo is put on the casks to fill up the hold, the casks suffer. If the captain does what he ought to have done here and refuses to put an unsafe weight on the oil casks, all is well. In other words the whole difference between damage and safety depends in any case on proper stowage alone, and unseaworthiness, if unseaworthiness there was, at any rate was not the direct cause of the loss.

The respondents argued that the ship was one in which the cargo actually loaded could not be carried in safety, and on this ground they distinguished *The Thorsa* (*sup.*), a case not impeached, nor, in my opinion, impeachable. There it was said the chocolate or the cheese might have been stowed somewhere else; here, with the palm kernels, this could not be, for the structure of the ship did not permit it. My answer is a short one. The peccant palm kernels need not have been put into the ship at all; they could have been left behind. The only cargo that the plaintiffs are concerned with is the damaged palm oil; they cannot lose their rights, and equally they cannot enlarge them, because contracts of carriage were made with third parties. The warranty they rely on is a warranty with respect to their own cargo, that at the time when these puncheons were tendered for shipment the *Grelwen* was then fit to receive them, whatever might befall them afterwards, and if that warranty was satisfied they must look for their remedy to some cause of action in damages for what was done to their cargo by the stowage of the cargo of other persons. Whether the palm kernels that did this damage were the plaintiffs' own palm kernels or not, they failed to prove. It is not unlikely, but it remains uncertain. As long as a ship was supplied, which was seaworthy for the particular cargo, as to which the warranty of seaworthiness now in question was given, I cannot see how the ship became unseaworthy or how that warranty was broken by things done or omitted to be done under other contracts relating to other cargo. The question on this warranty is one of the ship's fitness for this shipment, not of her fitness for this shipment along with others. It is alike novel and contrary to principle to measure the warranty, which is implied with regard to the palm oil, by reference to other cargo, with which the oil had no connection except that of association under the same deck. The owners of the oil are entitled to have the oil and the kernels properly stowed in relation to each other, but not to have the whole cargo included in one common warranty of seaworthiness.

It must be remembered that the *Grelwen* was chartered to run in a line, loading on the berth as a general ship and calling at various ports to pick up such parcels of country produce as might be available. There is nothing in the charter to bind the shipowners towards the respondents at all. Their contract with the plaintiffs is in the bill of lading, if anywhere. As to the relations between the shipowners and the charterers they were not gone into at the trial, but there is no evidence that, even as between these parties, there was any contract but the bill of lading contract. If the captain had shut out all palm kernels that he could only carry in holds containing oil, there is nothing to show that the plaintiffs could have objected, and, apart from a point to be mentioned presently with regard to the plaintiffs' own consignments of palm kernels, he was contractually free to do whatever was right

in the interests of the palm oil, even to the extent of sailing with holds numbers 2, 3, and 4 half empty. The plaintiffs' real case is, in my opinion, that he ought to have done so.

It was, however, contended for the respondents that, so far the case being one of bad stowage, the captain had no choice but to stow the cargo as he did; that he only performed his duty in the arrangements which were adopted; and that improper stowage is a complete misnomer. With all respect I think that this argument is a mere paradox and rests on a complete misapprehension both of the evidence and the captain's duty.

The captain's evidence is that at Sherbro the charterers' shore agent came on board and "told him what to load." The ship's mate, however, was in charge of the loading itself. On this slender statement, which was not further developed or even put to the shore agent when he gave evidence, it is said that the captain had no choice in the matter and that, as the total cargo could not have been so stowed as to prevent some such damage as occurred, it follows that the ship was not fit to receive and carry her cargo and this palm oil as part of it, but was unseaworthy from the outset.

How can the captain's duty to stow the whole cargo and every parcel of it properly—a duty owed alike to the shippers of cargo and to the owners of the ship—be affected by the mode in which the charterers choose to carry on their business of procuring cargo? If they arrange to have certain parcels of local produce lifted by a particular vessel and it turns out that the captain cannot take them all without improperly stowing some of them, how does that turn his improper stowage, when he nevertheless does take them, into something else, which is not improper? Again, if the charterers require him to load an aggregate cargo, for which his ship is not fit, how does that prevent her from being fit for a several parcel, whose owners make no demand or contract at all as to the carriage of the deleterious parcels along with it?

The charterers' rights depend on the time charter, whose provisions were but little examined at your Lordships' Bar. It seems to have been assumed that the captain was bound under the charter to receive and stow the cargo actually tendered to him on behalf of the various consignors, and that on behalf of his owners he had an interest in accepting and stowing it all, whether it could be properly stowed or not. This is not so. The charter is a time charter; the hire is a fixed sum per month. The captain could not increase that hire by accepting more cargo than he could safely stow; he could only impose liability on his owners under bills of lading signed on their behalf and this without any corresponding advantage to them. Nothing in the charter requires him to take cargo irrespective of his ability to stow it properly, nor is there anything in it to relieve him from his responsibility for seeing to the stowage of his own ship. No doubt it might be a somewhat difficult problem for him to estimate exactly what weight of palm kernels the oil puncheons would bear, but that is the kind of difficulty a captain is expected to solve. It is his business to keep on the safe side. Nothing in the charter, at any rate, operates to relieve him from this duty or to transfer its effects to the ship herself, merely because she is not so built that errors in stowing cannot do anybody any harm. Even if the captain's conduct was excusable in him, the stowage remains improper, for it does not depend on his difficulties but on the cargo's safety.

The respondents further attempted to found an argument on the accident that several kinds of cargo shipped by the plaintiffs were included at each loading port in a single bill of lading. Nothing really comes of this; the point is a fallacy. For convenience—presumably because the plaintiffs did not contemplate selling any of their cargo while on passage for delivery ex ship at destination—only one bill of lading was signed at each port, but there is nothing in it to make all the goods named in it one composite consignment to be stowed together. No such contention was gone into at the trial. No such contract is likely in business. The oil and the palm kernels seem to have come aboard at random and quite independently of one another. The mate's receipts for the palm oil at each port of shipment are given without reference to any other cargo. One bill of lading includes goatskins, and the other bags of cocoa, which no one suggests are commodities that could or would be stowed or carried with oil casks as parts of a joint parcel. Any warranty with regard to the oil is a warranty arising out of the shipment of the oil—for the bill of lading itself is only evidence of the contract of carriage—and does not arise also out of the subsequent shipment of the superincumbent kernels. In fact the Sherbro cargo was loaded in the so-called Sherbro River, while the bill of lading was only signed subsequently at Sierra Leone, and the obligations as to the stowage and carriage of the oil are not complicated or affected by the distinct though parallel obligations as to the kernels. Of course, if the damage was done by a third party's palm kernels, as is quite possible and is left open on the evidence, no question of any warranty but that implied in favour of the plaintiffs can arise at all.

I turn to the question whether the plaintiffs really proved their allegations against the ship. This is a matter on which your Lordships are not in the least concluded by the findings below, and the question is too serious to be disposed of by mere acquiescence in the views of the trial judge.

What was the proof? A retired master mariner, who had never had experience of the carriage of palm oil in such a ship as the *Grelwen*, said that "there ought to have been some erection to keep the weight off the casks" —a thing which he admitted he had never seen in practice nor was he able to describe it.

Another, whose experience had been in the Ceylon trade, was asked and was allowed to give his opinion on the question, whether the *Grelwen* was seaworthy, though this was the question for the judge and was not a proper question for the witness. He answered that she was not seaworthy, being unsuitable owing to her great depth of hold, and that there should have been a temporary deck, though he did not pretend that he had ever seen such a thing in such a ship and candidly volunteered that the Ceylon trade, which alone he knew, was not comparable with the African palm oil trade. The witness who really counted with the trial judge was Capt. Cockrill, a cargo surveyor of experience. It is his case that has in truth been developed by the plaintiffs. He says that the ship ought to have had a temporary 'tween deck built, by bolting to the frames pieces of scantling from frame to frame, then resting thwartship beams from side to side of the ship on this scantling and laying 'tween deck planking fore and aft on these beams. He, too, told the judge how to decide the case by saying that the *Grelwen* was unseaworthy.

When this suggestion came to be tested in cross-examination, Captain Cockrill admitted that he had never seen such a temporary 'tween deck fitted for a voyage with palm oil, but that he had seen it in a Greek ship laden with onions not alleged to be an Isherwood ship, and in Adriatic ships carrying candied peel. He further vouched the direction of the Board of Underwriters of New York with regard to the carriage of petroleum in casks from the United States, but, on being pressed, he explained that apart from its being a totally different voyage and trade, the petroleum casks were only one-third of the size of the palm oil casks, and the actual wording of the directions was that ships built with 'tween deck beams should lay a 'tween deck on the beams fore and aft. Now the *Grelwen* is built without such beams. In effect he contended that palm oil puncheons ought not to be crushed under weights which they cannot bear, and therefore that the ships which carry them had better have 'tween decks and had better not have deep holds. What he had to say was not evidence of what is ever done or is feasible in such a case as this. It was an expert argument as to the possibility of preventing what happened here on grounds consistent with unseaworthiness and not merely with bad stowage. How much of this did the learned judge accept? He totally disregarded the suggestions of the plaintiffs' witnesses that the effect of what was done was to endanger ship and cargo by causing risk of heavy list or blocked suctions. He said that a ship without 'tween decks and with a 25ft. hold was not, as a ship, properly equipped for the carriage of palm oil, a fault "going to the hold of the ship and not to stowage as stowage"; that she could have been made fit by erecting something to keep the weight of the superincumbent cargo off the bilges of the barrels, but out on the coast there were not the means to do this, and the ship had not brought with her the appliances or equipment necessary for the purpose. I think it is plain that the case made before Rowlatt, J. did not lay stress on the theory now relied on, that the ship should have been provided, under the name of "equipment," with the means of reconstructing her holds, in case enough palm kernels should be tendered to make this desirable in the interests of a full cargo. He says to the witness Mr. Camps, "it is like putting a grid round your case," and in his judgment, "it could have been made proper for the stowage of such a cargo by the erection of what has been called a temporary 'tween deck or a platform, by the erection of something, to use perfectly plain and popular language, which would tend to keep the weight of the superincumbent cargo off the bilges on the barrels"—a view of temporary 'tween decks very far indeed from Captain Cockrill's plan. With this view the majority of the members of the Court of Appeal agreed. This is not a finding that the ship and her holds were not fit to carry the oil. It is a finding, at most, that, if the captain was so ill-advised as to overload the casks of oil, the deep holds gave him a chance of doing so. I think that in effect the decisions in both courts come to this. If the ship had been built on a different plan, if instead of being designed to have deep unobstructed holds she had been provided with 'tween decks or the means of erecting a substitute for 'tween decks, the oil casks would not have been crushed; but what is this except saying that if the ship had been so designed, that those in charge of the stowage could not commit the particular blunder which they did commit in stowing her, then this cargo would not have been damaged, at any rate in the particular way in which it was damaged? Of course, a ship perfectly fit to carry one cargo may be unfit to carry another and so be unseaworthy in that connection, but a ship does not become unseaworthy merely because her construction or appliances are not fool-proof or because she does not carry about the world contrivances for preventing by anticipation the consequences of any want of care or skill, of which those in charge of the cargo may be guilty. If a captain, having a perfectly good hold at his disposal, puts cargo into it in the wrong way, or puts more cargo into it than is consistent with the safety of individual packages, the result is not that he makes his ship unseaworthy, but that he proves himself to be an incompetent officer. One result of improper stowage is that damage will result thereby, and the cargo will be discharged at its destination more or less injured during the voyage, but such a loss is not caused by unseaworthiness merely because it happens during the voyage. It is the direct result of bad stowage, even though in a different ship that particular error in stowing could not have been committed.

We are not now concerned with any question of the right to make a ship seaworthy for her

service in stages, nor is there any suggestion here, as there was in *Cohn* v. *Davidson* (*sup.*) that, during or after the loading and before sailing, the ship sustained any damage, which rendered her unseaworthy before proceeding to sea, though she had been seaworthy previously. Such as she was when she loaded the oil, such she was also when she put to sea, and the whole case turns on the ship's original design and construction, and on the absence of any "equipment" or endeavour to fit her with 'tween decks *pro hac vice.* It appears to me to have been decided, that, even in the case of something which is a defect in the ship herself, structural or accidental, sufficient to render the ship unseaworthy if not properly handled or adjusted, though I can find no such defect here, it is an answer to an allegation of unseaworthiness to show that, in the ordinary course of proper management, the ship so constructed, or the appliance so adjusted, will be restricted to its proper uses and prevented from being a source of danger. The reasoning of your Lordship's House in *Abram Lyle and Sons* v. *Owners of Steamship Schwan* (*sup.*) shows that, assuming the three-way cock to have been an unfit contrivance in itself, the ship would nevertheless, have been seaworthy, if those in charge could in the ordinary course have seen its risks and known how to meet them. "The position is this," says Lord Gorell, "the vessel was not reasonably fit to carry the cargo in the circumstances, for the cock in question was of an unusual, improper and dangerous character, and those who had to use it on the voyage had no reason to suspect this, though, if they had known the truth, they could have adjusted the cock so as to prevent any risk of water getting to the cargo." The latter part of this sentence is irrelevant, if the construction of the cock itself was sufficient to make the ship unseaworthy. So, in *Steel* v. *State Line Steamship Company* (*sup.*), the porthole, which was designed to be opened or shut as occasion might require, only became an element of unseaworthiness because the cargo had been so stowed that it remained loose during the voyage, since it could not be got at and fastened. There was no improper stowage of the cargo as cargo, but there was an obstruction to a part of the ship's appliances affecting the proper working of it as part of the ship, and so the ship sailed with an open hole in her side that could not be closed. If the porthole had continued to be accessible, but had been left open by the carelessness of those responsible for shutting it, the ship would not have been unseaworthy, but the officers or crew would have been careless. To load bullion on a ship which has no efficient strong-room, or passengers' luggage in a ship which has nothing but a water-closet to put it into, is not mere bad stowage, if it is bad stowage at all; it is accepting goods for carriage in a ship that has no fit place to put any of them in at all. No case has been cited in which unseaworthiness has been held to arise without the ship or some part of her being affected so as to make her less than fit for her purpose, and I accept the great authority in these matters of Scrutton, L.J., for the statement that the respondents' argument goes beyond any of the decided cases and beyond the principles of the law as to unseaworthiness and produces results in connection with unexceptionable vessels which are almost absurd. I can see no analogy between the separation cloths, dunnage mats, or temporary bulkheads (mere perpendicular separations of planks), mentioned in *Hogarth and Co.* v. *Walker* (*sup.*), and the elaborate structural alteration of this ship, which the respondents postulate.

Nearly twenty years ago the Court of Appeal held, affirming Channell, J., that a ship is not unseaworthy where the mode in which the cargo is stowed practically puts the ventilation system out of action on the voyage, whereby for want of ventilation other cargo is damaged. In that case the cause of action is for bad stowage (*Bond, Connolly, and Co. and Woodall and Co.* v. *Federal Steam Navigation Company*, *sup.*), and Sir Gorell Barnes, P., treated the case for unseaworthiness as unarguable. If that case stands—and it has not been challenged—the present case must *a fortiori* be one of improper stowage only, for here no part of the ship or her appliances was obstructed or affected at all. She was simply the good ship that she was designed to be. There must have been a point in the loading at which the weight borne by the puncheons changed from an amount that they could carry to an amount that they could not. It seems to me to be a mere paradox to say that beyond that point the ship, theretofore seaworthy in every sense, became on a sudden unseaworthy in respect of all the oil already loaded, as well as for any loaded thereafter, and became unseaworthy retrospectively, though nothing had changed except the admission of the further cargo. If this ship had sailed as soon as the oil puncheons were on board, her fitness to load and carry the cargo could not have been impugned. Even as it was, when she sailed, she and all the appliances were exactly the same, structurally and functionally, as they would have been in that case, and all attempts to show that in her actual condition she and her cargo were exposed to accidents or perils of the sea to any different or greater extent than if she had had 'tween decks broke down completely on the evidence.

The distinction between unseaworthiness of the ship and improper stowage is very plainly stated in *Wade* v. *Cockerline* (*sup.*) by Kennedy, J., whose judgment was affirmed in the Court of Appeal. "I could not give a case," he says, "in which the immediate cause included in the exceptions . . . could be better exemplified than by what happened in this case. The ship was perfectly seaworthy to be loaded with the cargo upon deck. She did not become an unseaworthy ship, but an accident was produced on board. I suppose that immediately before the accident she could

not safely take in any more wood cargo on deck, but she was safe up to that moment. With a little care up to the moment at which the accident happened, the defect in stowage might and, if the stevedores had given heed to the warnings of the officers, would have been set right. I do not see how unseaworthiness of this vessel at any time can properly be alleged. The ship, as a ship, never was unseaworthy to receive the cargo." Adapting this language to the present case, I say: "She did not become an unseaworthy ship, but improper stowage was produced on board."

Unseaworthiness is a quality of the ship, however arising. A warranty of seaworthiness means that the ship is reasonably fit to "meet and undergo the perils of the sea and other incidental risks, to which she must of necessity be exposed in the course of the voyage," to quote Lord Tenterden's language, adopted in *Kopitoff* v. *Wilson* (*sup.*). True, this refers to the laden ship and to her fitness with her cargo to undergo these perils, but her cargo is to be considered distributively, and unfitness with regard to one parcel is not necessarily involved in unfitness as to all. Bad stowage, which endangers the safety of the ship, may amount to unseaworthiness, of course, but bad stowage, which affects nothing but the cargo damaged by it, is bad stowage and nothing more, and still leaves the ship seaworthy for the adventure, even though the adventure be the carrying of that cargo.

There is a sense, but I think one sense only, in which the *Grelwen* might be said to have been unfit for the carriage of this cargo. One must distinguish between general fitness for what the nature of the trade requires and fitness to receive and carry a particular cargo, or part of a cargo, tendered in the course of that trade. A ship which in a certain trade, and in certain not improbable combinations of cargo offering in the trade, has to shut out cargo and to sail less than a full ship, because if she takes the cargo offered she will thereby damage other cargo already loaded, is *pro tanto* an unprofitable ship. She is not as good a freight-earner as she might be. For the cargo, however, that she does carry without sacrificing it to enable her owners to carry more cargo and so earn more freight she is perfectly fitted and quite seaworthy. All that can be said is that she might have paid better in another trade, or that another ship differently built might have paid better in the same trade. The *Grelwen* was not structurally unfitted for the West African trade, nor is that the question; but it may be that ships of another design might do better than she could. The circumstance, so much harped upon, that all Elder Dempster Company's own ships had 'tween decks is really accidental. Being better suited to the trade, they were more able to load full cargoes, however made up, but the point is not that they can carry palm oil better than the *Grelwen*, but that they can carry palm kernels too. So far as I can see, if an entire cargo of palm kernels be assumed the *Grelwen* is better fitted for its carriage than a 'tween deck ship would be, for, with her unencumbered holds and absence of 'tween decks to occupy cargo space she can carry more palm kernels than a ship of the same deadweight capacity equipped with 'tween decks. Really that is all.

Beyond all doubt, the plaintiffs, the owners of the oil cargo, have been very badly used, and, as the oil was carried on terms which relieved the defendants from liability for bad stowage, and only make them liable if the plaintiffs can show the ship to have been unseaworthy, I am very sensible of the temptation to do substantial justice by accepting a finding of unseaworthiness. The consequences of such a finding are, however, grave, since unseaworthiness affects not merely the contracts of carriage but the contracts of insurance. The unseaworthiness alleged consists in this—that a ship, unimpeached in herself, built to have holds unencumbered by transverse 'tween deck beams, is unfit to engage in the ordinary carrying trade of the West African coast unless, in some mode or other, she is fitted with 'tween decks and so made structurally other than what she was designed and built to be. Accordingly, I have thought it right to resist the impulse to take the injured plaintiffs' part and have ventured to examine the facts closely, lest I should arrive at a conclusion that would be seriously inconsistent with the way in which this class of ship is and necessarily must be employed in commerce. Ships built under the Isherwood patents are a numerous, and, so far as I know, an accepted type of ship, and in their freedom from 'tween decks and 'tween deck beams they have an advantage for carrying larger cargoes, which is part of their design. I shrink, as Scrutton, L.J. shrank, from saying on this evidence that in the ordinary West African trade such a ship is an unseaworthy ship by reason of her construction and design. If the question had not been encumbered with the technicalities and refinements of modern bills of lading it would not have occurred to anyone acquainted with practical shipping to affirm that this ship was unseaworthy, or to dispute that her cargo was improperly stowed. I could have understood that it might be argued, perhaps paradoxically, that the ship was not reasonably fit to load and carry this oil because she was in charge of a captain and mate who were without experience of such a cargo and knew their business no better than to overload the puncheons till they inevitably collapsed; but the argument which actually has been advanced is, I think, one which begins and ends with the circumstance that improper stowage is here the subject of an exception, unless the ship was what is called unseaworthy, whereby the loss occurred.

There was, finally, an argument that the shipowners might be liable in tort, or at any rate as bailees *quasi ex contractu*, though the charterers and their agents were not. This fails, to my mind. *Hayn, Roman, and Co.* v. *Culliford and Clark* (*sup.*) was the authority on which the respondents contended that the

shipowners were responsible for misfeasance, consisting in bad stowage, even though they were strangers to the contract of carriage. That case has little resemblance to such a case as this. There Denman, J. found that the defendants were, in fact, parties to the bill of lading and, as the evidence supported that finding, the observations of the Court of Appeal as to an alternative cause of action in tort were *obiter*. Of the various reports of the case, that in 40 L. T. Rep. 536 alone states the arguments of counsel, and from it Bramwell, L.J. appears to have treated the case as analogous to *Marshall* v. *York, Newcastle, and Berwick Railway Company* (*sup.*), where the only question was one of the right of a servant, whose master bought his ticket, to claim for the destruction of his own luggage. There is thus no connection between *Hayn, Roman, and Co.* v. *Culliford and Clark* (*sup.*) and the present case, where the *Grelwen* was temporarily placed in a well-known line, trading under a well-known form of bill of lading. Further, so far as I know, *Hayn, Roman, and Co.* v. *Culliford and Clark* (*sup.*) is now regarded as an authority in ordinary shipping cases only upon the question of the meaning of "negligence in navigation" or similar expressions. It may be that in the circumstances of this case the terms to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading. It may be that, the vessel being placed in the Elder Dempster and Co.'s line, the captain signs the bills of lading and takes possession of the cargo only as agent for the charterers, though the time charter recognises the ship's possessory lien for hire. The former I regard as the preferable view, but, be this as it may, I cannot find here any such bald bailment with unrestricted liability, or such tortious handling entirely independent of contract, as would be necessary to support the contention.

I think the appeal ought to be allowed with costs here and below, and that judgment should be entered for the defendants.

Lord Carson.—I agree that the appeal should be allowed, and I have nothing to add to the judgments of my noble and learned friends Lord Cave and Lord Sumner, with which I concur.

Appeal allowed.

Solicitors for the appellants, Elder Dempster and Co., *Lawrence Jones* and *Co.*

Solicitors for the appellants, the Griffiths Lewis Steam Navigation Company, *Pritchard* and *Sons*, agents for *A. M. Jackson* and *Co.*, Hull.

Solicitors for the respondents, *Rawle, Johnstone*, and *Co.*, agents for *Hill, Dickinson*, and *Co.*, Liverpool.

Supreme Court of Judicature.

COURT OF APPEAL.

March 27, 28, 31, *and April* 16, 1924.

(Before Bankes, Warrington, and Scrutton, L.JJ.)

Adelaide Steamship Company v. The King. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Requisitioned ship — Collision — War risk— Assessment of compensation — Cesser of hire during repairs.

The petitioners' steamer, the W. was requisitioned by the Admiralty during the War and used as a hospital ship. The vessel was requisitioned under charter-party T.99, which provided that: "The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar but not more extensive clause: Warranted free of capture, seizure, and detention and the consequences thereof . . . and also from all consequences of hostilities or warlike operations. . . ." And that hire should cease to be payable if the ship should cease to be able to do her work "owing to deficiency of men or stores, breakdown of machinery . . . or any other cause." While the vessel was under requisition the petitioners' vessel came into collision with another vessel and the owners of that vessel brought an action against the petitioners for damages. The House of Lords held that the collision was caused by the negligence of the W., and that the petitioners were, therefore, liable for damages to the owners of the other vessel.

On a petition of right brought by the petitioners in this case, the House of Lords held that the collision arose in circumstances which constituted a war risk, and that the Crown was liable (16 Asp. Mar. Law Cas. 178; 129 L. T. Rep. 161; (1923) A. C. 292). *The case was remitted to the High Court for the assessment of damages.*

Held, that the petitioners were only entitled to recover as damages such items as consisted of reasonable costs and expenses of repair to the W. They were not entitled to be reimbursed the damages and costs which they had had to pay the owners of the vessel with which the W. collided because the collision was not a direct result of a warlike operation but was the result of the negligent performance of such operation.

Held, further, that by the words "other cause" in the cesser of hire clause the vessel was off hire while under repair.

Decision of Greer, J. (infra) *upheld.*

(a) Reported by T. W. Morgan and Edward J. M. Chaplin, Esqrs., Barristers-at-Law.

Appeal by the petitioners from the decision of Greer, J.

The petitioners were the owners of a vessel, the *Warilda*, which was requisitioned by the Admiralty during the War for use as a hospital ship and an ambulance transport. While under requisition the *Warilda* was bringing a number of wounded soldiers from Havre to Southampton one night and came into collision with another vessel. In a collision action it was held that the owners of the *Warilda* were liable to the owners of the other vessel, owing to the negligence of the *Warilda*. The case was remitted to the High Court for assessment of the damages.

F. D. MacKinnon, K.C., *C. R. Dunlop*, K.C., and *H. C. S. Dumas* for the petitioners.

Sir *T. W. H. Inskip* (S.-G.), *W. Norman Raeburn*, K.C., and *R. H. Balloch* for the Crown.

Dec. 20, 1923.—Greer, J. read the following judgment: On the 24th March 1918, the plaintiffs' steamship, the *Warilda*, while proceeding as an ambulance transport, carrying wounded soldiers from Havre to Southampton with nurses and medical staff, steaming at full speed and without lights, collided with the *Petingaudet*, causing damage to both vessels. Proceedings were taken by the owners of the *Petingaudet* against the owners of the *Warilda*, which resulted in the *Warilda* being found solely to blame for the collision.

The owners then presented this petition of right claiming that they were entitled to be indemnified in respect of their loss arising out of the collision by reason of the obligations undertaken by the British Admiralty under clause 19 of the charter-party, which was in the form known as T.99. At the time of the collision the *Warilda* was under requisition by the Crown. No charter-party had in fact been executed; but it has been admitted throughout these proceedings that the rights of the parties are to be determined in the same manner as they would be if a charter-party in the form of T.99 had been duly executed by the petitioners, and by the Director of Transports on behalf of the Crown.

The petition came on for hearing before McCardie, J., who delivered judgment on the 14th Feb. 1922, dismissing the claim: (see 15 Asp. Mar. Law Cas. 525; 127 L. T. Rep. 63). As the learned judge dismissed the claim it was unnecessary for him to ascertain the amount of the damages to which the petitioners would have been entitled if their claim was a valid one in law, but the learned judge ascertained, and has set out in his judgment, all the facts material to the question of liability.

On appeal to the Court of Appeal, the decision of McCardie, J. was reversed, and the following order was made (*ante*, p. 57; 128 L. T. Rep. 258; (1923) 1 K. B. 59): "It is ordered that this appeal be allowed and the judgment of the Hon. Mr. Justice McCardie herein dated the 14th Feb. 1922 be set aside. And this court doth declare that the collision or damage was a consequence of hostilities or warlike operation, and that the suppliants are entitled to recover from His Majesty the King by his Attorney-General such sum as shall be found due to them herein by the judge of the Commercial Court, together with the costs of this petition of right and of this appeal, such costs to be taxed by a taxing-master as provided by the Petitions of Right Act 1860. Liberty to apply."

On appeal to the House of Lords the judgment of the Court of Appeal was affirmed: (see *ante*, p. 178; 129 L. T. Rep. 161; (1923) A. C. 292).

The grounds on which the House of Lords decided as they did were first, that the *Warilda*, as an ambulance transport, was at the moment of the collision engaged on a warlike operation, and, secondly, that the fact that that warlike operation was negligently conducted by the *Warilda* did not preclude the petitioners from recovering such damages as they were properly entitled to under the contract of insurance contained in the charter-party T.99.

In due course, the petition was set down in the commercial list and heard by me as the judge taking that list on the 11th and 12th of this month, when, after hearing counsel, I reserved my decision.

The petitioners claimed as their damages a number of items which appear in their written claim, dated the 30th Aug. 1923. It was agreed that I should deal with each of those items and should award them to the petitioners if they showed that they were entitled to them, apart from the question of amount, even though some of them were not included in the petition as originally framed or within the damages which by the order of the Court of Appeal the commercial judge is directed to ascertain.

It was also agreed that I should not be called upon to determine the right amounts of each item, but should only determine the kinds or classes of damage which the petitioners were entitled to be paid, leaving the ascertainment of the amount to the agreement of the parties, or on failure of agreement to the Admiralty Registrar.

The first item of the claim was for hire for fifty-five days from the 25th March 1918 to the 18th May 1918—14,295*l*. The petitioners alleged that they are entitled to this hire during this period. This is not a claim under the contract of insurance contained in clause 19, but I decide it at the request and by the agreement of the parties as if it had been originally claimed in the petition and included in the order of the Court of Appeal.

The hire claimed as aforesaid is clearly due unless the vessel was off hire within the meaning of the cesser of hire clause in charter-party T.99. The material words are in the first paragraph of clause 25: "If from any deficiency of men or stores, breakdown of machinery, or any other cause, the working of the steamer is at any time suspended for a period exceeding twelve running hours, pay shall cease for the whole of such and any subsequent period of

whatever duration during which the vessel is inefficient."

As I have said, the *Warilda* was seriously damaged by the collision, the plates of her stem being twisted and so damaged that her fore-peak became full of water, and until repaired she was, in my judgment, inefficient for the purposes of her service under the charter-party. There was no deficiency of men or stores and no breakage of machinery. The question is whether what happened is included in the general words " or any other cause suspending the working of the steamer " within the meaning of these words in clause 25.

In my judgment the vessel was off hire from the time she landed her passengers after the collision until such time as she was repaired and rendered efficient for the service. It was argued for the petitioners that the damage to the hull was not within the words " any other cause suspending the working of the steamer," as it was not *ejusdem generis* with the other causes of suspension mentioned in the clause.

In the case of *Aktieselskabet " Frank "* v. *Namaqua Copper Company* (15 Asp. Mar. Law Cas. 20 ; 123 L. T. Rep. 523), I stated what I conceived to be the right test to apply to give effect to the *ejusdem generis* rule. I think that the right test is to ask whether the cause which is suggested to come within the general words is of a like kind with some or one of the causes specifically enumerated. In my judgment damage to the hull suspending the efficient working of the steamer is a similar cause to breakdown of machinery suspending the efficient working of the steamer. I accordingly decide that the vessel was off hire from the time when the working of the steamer was suspended by reason of the damage to the hull until she was repaired. As, however, she continued her service under the charter-party until she landed her passengers I think it cannot be said that she was off hire until that happened.

It is clear that if I come to the conclusion that there is nothing in the particular words used which enables them to be comprehended in any genus or genera, the words " any other cause " would have to be interpreted literally, and so interpreted would clearly cover what happened to the *Warilda*.

The items in the particulars, Nos. 2 to 17, are described as costs and expenses of repairs to the *Warilda*. It could not be, and was not disputed, that under the insurance contract contained in clause 19 of the charter-party, the petitioners were entitled to recover these costs, but some of the items deserve special considera-tion as they do not look as if they were costs of repairs at all. It seems to me quite clear that the wages of the officers and crew, and the cost of the coal used while the vessel was off hire, cannot be held to be recoverable as the direct consequence of the collision : (See *De Vaux* v. *Salvador*, 4 Ad. & E. 420 ; *Shelbourne and Co.* v. *Law Investment and Insurance Corporation*, 8 Asp. Mar. Law Cas. 445 ; 79 L. T. Rep. 278 ; (1898) 2 Q. B. 626).

But it is conceivable that there may be circumstances in which the wages of the officers and crew may be treated as part of the cost of repairs, for example, their wages for that period of time when they are engaged solely in taking the vessel into dry dock ; but the mere fact that the officers and crew had to be kept on during the repairs and their wages paid will not of itself entitle the petitioners to recover them under clause 19. Similar observa-tions apply to the claim for coal.

With regard to the claim for two-and-a-half per cent. commission on disbursements, I have not been sufficiently informed of the facts to enable me to say whether this is recoverable or not. The only observation I can make on the subject is that if it is a banker's commission such as was dealt with by Kennedy, J., as he then was, in *Agenovia Steamship Company* v. *Merchants' Marine Insurance Company* (8 Com. Cas. 212) it will be recoverable.

The other items which I have to consider consist of the damages which the petitioners have to pay to the owners of the *Petingaudet*, and the costs they have to pay. This claim involves the determination of a question of construction which is far from easy. In the traditional form of policy on a ship, the subject matter of the insurance is the ship, and by the policy the insurers undertake to indemnify the assured against either total loss of the ship or the partial loss by damage where such loss is occasioned by some one or other of the enumerated perils. For many years it has been usual for such policies to contain the f.c.s. clause substantially in the form quoted in clause 19 of the charter-party under consideration.

For many years past it has also become customary to affix to the form of charter-party the clauses known as the Institute Time Clauses. The first of these clauses is as follows : " And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel and the assured shall in conse-quence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision, the undersigned will pay the assured such proportion of three-fourths of such sum or sums so paid as their respective subscription have to bear to the value of the ship hereby insured.

It was conceded at the hearing that any ordinary policy of marine insurance would have this clause attached. It was contended for the Crown that the promise of indemnity contained in the part of the Institute Time Clauses above set out was not affected by the f.c.s. clause, and that the marine under-writers would continue liable under the Institute Time Clauses notwithstanding the presence in the policy of the exceptions covered by the f.c.s. clause ; and, secondly, whether this be so or not, the promise of indemnity contained in clause 19 did not cover the liability

of the shipowner to pay damages to the owners of the *Petingaudet*.

At the hearing I was inclined to think that the exceptions contained in the f.c.s. clause would apply to relieve the marine underwriters, but on consideration I have come to the conclusion that this view is not right. The Institute Time Clauses added to the policy as it existed without such clauses from an additional contract of insurance dealing with an entirely new subject-matter which has nothing to do with damage to the insured ship, but is of the same character as a third party risk policy on a motor-car or other vehicle moving on land. The exceptions contained in the f.c.s. clause only apply to damage, which is the direct or immediate result of warlike operations, &c., and, though the Court of Appeal and the House of Lords have decided in the present case that the collision and the damage to the *Warilda* were the direct result of warlike operations notwithstanding that such operations were negligently conducted it does not follow that they meant by that that the petitioners' liability to pay damages to the owners of the *Petingaudet* was the direct result of warlike operations. I do not think it was.

As regards the claim of the owners of the *Petingaudet*, the fact that the collision happened during a warlike operation was only material as showing the circumstances under which the alleged negligence took place. The liability to pay damages to the owners of the *Petingaudet* was not occasioned by the warlike operations, but was solely due to the negligent management of the vessel while carrying out a warlike operation.

The f.c.s. clause does not, in my opinion, free the insurer from the indemnity provision in the Institute Time Clauses in respect of collision occasioned by the negligence of servants of the insured owners, even where that negligence takes place in the course of carrying out a warlike operation. If the obligations of the underwriters on a marine policy are not excluded by a warranty in the terms of clause 19 of the charter-party, it is clear that the Crown cannot be held to have undertaken the obligation to indemnify the petitioners in respect of their liability to pay to the owners of the *Petingaudet*, or their own costs; but even if the liability of marine underwriters be so excluded, I would none the less still be of opinion that the promise of indemnity contained in clause 19 of the charter-party does not include a promise to indemnify the petitioners in respect of their liability to pay such damages or costs. The promise is a promise to undertake war risks, and the clause says that such risks are taken by the Admiralty on the ascertained value of the steamer if she be totally lost at the time of such loss, or, if she be injured, on the ascertained value of such injury.

It seems to me that such promise as is expressed or implied in clause 19 is confined to an insurance the subject-matter of which is the loss of the ship or damage to the ship, and it does not include any promise to indemnify the owners against claims for damages for collision which are based on negligent navigation.

The result of my judgment is that the only damages recoverable by the petitioners are the reasonable costs and expenses incurred in repairing the vessel.

My judgment is that the petitioners recover, as damages, such of the items included in the clause as may be proved to consist of reasonable costs and expenses of repairing the damage to the *Warilda.* I am not in a position to decide whether the wages or the coal included in the claim or any part of them are part of such reasonable costs and expenses. That will have to be decided either by agreement or, as I understand the parties have assented to, the Admiralty Registrar.

With regard to the costs of the proceedings before me, my own view is that they are covered by the order of the Court of Appeal.

The petitioners appealed.

F. D. MacKinnon, K.C., *C. R. Dunlop*, K.C., and *H. C. S. Dumas* for the appellants.

Sir *Thomas Inskip*, K.C., *W. Norman Raeburn*, K.C., and *R. H. Balloch* for the respondents.

Cur. adv. vult.

BANKES, L.J.—This appeal is a step in a long drawn out litigation arising out of a collision between the appellants' steamship, the *Warilda*, and a French vessel called the *Petingaudet.* The responsibility for the collision was fought up to the House of Lords, and in every court the *Warilda* was held solely to blame. The next question to be litigated was whether the marine risk underwriters or the Admiralty, who, under the provisions of charter T.99, occupied the position of war risk underwriters, were liable for the results of the collision. Again the question was fought up to the House of Lords, and the decision was that the Admiralty were liable upon the ground that the collision was, within the meaning of the material clause of the charter-party, a consequence of hostilities or war-like operations. This question came before the court in the first instance on a petition of right in which the appellants only claimed a declaration of liability in respect of the damage sustained by the *Warilda.* At the close of the argument in this court, on appeal from the judgment of McCardie, J., this court made a declaration that the suppliants were entitled to recover such sum as should be found due to them by the judge of the Commercial Court. During a discussion which took place as to the form of the order, it was quite clearly understood that the inquiry should include the question of liability for the damages and costs which the suppliants had to pay to the owners of the *Petingaudet*, as well as the question of the right of the Admiralty to stop payment of hire during the time the *Warilda* was being repaired. The order of this court was affirmed by the

House of Lords, and the questions left open for decision came before Greer, J. in the Commercial Court. It is from his judgment that the present appeal is brought. The question turns entirely, in my opinion, upon the construction of a few clauses in the charter-party T.99. The material clauses are 18, 19, and 25. The claim of the Admiralty to cease paying hire for the vessel while she was being repaired after the collision, depends upon the construction to be placed upon the language of clause 25. I so entirely agree with the conclusion arrived at by the learned judge on this point, and with the reasons which he gives for his decision, that I do not desire to add anything to what he said.

The question which has been elaborately argued in this court has reference to the appellants' claim to be reimbursed three-fourths of the damages and costs which the appellants have had to pay to the owners of the *Petingaudet*. Upon this point the material clauses of the charter-party are clauses 18 and 19, which are as follows: Clause 18: "The Admiralty shall not be held liable if the steamer shall be lost, wrecked, driven on shore, injured, or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather, or any other cause arising as a sea risk." Clause 19: "The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar, but not more extensive, clause: Warranted free of capture, seizure, and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or war-like operations, whether before or after declaration of war. Such risks are taken by the Admiralty on the ascertained value of the steamer, if she be totally lost, at the time of such injury." Had the third paragraph of clause 19 been omitted I should have felt considerable doubt as to the construction to be put upon these clauses. The argument for the appellants took this form. An ordinary English policy of marine insurance, it is said, includes the Institute Collision Clause. This clause covers a risk—an exceptional or unusual risk, it is true, but still a risk; and the risk is the having to pay damages and costs in the case of a collision due wholly or partly to the negligence of the assured's servant in charge of the vessel, the subject matter of the insurance. If the policy which contains the clause contains also the f.c.s. clause, the proper construction of the article is to read it with the f.c.s. clause incorporated with it. The clause so far as is material would then read: "And it is further agreed that if the ship hereby insured shall come into collision (other than a collision the consequence of hostilities or war-like operations) with any other ship or vessel, and the assured shall in consequence thereof become liable to pay," &c. If this is the true construction of the article and the clause read together, then the omission of the clause from the policy leaves the underwriter responsible for the loss covered by the article even when the collision is the result of the negligence of the servants of the assured, and the question of whether that negligence or the war-like operation is the *causa proxima* of the loss does not arise. I do not think that there is anything in the decided cases to which attention was called which necessarily excludes this view. *De Vaux* v. *Salvador* (L. Rep. 4 A. & E. 420) decided that the liability to pay damages and costs in the case of a collision at sea is, to use Lord Denman's language, neither a necessary nor a proximate effect of the perils of the sea. To meet this difficulty the Institute Collision Clause was introduced into the usual form of Lloyd's policy. *Xenos* v. *Fox* (19 L. T. Rep. 84; L. Rep., 3 C. P. 630) does not, in my opinion, decide that the subject to which the clause applies is not a risk within the ordinary meaning of insurance law. The decision no doubt was that the clause contains the whole agreement between the parties on the subject to which it relates, and consequently that the peril to which the clause relates was not an ordinary peril covered by the suing and labouring clause. At p. 638 of L. Rep. Bovill, C.J. sums up the view of the court in this language: "We think that this clause does not introduce a new subject matter of insurance to be affected by the usual perils, but is in the nature of an additional clause, as much as the suing and labouring clause itself." I read this decision as meaning that the risk covered by the collision clause is an unusual, and not a usual peril, and that the contract of the parties in relation to that peril is to be found within the four corners of the clause. The language of Romer, L.J. in the case of *Cunard Steamship Company Limited* v. *Marten* (9 Asp. Mar. Law Cas. 452; 89 L. T. Rep. 152; (1903) 2 K. B., at p. 515) is consistent with this view when he speaks of the ordinary language of a Lloyd's policy having "no application to the precise risk insured." The risk he there refers to was the risk undertaken by a clause in the policy in these words: "Liability of any kind to the owners of mules owing to the omission of the negligence clause in contract." It is not, in my opinion, necessary to express an opinion on the above argument for the appellants, as I think that any possibility of accepting it is excluded by the express language of the third paragraph of clause 19. I read "such risks" as meaning all the risks covered by the clause. If this is correct it excludes the risk covered by the collision clause, because the extent of the Admiralty's liability cannot be measured by the scale indicated in this paragraph. This scale is applicable, and applicable only, to the injury done to the *Warilda* herself. I should imagine that this was the view of the appellants themselves when they decided, in the first instance, to limit their claim in the petition of right to a declaration in reference to the damages due to that injury. Be this as it may, I think that the appeal fails for the reasons I have given and must be dismissed with costs.

WARRINGTON, J.L.—The appellants are the owners of the steamship *Warilda*. On the 24th March 1918 the *Warilda* came into collision with the steamship *Petingaudet*, both ships being seriously injured. In the proceedings instituted by the owners of the *Petingaudet* it was finally determined by the House of Lords that the *Warilda* was solely to blame for the collision and her owners have paid to the owners of the *Petingaudet* a large sum for damages and they have also had to pay their own and the plaintiffs' costs of that litigation.

At the time of the collision the *Warilda* was in the employ of the Government under the terms of the well-known document T.99. A question having arisen between the Government and the appellants whether the collision was the consequence of warlike operations and therefore one of the risks taken by the Admiralty as one of the terms of their employment of the ship, a petition of right was presented claiming compensation for the loss or damage occasioned by the collision. In these proceedings an order of the Court of Appeal was made on the 18th July 1922, whereby it was declared that the collision or damage was a consequence of hostilities or warlike operations and that the suppliants were entitled to recover from His Majesty the King, by his Attorney-General, such sum as shall be found due to them therein by the judge of the Commercial Court.

The question as to the sum to be so recovered came before Greer, J. in the Commercial Court and he allowed to the appellants the costs of repairing their own ship but disallowed altogether the damages paid by them to the owners of the *Petingaudet* and the costs of the proceedings in the Admiralty action. He also disallowed a claim by the appellants to be paid hire during the period occupied in repairing the damage to their own ship.

The appellants appeal from these disallowances. There is no cross-appeal as to the sum allowed by Greer, J.

It has been agreed that the rights of the parties must be determined on the footing that the ship was employed by the Admiralty upon the terms of the document T.99. The questions raised are questions as to the true construction of that document. It expresses the terms of a contract of a composite nature—a charter-party and a policy of insurance against "war risks." The question as to the damages paid to the owners of the *Petingaudet* and the costs of the proceedings in the Admiralty action arise out of the provisions as to insurance, the question as to hire out of the provisions of the charter-party. The questions are quite independent of each other.

The insurance provisions are contained in clauses 18 and 19 which are in the following terms: 18. "The Admiralty shall not be held liable if the steamer shall be lost, wrecked, driven on shore, injured or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather or any other cause arising as a sea risk." 19. "The risks of war which are taken by the Admiralty are those risks which would be excluded by an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause: Warranted free of capture, seizure, and detention and the consequences thereof or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war. Such risks are taken by the Admiralty on the ascertained value of the steamer, if she be totally lost, at the time of such loss, or if she be injured, on the ascertained value of such injury. Should a dispute arise as to the value of the steamer the same shall be settled as laid down in Clause 31," viz., by arbitration.

It is common ground that the expression "an ordinary English policy of marine insurance" means in the contract under consideration a policy to which is attached as part of it a copy of what are known as the Institute Time Clauses. The first of these is in the following terms as far as it is material: "And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision the undersigned will pay the assured such proportion of three-fourths of such sum or sums so paid as their respective subscriptions hereto bear to the value of the ship hereby insured, provided always that their liability in respect of any one such collision shall not exceed their proportionate part of three-fourths of the value of the ship hereby insured, and in cases in which the liability of the ship has been contested . . . they will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur, or be compelled to pay."

These clauses also include an f.c.s. clause in identical terms with that inserted in the policy and referred to and quoted in the contract now in question, but this fact in my opinion makes no difference to the construction of the compound document as a whole.

Now I have already pointed out that the order of the Court of Appeal as affirmed by the House of Lords merely declared that the collision or damage was a consequence of hostilities or warlike operations, it left open all questions as to the amount the suppliants were entitled to recover and in particular the question now before the court. The argument for the appellants seems to me to come to this: Taken by itself the collision clause applies to collisions under whatever circumstances they arise. The f.c.s. clause excepts from the category of collisions in respect of which the obligation under the clause would arise all those which are the consequence of warlike operations. The liability in respect of such a collision which but for the f.c.s. clause would fall on the marine underwriters is therefore a risk of war undertaken by the Admiralty.

This argument rests in my opinion on the contention that the f.c.s. clause excludes from the category of collisions in clause 1 collisions which are the consequences of warlike operations. On this point I agree with the judgment of Greer, J. The collision and the material damage to both ships may be the consequences of warlike operations but the liability of the owners of the *Warilda* to those of the *Petingaudet* arose solely from the negligence of their servants and was not the consequence of warlike operations. In the collision action the nature of the operations in which the *Warilda* was engaged was wholly irrelevant to the issue between the parties. It seems to me that the object of the f.c.s. clause is to define by exclusion the liabilities undertaken by the underwriters and that the indemnity expressed in the clause in question is an indemnity against a liability which is not a consequence of warlike operations, but of the negligence of the *Warilda's* officers and crew.

It may be that on this reasoning the marine underwriters may be answerable for the damages and costs in question to the extent specified in the clause, but they are not before the court, and on this question I express no opinion. All we have to decide is what obligagations were undertaken by the Admiralty? The only point I decide is that the liability to pay damages to the owners of the *Petingaudet* and the costs of the collision action and subsequent proceedings are not the consequence of warlike operations, and, therefore, not within clause 19.

But, if I am wrong in this view, I am of opinion that on the construction of clause 19 itself all that the Admiralty undertook were risks to the insured ship herself. The third sentence of the clause: " Such risks are taken by the Admiralty on the ascertained value and so forth " seems to me to indicate with sufficient clearness that the parties had in mind only the loss or injury of the ship herself, and not injury to another ship caused by the negligence of the officers and crew of the insured ship.

The cases which were cited in the course of the argument do not in my opinion throw much light on the case in the point of view from which I regard it.

As to the second question whether the appellants are entitled to hire during the period occupied in repairing the *Warilda* herself I agree with Greer, J. that this matter is concluded against them by clause 25 of the contract.

On the whole I think the appeal should be dismissed with costs.

SCRUTTON, L.J.—The chief question in this case is whether the owners of the *Warilda* can recover from the Crown the sums they have been compelled to pay to the owners of the *Petingaudet* for damage caused to that ship by a collision in which those navigating the *Warilda* were negligent, and the *Warilda* was held alone to blame.

The *Warilda* was employed by the Crown during the war as a hospital ship on the terms of charter T.99, and at the time of the collision was crossing the channel at full speed without lights. She saw three points on her starboard bow the loom of a ship half a mile away, and has been found alone to blame for not reducing speed.

I need not read again clauses 18 and 19 of T.99 which put sea risk on the owners and war risk on the Admiralty. Under these clauses the House of Lords has held that the *Warilda* was engaged in warlike operations negligently performed, and that anything that can be described as consequences of hostilities or warlike operations can be recovered by the owners from the Admiralty. They have held that the *Warilda* was engaged in warlike operations, and that the negligence of those on board her is not a new and independent cause which prevents the collision being a consequence of warlike operations.

No question as to what exactly the Admiralty were bound to pay under clause 19 was raised before the House of Lords, and in particular, the question as to the incidence of damages which the *Warilda* had to pay to the *Petingaudet* in consequence of the negligence of those on board the *Warilda* was not discussed at all.

Lloyd's policy indemnifies against damage caused by certain risks or perils, of which perils of the sea is one; and collision whether caused by negligence or not has always been treated as a peril of the sea. But when it was attempted to claim under the policy as a loss by perils of the sea damages which one ship had to pay another because of her negligence causing a collision, the claim was rejected in 1836 by the Court of King's Bench in *De Vaux* v. *Salvador* (*sup.*). It is true that in that case, both ships being to blame, the arbitrators who assessed the damage applied the *rusticum judicium* of the Admiralty; but this appears to make no difference to the principle on which the decision was rested, namely, that sums which the shipowner had to pay another shipowner for damage done by the negligence of his servants, were too remote from the sea perils against which the ship itself was insured to be recovered under a marine policy. This decision was much discussed in the United States, Story, J. disapproving it, and Mr. Phillips supporting it, but the same view was ultimately taken by the Supreme Court of the United States. In England it was accepted as law, and a special clause known as the " running down clause " was added to the policy by which in its simplest form the underwriter undertook to pay three quarters of the sum for which the shipowner was held liable either alone or on balance to another ship by reason of negligence. He was of course not liable unless there was negligence. But this clause was not treated as insuring against consequences of a peril, but as a special contract to repay portions of sums paid. For instance, the sue and labour clause enables the assured to recover expenses incurred in saving the ship from the operation of perils insured against, but when the attempt was made to recover the costs of the successful defence of a collision claim under the sue and labour clause

the Court of Common Pleas in *Xenos* v. *Fox* (*sup.*), after hearing arguments from Mr. J. C. Mathew, Sir George Honyman, and Mr. Watkin Williams rejected the claim. Bovill, C.J. puts the judgment of the court thus at p. 635: "It has been long settled that an ordinary policy does not cover the liability for damage done to another vessel by the negligence of those in charge of the vessel insured; and such a case would not come within the ordinary perils insured against, or within the usual suing and labouring clause in an ordinary policy. A collision clause in various forms has therefore for many years been in use where parties desire to be protected against the consequences of a collision arising from the fault of their own vessel. It is in each case a special contract very different from the contract of insurance in its ordinary form; and the liability under it does not depend upon the ordinary perils covered by the policy, but upon the special matters mentioned in the clause itself." Again, on p. 637: "The collision clause is not an insurance against the perils mentioned in the policy, but is an engagement of a very restricted character, extremely limited in extent, and subject to very precise conditions, to pay a proportion of a part of something that the assured may be liable and compelled to pay to the owner of another vessel, in a suit defended with the underwriters' written consent. We think that this clause does not introduce a new subject-matter of insurance to be affected by the usual perils, but is in the nature of an additional clause, as much as the suing and labouring clause itself."

This being the nature of the collision clause, one comes to the construction of clauses 18 and 19 of the charter. It has long been the practice of insurance after the policy has professed to insure against certain named perils, for a clause known as the f.c.s. clause to cut out certain of those perils from the policy, or in the language of the clause to warrant the ship free of (loss by) capture and other named perils. This clause came into existence at the time of the Napoleonic Wars and the Continental system, and was then directed to warranting the ship free of capture and seizure in foreign parts under that system. It was gradually extended to cover all consequences of hostilities or warlike operations, though it includes lawful seizures by other Governments for breaches of their laws: (see *Miller* v. *Law Accident Insurance Company Limited* (9 Asp. Mar. Law Cas. 386; 88 L. T. Rep. 371; (1903) 1 K. B. 712). But when one set of underwriters excluded from their policy losses covered by the f.c.s. clause, another set of underwriters were ready to cover losses excluded from that policy by the same clause. As was said by Erle, C.J. in *Ionides* v. *The Universal Marine Insurance Company* (14 C. B. (N. S.), at p. 285: "The words of the exception in this policy are to be construed as they would be if the assured had re-assured his cargo against the perils which are excepted by the warranty now in question." But if so, the reasoning of *De Vaux* v. *Salvador* (*sup.*) would apply, and just as in that case the payment of damages to another ship for negligence was not a proximate consequence of the peril of the sea collision, so in the present case the payment of damages to another ship for negligence would not be a proximate consequence of warlike operations. The shipowner did not pay because he was on a warlike operation, but because his servants were negligent. As Willes, J. said in the *Ionides* case, "consequences" is the same as "effects," and "in construing the exception, we can only look at the proximate consequences of hostilities" or warlike operations. These would be damage to the ship insured, but not a payment to another ship, the liability for which depends only on negligence. Whether intentionally or unintentionally, the parties have worded clause 19 of this charter in accordance with this view. The Admiralty take responsibility for certain risks or perils; and "such risks are taken on the ascertained value of the steamer, if she be totally lost, at the time of such loss, or, if she be injured, on the ascertained value of such injury." This clause is pertinent to a claim for loss of or damage to ship, but quite inapplicable to a claim under the collision clause for three-fourths of the payment made. And the marginal note: "War risk damage or loss of ship" expresses the same view. I expect the parties did not think of the collision clause; whether if they had thought they would have included it is a matter of conjecture, but I suspect the Admiralty would not have welcomed a suggestion that they should insure payments which would only have had to be made if the officers and crew provided by the shipowner were negligent. At any rate, the words used, which we have to construe, have not, in my view, according to well recognised principles of marine insurance, made the Admiralty liable to indemnify the shipowners against this payment. Mr. MacKinnon argued that, though the policy undoubtedly insured loss of ship, damage to ship, and general average sacrifice, all damages to the subject-matter insured, and this claim was a payment by the shipowner, not a damage to the ship, yet a Lloyds' policy undoubtedly covered other payments by the shipowner, such as general contribution, salvage whether by agreement or voluntary, and particular charges under the sue and labour clause. But all these sums are, by the old-established practice of underwriters, recovered as losses by perils insured against, the perils they were made to avert. Payments under the collision clause are not recovered, as pointed out in *Xenos* v. *Fox* (*sup.*), as consequences of perils insured against, but under a special and limited promise to pay, and do not, in my opinion, come under clause 19 of the charter. For these reasons I agree with the view of Greer, J. on this point.

The other matter raised by the appeal was whether during the time that the collision damage repairs were being executed, the Admiralty were justified in stopping hire.

They claimed to do this under clause 25 of the charter, alleging that the working of the steamer was suspended by inefficiency arising from "any other cause," *i.e.*, damage to hull. This claim seems to me to be correct; and to make the Admiralty insure the hire under clause 19 would be to make them insurers of freight, and not, as I think they are, insurers of ship only.

For these reasons, in my opinion, the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the petitioners, *Parker, Garrett, and Co.*

Solicitor for the Crown, *The Treasury Solicitor.*

Feb. 11, 12, *and* 22, 1924.

(Before BANKES, SCRUTTON, and SARGANT, L.JJ.)

THE KOURSK. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Collision—Vessel damaged by separate acts of two wrongdoing vessels—Separate acts of neglect producing a single injury—Judgment against one wrongdoer, whether bar to an action against the other wrongdoer—Judgment unsatisfied—Wrongdoers not joint tortfeasors.

Where separate and independent acts of negligence cause or contribute to a single injury the actors are not joint tortfeasors, and judgment in favour of the injured party against one tortfeasor does not bar an action by such injured party claiming the same damage against the other tortfeasor.

The plaintiffs' vessel was sunk in collision with the C.C. *The collision was caused partly by the fault of the* K., *belonging to the defendants, which collided with the* C.C. *very shortly before the* C.C. *collided with the plaintiffs' vessel, and partly by the fault of the* C.C., *which contributed to the collision with the* K. *There was no negligent act during the interval between the collisions. The plaintiffs recovered judgment against the owners of the* C.C., *which judgment was only partially satisfied. Thereupon the plaintiffs brought the present action, claiming the same damage for which they had recovered judgment against the owners of the* C.C.

Held, that the negligent acts of the C.C. *and the defendants' vessel being separate and independent, the judgment which the plaintiffs had recovered against the* C.C. *was not a bar to a subsequent action against the defendants, notwithstanding that the injury caused by the two acts of negligence was identical.*

Judgment of Hill, J. (infrà) *approved.*

APPEAL from a decision of Hill, J. (*infrà*) in an action of damage by collision.

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

The appellants (defendants) were the owners of the steamship *Koursk.* The respondents (plaintiffs) were the owners of the steamship *Itria*, and claimed to recover from the appellants damages for injuries sustained by the *Itria* in a collision which took place in April 1918 between the *Itria* and the steamship *Clan Chisholm*, which the respondents contended was caused by the fault of the *Koursk.*

The case is reported upon the issue raised by par. 13 of the defence of the appellants, in which the defendants (appellants) pleaded that the plaintiffs (respondents) had recovered judgment against the owners of the steamship *Clan Chisholm* for the damage which the plaintiffs sustained by reason of the collision between the *Itria* and the *Clan Chisholm* and which they claimed in this action against the defendants, and the defendants said that, if contrary to their contentions the navigation of the *Koursk* was in any way responsible for the loss of or damage to the *Itria*, the plaintiffs had suffered damage by reason of a joint tort committed jointly by the owners of the *Clan Chisholm* and the owners of the *Koursk* or their servants and had recovered judgment against one of the said joint tortfeasors and were not entitled to proceed against the other.

The following statement of facts is taken from the judgment of Hill, J.:

"On the 18th April 1918 a collision took place between the *Clan Chisholm* and the *Koursk*, and almost immediately afterwards the *Clan Chisholm* collided with and sank the *Itria.* The owners of the *Itria*, who are the present plaintiffs, issued a writ against the *Clan Chisholm* on the 29th May 1918, and in that action, when the defence came to be delivered, the owners of the *Clan Chisholm* said the blame was entirely due to the *Koursk.* Upon that the plaintiffs issued a writ *in rem* against the owners of the *Koursk* on the 2nd Aug. 1918. They did not arrest or seek to arrest the *Koursk*, probably for the reason, as appears from Lloyd's List of the 22nd June 1918, that this court in an action between the *Clan Chisholm* and the *Koursk* had decided that a warrant of arrest against the *Koursk* could not be issued upon the ground that she was in the employ of the British Government. The writ of the present plaintiffs, the owners of the *Itria*, against the *Koursk* was served on the 28th Feb. 1919, and an appearance was entered on the 5th March 1919. The action of the plaintiffs against the owners of the *Clan Chisholm* proceeded and was tried at the same time as cross actions between the *Clan Chisholm* and the *Koursk.* That trial was on the 14th March 1919. On the 25th March 1919 the Admiralty Court gave judgment for the plaintiffs, the owners of the *Itria*, against the *Clan Chisholm*, and also a judgment of both to blame in the consolidated action of the *Koursk* and *Clan Chisholm.* That went to the Court of Appeal, and the judgment was varied. It went to the House of Lords, where the judgment of the Admiralty Court was restored, on the 17th Feb. 1920. On the 5th March 1920 the

Clan Chisholm brought an action for limitation of liability against the owners of the *Itria*. A decree was made on the 21st June 1920, and the registrar's report in favour of the owners of the *Itria* was made on the 29th Nov. 1920. It may be supposed from the fact that the *Itria* was sunk that the *Clan Chisholm's* limitation amount fell very far short of satisfying the damage suffered by the present plaintiffs. The only date I need mention is, I think, that in this year—on the 27th Feb—the *Koursk* was arrested in the present action, and the pleadings were all in this year. The reason why the *Koursk* was not arrested sooner was that, until a decision in the Commercial Court (which, I think, was given this year), it was not apparent that the *Koursk*, amongst other ships said to belong to the Russian Volunteer Fleet, were free from British Government control."

Stephens, K.C. and *Darby* for the plaintiffs.

Laing, K.C. and *Dumas* for the defendants.

Cur. adv. vult.

July 2, 1923.—HILL, J. (after stating the facts as above) gave the following judgment: The present suit was heard by me last month, and I found the *Koursk* to blame. I had already found in the previous action the *Clan Chisholm* to blame. The question which now arises is this: The plaintiffs have recovered judgment against the *Clan Chisholm*; can they now recover judgment against the *Koursk*? If both actions had been tried together then, of course, the plaintiffs would have recovered judgment against both the owners of the *Koursk* and the owners of the *Clan Chisholm*, and each of those defendants would have been liable for the full amount of the plaintiffs' damages. But what is said is that inasmuch as on the 25th March 1919, the plaintiffs recovered judgment against the owners of the *Clan Chisholm* there was a right of recovery against the owners of the *Koursk*, then and there determined. I understand that it is not disputed that at common law, if the tort of the *Koursk* and the *Clan Chisholm* in damaging the *Itria* is one, then recovery and judgment by the plaintiffs against the *Clan Chisholm*, whether satisfied or not, will prevent recovery against the *Koursk*.

I am here using figurative language, I know, for brevity, but, of course, when you talk of the name of a ship you ought really to talk of the owners of the ship, but no one will misunderstand me when I am speaking of the tort of the *Koursk* and of the *Clan Chisholm*, and of recovery of the one against the other. That really raises this point: Was the tort of the *Koursk* and the *Clan Chisholm* one or two? The damage was one, of that there is no doubt, but that is only one element in the tort. It was an action of negligence. Perhaps we may talk about an action of trespass, but in the form in which it is always launched in this court it is always an action on the case in negligence—the tort is negligence causing damage—and, in my view, both elements must be taken as one, the one *injuria* causing one damage. It is not always easy to distinguish, where a wrong has been committed by more than one person, whether the wrong is one wrong in which two co-operate, or separate wrongs which happen to produce one effective damage. Some of the cases referred to, of course, are simple enough. Take *Brinsmead* v. *Harrison* (27 L. T. Rep. 99; L. Rep. 7 C. P. 547)—a case of detinue—the detinue of a single article by one man by the orders of another—that is a simple case of a simple act. Another case that has been referred to, *Sadler* v. *Great Western Railway Company* (74 L. T. Rep. 561; (1896) A. C. 450), is a clear case of nuisance by the neighbours on either side. Nobody has been able to find any case in which the matter has been decided where the plaintiff has complained of negligence. Mr. Laing has referred me to several cases in the Admiralty Division which I will refer to. Mr. Stephens referred me at the last hearing to expressions in judgments of Collins, L.J., or the Master of the Rolls, I am not sure which, but there is no decision. You may say at any rate of these common law cases that they do not treat it as obvious that where there is one damage two negligences which combine to produce it cannot be separate torts. In *Thompson* v. *The London County Council* (80 L. T. Rep. 512; (1899) 1 Q. B. 840) there were two separate actions of negligence, but in dealing with the matter Collins, L.J. says this on page 844: "An argument was presented to us which, it appears to me, was based upon a fallacy, that was that, because the plaintiffs had claimed only one damage, therefore their cause of action was necessarily one also, however many persons they chose to put on the writ as bringing about that one damage. It seems to me that that is no test at all. The damage is one thing, and the *injuria* is another. What constitutes the cause of action is the *injuria*, the wrong done by a separate tortfeasor; and when we analyse this case (the facts are not in dispute) we find we are dealing with it upon the assumption that the two acts which were done, the one by the London County Council and the other by the New River Company, are entirely disconnected torts—each of them a separate *injuria*—if it be *injuria* at all—quite distinct the one from the other."

In *Bulloch* v. *The London General Omnibus Company* the point that is now raised was argued at considerable length (95 L. T. Rep. 905; (1907) 1 K. B. 264). That was an action of negligence in the driving and management of land vehicles. The plaintiff, who was injured, had joined both the omnibus company and the owners of a cart and the statement of claim alleged that the plaintiff had received personal injuries from their joint negligence, and, alternatively, that he had suffered from the separate injuries of each of the defendants. Negligence was found against one, and the question arose about costs. There was what the Master of the Rolls described as an elaborate

argument (and so it appears to have been from the notes) based upon the contention that there were two separate causes of action and that they never ought to have been joined in one action. What the Master of the Rolls said was: "An elaborate argument has been addressed to us upon another point which is said to afford a ground for impugning the order, the point being that there had been a misjoinder of separate causes of action. If in fact there was such a misjoinder it was for the defendants to take steps to remedy it; no such steps were taken, and it is much too late to complain of the irregularity if there was one." The court did not decide whether they were separate causes of action or not—it merely said it was too late to take the point. The matter was argued later on, and it would have been a simple answer to the argument to say: "This was a joint tort." When we speak about improperly joining two people who had committed a joint tort we do not get much from the common law cases, except that we cannot find any case of an action for negligence in which the doctrine contended for by Mr. Laing applies. There are certain Admiralty cases which Mr. Laing very properly referred me to which have used language in which apparently the persons in charge of two ships were each separately negligent, and the negligence producing one damage has been spoken of as that of joint tortfeasors. In two of these cases it seems pretty clear that the language which was used was quite adequate—in *The Avon and Thomas Jolliffe* (6 Asp. Mar. Law Cas. 605; 63 L. T. Rep. 712; (1891) P. 7), and in *The Englishman and The Australia* (7 Asp. Mar. Law Cas. 605; 72 L. T. Rep. 203; (1895) P. 212)—to indicate that the act or neglect was joint. It was a case of master and servant—tug and tow—co-operating at one time in excessive speed and at another time in entering or leaving a dock at an improper time. There was no question that the act was joint and that only two people were co-operating. In *The Devonshire* (10 Asp. Mar. Law Cas. 210; 107 L. T. Rep. 179; (1912) A. C. 634) and *The W. H., No. 1 and The Knight Errant* (11 Asp. Mar. Law Cas. 407; 102 L. T. Rep. 643; (1910) P. 199), and I think in *The Frankland* (9 Asp. Mar. Law Cas. 196; 84 L. T. Rep. 395; (1901) P. 161) that cannot be said. The acts producing the one damage seem to have been separate, though, being combined, they produced one damage. The combined effect was one damage.

In the House of Lords, in the case of *The Devonshire* (*sup.*) Lord Atkinson treated the delinquents as joint tortfeasors, and Lord Mersey speaks of them as joint tortfeasors, and says they were consequently jointly liable, and Sir Francis Jeune, in *The Frankland* (*sup.*) speaks of them as joint tortfeasors. In none of those cases did the question that we have to consider present itself for decision. In each case the judgment would have been precisely the same if the word "joint" had been left out, and the persons involved had been spoken of as "tortfeasors." In my view it would be very dangerous to conclude from any of those three judgments that the judges who gave them were directing their minds to the problem which we have to deal with to-day. They do not seem to be any real assistance to me. I think that the question must always be one dependent upon the particular facts of the case. Where there are two negligent persons causing one damage I think you have to find out, are they participating in one act or are they taking part in separate acts of negligence combining to produce the same damage? I think we must look at the facts for that. I think the matter may also be fairly tested in the way that Mr. Stephens suggested by considering what you have to plead. If you would have to make quite separate charges of negligence against the one from those which you would have to make against the other, then you have a test as to whether they are both of them taking part in one act or neglect, or whether they are guilty of separate acts of neglect, which combined to effect one damage. Now apply that to the present case. There were two quite separate acts, or neglects, which, by their combined effect, caused the *Clan Chisholm* to run into and sink the *Itria*. Those in charge of the *Koursk* were guilty of want of due care towards the *Itria*, because they allowed the *Koursk* to get out of position in the convoy, and did not correct that mistake, and brought themselves into collision with the *Clan Chisholm*, and thereby contributed one of the causes which drove the *Clan Chisholm* against the *Itria*. The *Clan Chisholm* was in fault, because, being put in a dangerous situation by the *Koursk*, those in charge of her did not reverse, with the result that she did not prevent herself from being driven against the *Itria*. It was the combined effect of those two separate acts of negligence which, in my view, produced the one damage, and in my view that is not one tort, but is two torts. The principle, therefore, contended for does not apply to the facts of this particular case.

That being so it is unnecessary for me to consider the further point which Mr. Stephens raised, namely, that there should be some difference in this matter between the application of the common law rule and of the Admiralty rule. It is enough for me to say that treating the common law rule as applicable to this court it is a rule which does not, on the facts of this case, deprive the plaintiffs of their right of action against the owners of the *Koursk*. I have already pronounced the *Koursk* to blame, and there will be judgment accordingly.

The defendants appealed.

Dunlop, K.C. and *Dumas* for the appellants.—Hill, J. was wrong in holding that because the acts of negligence on the *Clan Chisholm* and the *Koursk* were different the torts were separate. A tort becomes a joint tort because the damage suffered by the plaintiff has been produced by the combined acts of

negligence of different persons. There is only one wrong in this case, and not two distinct wrongs. Therefore judgment against the *Clan Chisholm* is a bar to an action against the *Koursk* since judgment against one joint tortfeasor bars an action against the other :

King v. *Hoare*, 13 M. & W. 494 ;
Buckland v. *Johnson*, 1854, 15 C. B. 145 ;
Brinsmead v. *Harrison*, 27 L. T. Rep. 99 ; L. Rep. 6 C. P. 584 ;
London Association for Protection of Trade v. *Greenlands Limited*, 114 L. T. Rep. 434 ; (1916) 2 A. C. 15.

If the wrong is actionable *per se*, without proof of special damage, the wrongful act must be done by two persons acting in concert in order that they may be joint tortfeasors. But where the wrongful act causes actual damage, it is sufficient that two or more wrongful acts combine to produce a single damage in order that the actors may be joint tortfeasors. Reference was made to :

Thompson v. *London County Council*, 80 L. T. Rep. 512 ; (1899) 1 Q. B. 840 ;
Bullock v. *London General Omnibus Company*, 95 L. T. Rep. 905 : (1907) 1 K. B. 264 ;
Goldrei Foucard and Son v. *Sinclair*, 118 L. T. Rep. 147 ; (1918) 1 K. B. 180 ;
Salford Corporation v. *Lever*, 63 L. T. Rep. 658 ; (1891) 1 Q. B. 168.

There are certain Admiralty decisions in which damage to a vessel by the separate acts of negligence of two other vessels has been treated, or referred to judicially as having been caused by a joint tort :

The Bernina, 6 Asp. Mar. Law Cas. 257 ; 58 L. T. Rep. 423 ; 13 App. Cas. 1 ;
The Avon and *Thomas Joliffe*, 6 Asp. Mar. Law Cas. 605 ; 63 L. T. Rep. 712 ; (1891), P. 7 ;
The Englishman and *The Australia*, 7 Asp. Mar. Law Cas. 605 ; 72 L. T. Rep. 203 ; (1895) P. 212 ;
The W. H. No. 1 and *The Knight Errant*, 11 Asp. Mar. Law Cas. 407 ; 102 L. T. Rep. 643 ; (1910) P. 199 ;
The Devonshire, 10 Asp. Mar. Law Cas. 210 ; 107 L. T. Rep. 179 ; (1912) A. C. 634 ;
The Frankland, 9 Asp. Mar. Law Cas. 196 ; 84 L. T. Rep. 395 ; (1902) P. 161.

The decisions in *Sadler* v. *Great Western Railway Company* (74 L. T. Rep. 561 ; (1896) A. C. 450) and *Thompson* v. *London County Council* (*sup.*) are not authorities against the appellants' contention, since the question raised in these cases was whether there had been a misjoinder of parties. See also *Frankenburg* v. *Great Horseless Carriage Company* (81 L. T. Rep. 684 ; (1900) 1 Q. B. 504). The reason for the rule is that when judgment is obtained against one tortfeasor the cause of action *transit in rem judicatam*, and the other tortfeasor is necessarily released. The test must therefore be whether there was a single damage, and not whether there were separate acts of negligence. The respondents had recovered judgment against the owners of the *Clan Chisholm*, and upon this principle their cause of action (*i.e.*, the doing of the damage to the *Itria*) *transit in rem judicatam*, and the appellants are thereby released. Reference was also made to :

Re Becu, 118 L. T. Rep. 629 (Swinfen Eady, L.J., at p. 632) ;
Smurthwaite v. *Hannay*, 71 L. T. Rep. 157 ; (1894) A. C. 494 ;
O'Keeffe v. *Walsh*, 1903, 2 I. R. 681 ;
Phillips v. *Berryman*, 1783, 3 Doug. 286 ;
Ratcliffe v. *Evans*, 66 L. T. Rep. 794 (1892) 2 Q. B. 524 ;
Martin v. *Kennedy*, 1800, 2 Bos. & P. 69 ;
Brunsdon v. *Humphrey*, 1884, 51 L. T. Rep. 529 14 Q. B. Div. 141 ;
Hoare v. *Niblett*, 64 L. T. Rep. 659 ; (1891) 1 Q. B. 781 ;
Day v. *Porter*, 1838, 2 M. & Rob. 151 ;
Morris v. *Robinson*, 1824, 3 B. & C. 196 ;
Darley Main Colliery v. *Mitchell*, 1886, 54 L. T. Rep. 882 ; 11 App. Cas. 127.

Stephens, K.C. and *Darby* for the respondents.—There was no election to sue the owners of the *Clan Chisholm*. The owners of the *Koursk* were not sued because the *Koursk* being under requisition the action against them could not be proceeded with. In order that a tort may be a joint tort there must be a joint *injuria*, as well as a single *damnum*. It does not follow from the fact that there is one *damnum* that there are two *injuriæ*. Two distinct acts of negligence caused the sinking of the *Itria*, *i.e.*, the porting of the *Koursk* and the failure of the *Clan Chisholm* to reverse in due time. The case against the *Clan Chisholm* was therefore different, and rested upon different evidence. It is a test of a joint tort to see whether the case against each tortfeasor rests upon the same evidence : (see Bowen, L.J. in *Brunsdon* v. *Humphrey*, *sup.*). The observations which were used in the Admiralty cases which have been referred to were *obiter*, and in some instances where the expression " joint tortfeasor " is employed, " tortfeasor " might have been equally as appropriately employed. The appellants' contention could have been taken, but was not, in *The Morgenry* and *The Blackrock* (8 Asp. Mar. Law Cas. 591 ; 81 L. T. Rep. 417 ; (1900) P. 1). Reference was also made to *The Drumlanrig* (11 Asp. Mar. Law Cas. 520 ; 103 L. T. Rep. 773 ; (1911) B. C. 16). In any view of the facts, supposing that there was one tort and not two torts, the common law rule as to joint tortfeasors does not apply in Admiralty owing to the existence of the right to limitation of liability.

Dunlop, K.C. replied. *Cur. adv. vult.*

Feb. 22.—BANKES, L.J. read the following judgment :

The question for decision in this appeal is whether a judgment recovered by the respondents against the owners of the steamship *Clan Chisholm* is a bar to the present action brought

by the respondents against the appellants. The material facts which raise the question are as follows: Three vessels, the *Itria*, the *Clan Chisholm* and the *Koursk*, with two others were in convoy in line abreast. The *Itria* was the guide vessel in the centre, having the *Clan Chisholm* next her on her port side and the *Koursk* beyond the *Clan Chisholm*. Owing to the negligent navigation of the *Koursk*, that vessel failed to keep position and threatened to run into the *Clan Chisholm*, whereupon, in order to avoid the collision, the *Clan Chisholm* ported and kept her speed. In spite of this manœuvre the two vessels collided, and as a result of the *Clan Chisholm's* porting and keeping her speed she ran into the *Itria*. A number of actions were brought. The owners of the *Itria* sued the owners of the *Clan Chisholm*, and the owners of the latter vessel sued the *Koursk*. These two actions were tried together, and it was decided that as between the *Itria* and the *Clan Chisholm* the latter was alone to blame for the collision between those two vessels, and that as between the *Clan Chisholm* and the *Koursk* both vessels were to blame for the collision between them, though the blame was apportioned as to two-thirds to the *Koursk* and one-third to the *Clan Chisholm*. The amount recoverable from the owners of the *Clan Chisholm* under the judgment recovered against them by the owners of the *Itria* was not nearly sufficient to cover the latter's loss, as the *Clan Chisholm* had taken the usual proceedings to limit her liability to the statutory sum. It was under these circumstances that the present action was brought, in which the owners of the *Itria* claimed a judgment against the owners of the *Koursk* for the damage and loss occasioned by the loss of the *Itria* and a reference to the registrar and merchants to assess the amount thereof. To this claim the defendant pleaded that the damage complained of was the result of the joint tort committed by those in charge of the *Koursk* and of the *Clan Chisholm*, and that the judgment recovered against the latter was a bar to the present action.

There is no doubt, and Hill, J. so found, that the combined negligence of those in charge of the *Clan Chisholm* and the *Koursk* had the effect of bringing about the collision of the *Clan Chisholm* with the *Itria*. The question for decision is whether the rule originally laid down in *Brown* v. *Wootton* (1606 Yelv. 67), and approved in *King* v. *Hoare* (13 M. & W., 494, 504), and accepted in *Brinsmead* v. *Harrison* (27 L. T. Rep. 99; L. Rep. 6 C. P. 584), applies to the facts of this case. The rule shortly stated by Willes, J. in the last-mentioned case is this: "If two commit a joint tort the judgment against one is of itself without execution a sufficient bar to an action against the other for the same cause." It is curious to notice the different reasons given by different judges for the rule. It is unnecessary to discuss them, as the rule must be accepted. It is a curious fact also that, at any rate so far as my researches go, the question of what constitutes a "joint tort" or "the same cause" within the meaning of the rule has never been closely considered in any reported case. The test of whether this rule applies or not has sometimes been said to be whether the cause of action against the two persons said to be joint tortfeasors is the same or different. With submission to those who have held that view, I think that this cannot be considered an exhaustive test, as I can imagine cases in which as against two obvious tortfeasors it would be quite possible to frame two quite distinct causes of action in respect of the injury caused by the joint tort. As an instance I may take the case where A. B. and C. conspire to assault X., and A. and B. commit the assault. X. would have a cause of action for assault and battery against A. and B., and quite a separate cause of action against C. for the conspiracy if he elected to proceed against the joint tortfeasors separately. In *King* v. *Hoare* (*sup.*) Parke, B. undoubtedly adopts the cause of action test where he says: "If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, *Transit in rem judicatam*—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents it being the subject of another suit, and the cause of action, being single, cannot afterwards be divided into two." The learned judge appears to me to be dealing with a case where there is only one possible cause of action, or substantially only one cause of action, as he speaks of the cause of action "being single." In such a case the test is no doubt an accurate one.

As I have already said, I can find no case in which the question has been closely considered, but I do find dicta which support both sides of the argument which has been addressed to this court. There is no doubt that both in the case of *The Devonshire* (10 Asp. Mar. Law Cas. 210; 107 L. T. Rep. 179; (1912) A. C. 634, 657) Lord Atkinson, and in the case of *The W. H. No.* 1 (11 Asp. Mar. Law Cas. 407, 408; 102 L. T. Rep. 643; (1910) P. 199, 204), the then president, spoke of what appear to be two separate torts producing one damage as joint torts and the authors as joint tortfeasors. The point now under discussion was not under consideration in either case, and I cannot regard these dicta as authorities. It is no doubt quite common to speak of each of two separate

tortfeasors as joint tortfeasors in the sense that where each has contributed to the injury complained of, each is liable for the whole of the damage done. In my opinion, the use of the expression under such circumstances is inaccurate and misleading. I find a dictum of Collins, L.J. in *Thompson* v. *The London County Council* (80 L. T. Rep. 512; (1899) 1 Q. B. 840, 844), which supports this view. The question there was whether under the practice rules then existing, it was permissible to join as defendants the water company and the London County Council, whose separate acts of negligence acting in combination had caused injury to the plaintiff's property. A considerable interval had there elapsed between the first act of negligence and the second, but that does not, in my opinion, weaken what the Lord Justice says: "But an argument was presented to us which, it appears to me, was based upon a fallacy, that was that because the plaintiffs had claimed only one damage that, therefore, their cause of action was necessarily one also, however many persons they chose to put on the writ as bringing about that one damage. It seems to me that that is no test at all. The damage is one thing, and the *injuria* is another. What constitutes the cause of action is the *injuria*, the wrong done by a separate tortfeasor; and when we analyse this case (the facts are not in dispute) we find we are dealing with it upon the assumption that the two acts which were done, the one by the London County Council and the other by the New River Company, are entirely disconnected torts, each of them a separate *injuria*—if it be *injuria* at all—quite distinct one from the other. The one was done recently by the county council by excavation, and the other at a much earlier date by the water company allowing water from its mains to weaken the soil in front of the plaintiffs' property, and the joint result of those two independent torts has been that the plaintiffs' house has come down. The damage is one, but the causes of action which have led to that damage are two, committed by two distinct personalities." The Lord Justice mentions the interval of time in support of his view, but not as the foundation of it.

It is easy to put instances the mere mention of which indicates that the law must require something more than the single *damnum* to convert two quite separate and distinct torts into a joint tort. For instance, A., who wishes to approach B.'s house in order to commit a burglary, trespasses on his land and crosses a brook by an already damaged bridge, which he seriously weakens by his weight. Next day C., wishing to approach the same house, mistaking it for that of a friend, trespasses on B.'s land, and in crossing the same bridge, breaks it completely down by his weight. Can it possibly be said that the damage to the bridge was caused by a joint tort, or that A. and C. are joint tortfeasors? I think not, and if this view is correct it follows that in order to constitute a joint tort there must be some connection between the act of the one alleged tortfeasor and that of the other. It would be unwise to attempt to define the necessary amount of connection. Each case must depend upon its own circumstances. The learned authors of Clerk and Lindsell on Torts, 7th edit., p. 59, say this: "Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design," and they cite a dictum of Tindal, C.J. in *Petrie* v. *Lamont* (1842, Car. & M., 93, 96) in support of their statement. Later, they say "there must be concerted action towards a common end." I am not sure that the rule is here stated sufficiently widely to cover every possible case, though it clearly supports the general conclusion as to the law which I have already indicated. Applying the rule thus explained to the facts of the present case, it seems to me clear that the judgment of Hill, J. was right. The negligence of those in charge of the *Koursk* was not keeping station and running into the *Clan Chisholm*. This negligence clearly contributed to the loss of the *Itria*, as the learned judge has found that after the collision with the *Koursk*, the *Clan Chisholm* could not have avoided the collision with the *Itria*. The negligence of the *Clan Chisholm*, as found by the learned judge and the House of Lords, consisted in not stopping and reversing after she hard-a-ported. This negligence contributed both to the collision with the *Koursk* and to the consequent collision with the *Itria*. The *damnum* no doubt is only one, and the act of negligence of each contributed to that *damnun*, but the acts of negligence are still, in my opinion, separate. There is no possible connection between them. They began, and they continued, and they ended as separate acts, and they never became a joint act. On the question of fact as to whether the *Clan Chisholm* could after the collision with the *Koursk* have avoided the collision with the *Itria*, I agree with the view taken by the learned judge that she could not. For these reasons the appeal, in my opinion, fails, and must be dismissed with costs.

It is not necessary, in the present case, to say anything which may hereafter have to be seriously considered as to how far a defendant in such an action as the present may be entitled to credit for anything recovered from a contributing tortfeasor; nor have I referred to the rule in Admiralty as to the division of damages where the vessels of both plaintiff and defendant are to blame, nor have I referred to the application of Order XVI., r. 1, which permits the joinder of claims by persons in whom a right of relief in respect of or arising out of the same transaction whether jointly, severally, or in the alternative. None of these questions are material to the present appeal, but with regard to the last I will merely indicate that, in my opinion, the ordinary case of a claim against both owners of two separate vehicles which are alleged to have contributed to the damage

in a running down case is more correctly dealt with as a claim against them severally or in the alternative, than as a claim against them jointly.

Scrutton, L.J.—A collision between the steamships *Clan Chisholm* and *Koursk* has been held by the House of Lords to be caused by the negligence of each ship, in the proportion of two-thirds liability to the *Koursk* and one-third to the *Clan Chisholm*. The negligence of the *Koursk* consisted in deviating from her convoy course into the track of the *Clan Chisholm*. The negligence of the *Clan Chisholm* consisted in not reversing her engines when she saw the *Koursk* out of her course. The two negligences were separate and independent, not taken in concert, or as part of a common plan, and both, in the view of the House of Lords, contributed to the collision. The question is then raised whether there was separate negligence of the *Clan Chisholm* after her collision with the *Koursk*, so that her subsequent collision with the *Itria* could not be attributed to the preceding negligence of the *Koursk*. The *Itria* had got judgment against the *Clan Chisholm* on this second collision on the ground of her original negligence, and in that action it was immaterial to decide whether the *Clan Chisholm* was guilty of any subsequent negligence. In the action between the *Clan Chisholm* and the *Koursk*, Hill J. did decide that there was no negligence of the *Clan Chisholm* subsequent to the first collision, and this brought the damage to the *Itria* so far as that damage was paid by the *Clan Chisholm* into the damage to be apportioned between the *Clan Chisholm* and the *Koursk*. The *Itria* got judgment against the *Clan Chisholm* for the whole of the damage, but the *Clan Chisholm's* limitation of liability would prevent the *Itria* from recovering a great part of her damage against the *Clan Chisholm*. The *Itria* therefore proceeded against the *Koursk*, as soon as she ceased to be a requisitioned ship, to recover some part of the remainder of her damage.

The *Koursk* took two points in answer: (1) That the *Clan Chisholm* was negligent after the first collision, so that her collision with the *Itria* was not the result of the *Koursk's* negligence before the first collision. Though this point had been decided against the *Koursk* in the *Clan Chisholm's* action by Hill, J. and not challenged in the House of Lords, it could be raised again in the action by the *Itria*, who was not a party to the first action by the *Clan Chisholm* against the *Koursk*. Hill, J., on the advice of his assessors, repeated the previous finding of no subsequent negligence against the *Clan Chisholm*, and this court, with the concurrence of its assessors, upheld his decision. The first defence of the *Koursk* against the *Itria* therefore failed.

The second defence was more formidable. It was that the *Koursk* and *Clan Chisholm* were "joint tortfeasors," and that the *Itria*, by taking judgment against the *Clan Chisholm*, had lost her remedy against the *Koursk* for the "joint tort."

I consider separately the position at common law and in Admiralty, because undoubtedly the fact that whereas, at common law, contributory negligence bars the claim of either party, at Admiralty it results in a liability of either party for half the damages suffered by the other, and may produce different results: see *The Frankland* (9 Asp. Mar. Law Cas., 196; 84 L. T. Rep. 395; (1901) P. 161).

The common law rule both in contract and tort is stated by Parke, B. in *King* v. *Hoare* (*sup.*): "If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, *transit in rem judicatam*—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action and prevents its being the subject of another suit, and the cause of action being single, cannot afterwards be divided into two. Thus it has been held, that if two commit a joint tort, the judgment against one is, of itself, without execution, a sufficient bar to an action against the other for the same cause: (*Brown* v. *Wootton*, *sup.*)" When in *Kendall* v. *Hamilton*, 1879 (41 L. T. Rep. 418; 4 App. Cas., 504, 526, 542), the House of Lords had to consider whether there was in cases of contract any equitable power to relieve against the common law rule, and held there was not, both Lord Penzance, who dissented, and Lord Blackburn, who agreed, put the rule on the same ground. Lord Penzance said: "When that which was originally only a right of action has been advanced into a judgment of a court of record, the judgment is a bar to an action brought on the original cause of action." Lord Blackburn said: "But *King* v. *Hoare* (*sup.*) proceeded on the ground that the judgment being for the same cause of action, that cause of action was gone. *Transivit in rem judicatam*, which was a bar, partly on positive decision and partly on the ground of public policy, that there should be an end of litigation, and that there should not be a vexatious succession of suits for the same cause of action. The basis of the judgment was that an action against one on a joint contract was an action on the same cause of action as that in an action against another of the joint contractors, or in an action against all the joint contractors on the same contract." This court in *Parr* v. *Snell* (128 L. T. Rep. 106; (1923) 1 K. B. 1)

had held that when the judicature rules have destroyed the effect of the rule in certain classes of cases, it is still in force in claims for unliquidated damages and judgments thereon.

The substantial question in the present case is: What is meant by "joint tortfeasors"? and one way of answering it is: "Is the cause of action against them the same?"

Certain classes of persons seem clearly to be "joint tortfeasors." The agent who commits a tort within the scope of his employment for his principal, and the principal; the servant who commits a tort in the course of his employment, and his master; two persons who agree in common action, in the course of and to further which one of them commits a tort. These seem clearly joint tortfeasors; there is one tort commited by one of them on behalf of or in concert with another.

Counsel for the *Koursk* argued at first that if the physical damage was the same all persons who contributed to it without lawful excuse were joint tortfeasors. This would cover the case of two ships which by quite independent action and separate negligence ran into a third ship, one on the starboard, one on the port side, whereby she sank; of two persons uttering independently separate and distinct slanders concerning a servant, whereby his master dismissed him; of two separate excavators who by independent excavations brought down the house of a third party. But in none of these cases would the cause of action be the same. Lord Esher in *Cooke* v. *Gill* (1873, 28 L. T. Rep. 32; L. Rep. 8 C. P. 107) and *Read* v. *Brown* (1888, 60 L. T. Rep. 250; 22 Q. B. Div. 128, 131) defined "cause of action" as "every fact which it would be necessary for the plaintiff to prove, if traversed, to support his right to the judgment of the court." Now, in the cases put to succeed against one tortfeasor, it would not be necessary to prove the negligence of the other tortfeasor. In the cases of master and servant, principal and agent, and concerted action, after proving the wrongful act causing damage of one tortfeasor, it would only be necessary to add to the same tort, *injuria* plus *damnum*, the nexus of responsibility for that tort, of agency, employment or concerted action. But the same damage does not mean the same tort, and therefore does not mean the same cause of action.

Counsel for the appellant then suggested an amended definition, "a joint tort is a tort for which two or more persons are jointly and severally liable to the injured person." This seems directed rather to the remedy for the tort than to the nature of the tort itself, and to say that a joint tort is one for which persons are jointly liable only leads to the inquiry: For what torts are persons jointly liable? The answer is: For a tort (damage plus *injuria*) which they both commit or are responsible for the commission of, but not for tort where such is responsible for a different *injuria* and the two *injuria* happen to produce the same *damnum*.

I am of opinion that the definition in Clerk and Lindsell on Torts, 7th edit., p. 59, is much nearer the correct view. "Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design . . . but mere similarity of design on the part of independent actors causing independent damage is not enough; there must be concerted action to a common end." Still more so when there is not even similarity of design, but independent negligences accidentally resulting in one damage. This is the view of Sir John Salmond: "Persons are not joint wrongdoers simply because their independent acts have been the cause of the same wrongful damage (Salmond on Torts, 5th edit., pp. 84–85). I myself should put 'wrongful' before 'acts' instead of before 'damage.' I think it is also the view of Collins, L.J. in *Thompson* v. *London County Council* (*sup.*): The fallacy that . . . because the plaintiffs had claimed only one damage, that therefore their cause of action was necessarily one also. . . . What constitutes the cause of action is the *injuria*, the wrong done by a separate tortfeasor." To make the tort, you want a wrongful act causing damage; and to make the tort the same cause of action, both elements must be the same. Thus, in *Brunsden* v. *Humphreys* (51 L. T. Rep. 529; 14 Q. B. Div. 141), where the negligence was the same, but one damage was to the person and one to the property, a judgment for one cause of action, wrongful injury to property was not bar to a second cause of action, trespass to the person. If this is so where the same negligence causes different kinds of damage, still more is it so where different and independent wrongful acts cause the same damage; there are two causes of action, and a judgment on one does not bar the other."

The judgment below in effect takes the same view as to the meaning of "joint tortfeasors." In the present case the *Koursk* was guilty of negligence in proceeding out of course across the line of its convoy; the *Clan Chisholm* was guilty of quite independent negligence in not reversing when the action of the *Koursk* was observed. These two separate and independent negligences resulted in a collision, the direct consequence of which was a collision with the *Itria*. In my view the *Koursk* and the *Clan Chisholm* were not joint tortfeasors of the same tort, but separate tortfeasors of two different torts, and therefore at common law judgment against one in respect of the cause of action against it would not be an answer to a claim against the other in respect of the different cause of action on which it was sued.

It is true that in various cases to which we were referred eminent judges have used the phrase "joint tortfeasors" in respect of separate acts of negligence. This was always *obiter* and in regard to a matter immaterial to the decision. If there is no contribution between joint tortfeasors there is, of course, no contribution between independent tortfeasors, and the phrase "no contribution between joint tortfeasors" is equally true if

read "no contribution between tortfeasors." Lord Atkinson, in *The Devonshire* (*sup.*), uses the phrase "joint tortfeasors" about persons guilty of independent acts of negligence where "tortfeasors" would be equally accurate as far as the consequence of several liability for all the damage, the matter then being discussed, was concerned; indeed, he uses the phrase "tortfeasors" in the same sentence. I am quite unable to regard these casual and irrelevant inaccuracies as amounting to a determination of principle.

In Admiralty, the result is at least the same. For it has been decided that one of two ships, who, by separate acts of negligence, damage a third, can bring the damage it has to pay the third into the calculation of half damages following on the judgment "both to blame": *The Frankland* (*sup.*). The *Clan Chisholm* can apparently, therefore, bring into her claim against the *Koursk* the damages she has paid to the *Itria*. Further, innocent cargo owners in a ship in collision caused by its own negligence and that of the other ship can only recover half their damage against either ship: (The *Drumlanrig*, 11 Asp. Mar. Law Cas. 520; 103 L. T. Rep. 773; (1911) A. C. 16), and it would seem to follow that a judgment against one tortfeasing ship for one-half cannot be a bar to a claim for the other half against the other tortfeasor. In the present case, owing to limitation of liability, the *Itria* will not recover her whole damage unless she can sue both the *Clan Chisholm* and the *Koursk*, perhaps not even then. It seems clear that persons who are not joint tortfeasors at common law are not joint tortfeasors in Admiralty; indeed, in the latter court they are in a better position as to contribution.

In my view, the appeal should be dismissed with costs.

SARGANT, L.J.—On the facts established in this case a very interesting and difficult question has to be determined as to the liability sought to be established by the plaintiffs against the defendants, or, to use the brief and figurative language which was employed by Hill, J., and will be adopted in this judgment, by the *Itria* against the *Koursk*. To make the reasons for my judgment clear, it is necessary to state the salient facts of the case, but I will do this as briefly as possible.

On the 18th April a convoy of five vessels under escort were in the Mediterranean making for the United Kingdom in line abreast, with a prescribed distance of four cables between each adjoining pair of vessels. The centre ship, and that from which the distances had to be taken, was the *Itria*; nearest to her on her port hand was the *Clan Chisholm*; and beyond this ship again, and furthest to port, was the *Koursk*. The two vessels on the starboard side of the *Itria* were not in any way concerned in the collision which forms the subject of the present litigation, and need not be further considered or mentioned. The course prescribed was a zig-zag changed at short intervals of fifteen, ten and five minutes. The ships were proceeding without lights, and in the dark, the time of the collision being just before 3 a.m.

A few minutes before that hour the *Koursk* got out of position and was observed heading for the *Clan Chisholm* at a distance of about one-and-a-half cables. The *Clan Chisholm* hard-a-ported, hoping to avoid collision or to receive a slanting blow only; but did not reverse her engines. A collision ensued between the *Koursk* and the *Clan Chisholm*, and within about a minute this was succeeded by a second collision between the *Clan Chisholm* and the *Itria*, which sank the latter vessel.

As the result of these collisions three or four actions were begun. There were cross-actions between the *Koursk* and the *Clan Chisholm*; there was an action by the *Itria* against the *Clan Chisholm*; and lastly, there was the present action by the *Itria* against the *Koursk*. This last action has been delayed for various reasons and has only recently been tried. The other three actions came on for trial together in March, 1919 by Hill, J., and the result of his judgment, as ultimately restored by the House of Lords after an intermediate reversal, was this: In the actions in respect of the collision between the *Koursk* and the *Clan Chisholm* the *Koursk* was found two-thirds to blame and the *Clan Chisholm* was found one-third to blame (her contributory negligence consisting in not having reversed before the first collision); and in the action by the *Itria* against the *Clan Chisholm* judgment was given against the *Clan Chisholm*, it being admitted that the *Itria* was blameless, and the finding that the *Clan Chisholm* was to blame in respect of the first collision involving the finding that she was also to blame for the immediately subsequent collision.

The present action by the *Itria* against the *Koursk* was tried by Hill, J. in June last, and by agreement between the parties the materials which had been used on the previous trial in March 1919 were again used at the second trial. At this second trial the *Koursk*, while not questioning the finding of fact that the first collison was due partly to the negligence of the *Koursk*, raised two defences, one of fact and the other of law. The first defence was that the second collision was proximately caused not by the first collision, but by an intervening act of negligence on the part of the *Clan Chisholm* subsequent to the first collision, namely, a second failure to reverse. The second defence was that even if the causation of the first collision and the second collision was indistinguishable, they were caused by the joint tort of the *Clan Chisholm* and the *Koursk*, and that the *Itria*, having recovered judgment against one of the joint tortfeasors, is barred from now recovering against the other.

[The learned Lord Justice dealt with the first point, saying that in his opinion the judgment of Hill, J. finding that there was no intervening negligence, was unquestionably right, and continued :]

As regards the second defence, Hill, J. took time to consider his judgment and ultimately decided that though there was but one damage it was caused by two separate acts of negligence, that there were, therefore, two separate torts and not one joint tort, and accordingly that the *Itria* was still entitled to recover against the *Koursk*. It is with respect to this second part of the learned judge's judgment that the main argument has taken place before us and that the real difficulty arises.

The definition of joint tortfeasors in Clerk and Lindsell on Torts, 7th edit., pp. 59–60, is as follows: "Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design. 'All persons in trespass who aid or counsel, direct, or join, are joint trespassers.' If one person employs another to commit a tort on his behalf, the principal and the agent are joint tortfeasors, and recovery of judgment against the principal is a bar to an action against the agent. But mere similarity of design on the part of independent actors, causing independent damage, is not enough; there must be concerted action towards a common end." And the discussion in Salmond on Torts, 5th edit., p. 84, is to much the same effect. Stress is laid there on the feature that there must be responsibility for the same action, the imputation by the law of the commission of the same wrongful act to two or more persons at once. The examples given are under three heads—agency, vicarious liability, and common action.

It would appear, therefore, if these definitions are correct, that in order to constitute joint tortfeasance in the strict sense of the word (and apart from certain expressions in *The Frankland* (*sup.*) and *The Devonshire* (*sup.*) herein after-mentioned, we have not been referred to any less strict definition) there must be a concurrence in the act or acts causing damage, not merely a coincidence of separate acts which by their conjoined effect cause damage. And this view is strongly supported by a passage in the opinion of Lord Bramwell in *The Bernina* (6 Asp. Mar. Law Cas. 257, 260; 58 L. T. Rep. 423; 13 App.Cas. 14). He there says: "But take the case put in argument of injury not to a passenger, but to one of the public by separate acts of negligence in two persons, which acts conjoined caused the injury. . . . Such a case it is not easy to imagine, but let us suppose it. I should say an action might be maintained against the two jointly. If their conduct was wilful, it clearly might be, and I do not know why its being negligent should make a difference." It seems to me that Lord Bramwell obviously considered that in the case supposed the two persons guilty of separate negligence were not joint tortfeasors. If they had been they would *ipso facto* have been liable jointly, and it would have been wholly unnecessary to go through the process of reasoning employed.

The case supposed by Lord Bramwell in the above passage is precisely similar to the present case, and also to the case of *The Bernina* (*sup.*), when once that case was simplified by the very important decision that a passenger on one of two colliding vessels was not in any way identified with the vessel by which he was travelling, but was in the same position as one of the general public, or as the *Itria* in the present case, and it may therefore be useful to refer to some passages in the judgments in *The Bernina* to ascertain the precise legal position of two persons who, by the combined effect of separate acts of negligence, cause damage to a third person. Lord Esher said: "If no fault can be attributed to the plaintiff and there is negligence by the defendant and also by another independent person, both negligences partly directly causing the accident, the plaintiff can maintain an action for all the damages occasioned to him against either the defendant or the other wrong-doer." Lindley, L.J. said, speaking of the decision in *Armstrong* v. *Lancashire and Yorkshire Railway Company* (1875, 33 L. T. Rep. 228; L. Rep. 10 Ex. 47): "But if the proximate cause was the combined negligence of the two companies, I confess my inability to understand upon what principle the plaintiff could be held not entitled to sue either company; or in other words, to be without a remedy." And Lord Herschell said: "If by a collision between two vessels a person unconnected with either were injured the owner of neither vehicle could maintain as a defence 'I am not guilty because but for the negligence of another person the accident would not have happened.'"

These passages seem to me merely to lay down the principle that in such cases as these, the damage resulting from the combination of two negligences must not be regarded as too remote in an action against either wrong-doer, provided that the negligence of that wrong-doer was a proximate, though partial, cause of the accident; and see Beven on Negligence, 3rd edit. vol. i., p. 77. They seem to me inconsistent with the theory that the combination of the two negligences constitutes a joint tort. And they get rid of the difficulty which I felt during the progress of the present appeal, in accepting Mr. Stephens' contention that different facts would have to be established in the actions brought by the *Itria* against the *Clan Chisholm* and the *Koursk* respectively. It seems to me that in the first action the *Itria* would have to prove only negligence on the part of the *Clan Chisholm*, proximately, though it may be only partly, causing the accident; and in the second action the *Itria* would have to prove only negligence on the part of the *Koursk*, proximately, though it may be only partly, causing the accident. It would be for the defendant vessel in either action, if thought fit, to raise the defence that the negligence of the defendant alone and apart from the contributory negligence of the third vessel would not have caused the accident. And this contention would not on the principles above stated avail the defendant, and in any case would be a defence only and not a part of the cause of action that would have to be established

by the plaintiff. It seems to me, therefore, that the *Itria* had two separate and distinct causes of action, the one against the *Clan Chisholm*, and the other against the *Koursk*, though the resulting damage was the same in both cases.

As regards the language in four Admiralty cases which have been referred to, namely, (1) *The Avon and Thomas Jolliffe* (*sup.*); (2) *The Englishman and The Australia* (*sup.*); (3) *The Devonshire* (*sup.*); and (4) *The Frankland* (*sup.*), the first two present no difficulty. In each of these cases the operation was a joint one, conducted under a single ultimate direction, and the requirements of the strict definition of joint tortfeasance were satisfied. In the third and fourth cases the circumstances were different, the negligent vessels were under separate direction, and were guilty of separate negligences; and so far as legal cause of action was concerned, their position was strictly analogous to that of the *Clan Chisholm* and the *Koursk* here. And in the third case both Lord Mersey and Lord Atkinson, and in the fourth case Sir Francis Jeune, speak of the two negligent vessels as joint tortfeasors. Accordingly, these judgments form some authority for treating two separate negligences with one resulting damage as constituting a joint tort, if the phrase joint tortfeasors is to be treated as used there in its strict and technical sense. But when these cases are carefully examined there is no need for putting so strict a meaning on the phrase. The liability established in those cases was in no way dependent on the tort being joint, but might have resulted equally from separate negligences combining, indeed, to produce one damage, but forming on the principle above stated separate causes of action. The difference was quite immaterial for the purpose of the decision and no argument seems to have been addressed to it. I cannot attach to the use of the phrase "joint tortfeasors" in these cases any real importance for the present purpose.

It follows, therefore, that the judgment of the learned judge was right and that his decision should be affirmed. I am relieved to think that the result cannot follow here that the *Itria* should recover from the *Clan Chisholm* and the *Koursk* together more than the total damage done her; but this may, perhaps, be so in other cases. I regret that the Admiralty rule as to apportionment of damage applies only to that sustained by the two vessels who collide through their own negligence; and further, that in cases like this of damage by two acts of mere negligence the courts have not worked out some equitable system of contribution such as was effected by the Court of Chancery in the case of persons liable to one common debt or duty and as gave rise to the principles of general average: see Spence's Equitable Jurisdiction of the Court of Chancery, vol. i., pp. 661-663.

Solicitors: for the appellants, *Wm. A. Crump and Son;* for the respondents, *Waltons* and *Co.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Wednesday, April 9, 1924.

(Before EVE, J.)

Re TRADERS AND GENERAL INSURANCE ASSOCIATION LIMITED; *Ex parte* CONTINENTAL AND OVERSEAS TRADING COMPANY LIMITED. (a)

Insurance (Marine) — Goods — Policy to cover perils by fire from Antwerp to India from the loading aboardship and from shippers' or manufacturers' warehouse during transit until on board and during transhipment on quays, &c., until in consignees' warehouse—Goods taken from factory to Antwerp by barge and there damaged in warehouse fire—Liability.

The Continental and Overseas Trading Company Limited applied for a review of the decision of the liquidator of the Traders and General Insurance Association Limited in the following circumstances. The applicants were the purchasers of certain bales of blankets from a company at Termonde which were forwarded by them on the instructions of the buyers by barge to Antwerp for shipment by steamer to India. On arrival at Antwerp they were removed by the buyers' agents and warehoused to await shipment. Here they were damaged by fire. They were insured by the association from Antwerp to India, beginning from the loading aboardship, but the policy incorporated the warehouse to warehouse clause 6 of the Institute Cargo Clauses whereby they were insured from leaving the shippers' or manufacturers' warehouse during the ordinary course of transit until on board the vessel during transhipment, if any, and from the vessel whilst on quays, wharves, or in sheds during the ordinary course of transit until safely deposited in consignees' or other warehouse at destination named. The liquidator refused to admit the claim.

Held, that regard must be had to the whole document, and that the extension must be ascertained in each case by reference to the terms of the specification of the particular goods. That the terminus a quo *here was the port of shipment by steamer, and therefore did not extend to the factory or anywhere outside the ambit of that* terminus a quo. *Nor was the discharge ex barge equivalent to "leaving the warehouse." The decision of the liquidator was therefore right and the summons would be dismissed.*

THIS was a summons taken out by the Continental and Overseas Trading Company Limited, asking that the decision of the liquidator of the defendant company—the Traders and General Insurance Company—to disallow their claim for damage by fire to certain bales of blankets then in warehouse at Antwerp might be reviewed by the court.

(a) Reported by A. W. CHASTER, Esq., Barrister-at-Law.

The following statement of facts is taken from the judgment:

"This is an application to review the decision of the liquidator of the Traders and General Insurance Association Limited rejecting a proof for 621*l.* odd carried in during the liquidation by the Continental and Overseas Trading Company Limited. The claim is advanced for damage done by fire to goods alleged to be covered by a policy of marine insurance issued by the liquidating association. The contention on behalf of the liquidator is that the risk was not covered by the policy in that the goods at the time of damage had not left the shippers' or manufacturers' warehouse during the ordinary course of transit within the meaning of the policy.

"The facts are not in dispute. In March and April 1920 the claimants purchased the goods—ten bales of 150 blankets each—from the Société Anonyme La Dendre of Termonde, and the sellers, on the instructions of the buyers or their agents, forwarded the bales from Termonde to Antwerp by barge on the 7th Oct. 1920 for shipment in the steamship *Trevethoe*, due to leave Antwerp for India on the 12th of the month. When the goods arrived at Antwerp on the 8th they were removed from the barge by the agents of the buyers, and were warehoused to await shipment. The fire which damaged them broke out in the warehouse on the 11th. The policy covers the peril of fire and insures one-half of the goods from Antwerp to Karachi and the other half from Antwerp to Calcutta, 'beginning from the loading thereof aboard ship,' but it incorporates the 'warehouse to warehouse' clause No. 6 of the Institute Cargo Clauses, which is in these terms:

"The insured goods are covered subject to the terms of this policy from the time of leaving the shippers' or manufacturers' warehouse during the ordinary course of transit until on board the vessel, during transhipment if any and from the vessel whilst on quays, wharves, or in sheds during the ordinary course of transit until safely deposited in consignees' or other warehouse at destination named in policy.

"On behalf of the claimants it is argued that according to the true construction of the policy the risk began when the goods left the manufacturers at Termonde, or, alternatively, when they were discharged at Antwerp, to which it is answered, (1) that the underwriters cannot be held to have intended to undertake a risk which might have involved an undisclosed and lengthy land transit and one which is specifically mentioned in the specification attached to the policy in those cases in which it is to be included, and (2) that the discharge or delivery at Antwerp was not a delivery from a warehouse at all but from the barge—a condition of things to which the clause has no application."

Le Quesne, for the summons, submitted that the decision of the liquidator was wrong having regard to the incorporation in the policy of the "warehouse to warehouse" clause of the Institute Cargo Clauses. The risk began when the goods left Termonde, or when discharged at Antwerp.

Raeburn, K.C. and *Jardine*, on the other hand, contended that the decision was right and cited *Marten* v. *Nippon Sea and Land Insurance Company* (3 Com. Cas. 164) and *Fisher, Reeves, and Co.* v. *Armour and Co.* (15 Asp. Mar. Law Cas. 91; 124 L. T. Rep. 122; (1920) 3 K. B. 614).

EVE, J. (after stating the facts) said: To arrive at the true construction of the clause it is necessary to have regard to the whole of the document, including the specification incorporated as part of the policy. The clause undoubtedly extends the liability of the insurers to risks incurred before shipment, but the nature and area of that extension must, in my opinion, be ascertained in each case by reference to the terms of the specification relating to the particular goods. When goods are specified as consigned from Paris, Lyons, and other centres necessarily involving land transit, the additional risks of that transit would be covered, but where, as is the case with the two parcels out of which this claim arises, the *terminus a quo* mentioned in the specification is the port of shipment and the transit is in terms "by steamer," I cannot accept the view that the clause ought to be construed as imposing liability from the commencement of the transit from the factory or indeed at any point outside an area which, having regard to the local conditions, might fairly be held to be within what Mr. Raeburn has aptly spoken of as the ambit of the *terminus a quo*. Nor, in my opinion, ought I to treat the discharge ex barge on the 8th Oct. as equivalent to the leaving of the warehouse referred to in the clause.

The result is that the decision of the liquidator was right and this summons must be dismissed with costs.

Solicitors: *Simmons* and *Simmons*; *Clifford, Turner*, and *Hopton*.

House of Lords.

Nov. 26 and 27, 1923, and Feb. 11, 1924.

(Before Lords DUNEDIN, ATKINSON, SHAW, PHILLIMORE, and BLANESBURGH.)

ANGLO-NEWFOUNDLAND DEVELOPMENT COMPANY LIMITED (appellants) *v.* PACIFIC STEAM NAVIGATION COMPANY (respondents). (*a*)

ON APPEAL FROM THE SECOND DIVISION OF THE COURT OF SESSION IN SCOTLAND.

*Collision—". . . steam vessel . . . crossing from one side of the river towards the other side . . ."—Duty to keep clear of on-coming vessels—Vessel leaving dock—Contributory negligence—*Causa proxima*—Clyde Navigation By-laws, No. XIX.*

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

Rule XIX. of the Clyde Navigation By-laws provides: "Every steam vessel, under her own steam, crossing from one side of the river towards the other side, shall keep out of the way of vessels navigating up and down the river."

The steamer B., *415ft. long, was leaving a graving dock in the Clyde in order to proceed up the river. The width of the river opposite the dock was about 500ft. The* B. *was leaving the dock stern first; her steam was up, but she was not using it. A tug attached to her stern was pulling her out. When her stern was a little more than 100ft. from the opposite bank, and slanting across and down the river, she sighted at a distance of about three-quarters of a mile the steamship* A., *which was coming up the river under her own steam. The* B. *and her tug gave four short blasts as a warning that the river was blocked, repeated the blasts and continued the manœuvre. The* A., *however, came on, and while trying to pass between the* B.'s *tug and the bank, struck the tug, which was still about 100ft. from the bank, inflicting damage on it and knocking it against the stern of the* B., *with the result that the* B. *and the* A. *were also damaged.*

Held, that the A. *was solely to blame for the collision (1) because the* B. *was not in these circumstances infringing rule XIX. of the Clyde Navigation By-laws; (2) because, even if the* B. *had been infringing that rule, the collision was due to the subsequent and separate fault of the* A. *in coming on and attempting to pass the* B. *and her tug, although she had been warned that the river was blocked.*

Interlocutor of the Second Division (1923) *S. C.* 326), *affirmed.*

APPEAL against an interlocutor of the Second Division of the Court of Session (The Lord Justice-Clerk (Lord Alness), Lords Hunter and Anderson, Lord Ormidale dissenting), varying an interlocutor of the Sheriff Substitute.

The action was raised by the owners of the *Bogota* in the Sheriff Court at Glasgow against the owners of the steamship *Alconda*, with regard to a collision which took place about 4.30 p.m. in the Clyde on the 9th Dec. 1921.

Condescendence for pursuers:

1. The pursuers are the owners of the steamship *Bogota*, a vessel of 5167 tons gross, and 3127 tons net register. The defenders are the owners of the steamship *Alconda*, a vessel of 4298 tons gross, and 2695 tons net register, and in order to avoid arrestment of said vessel have agreed to prorogate the jurisdiction of this Court.

2. On the afternoon of Friday, the 9th Dec. 1921, about 4.30 p.m., the *Bogota*, which was loaded with part general cargo, left Elderslie Graving Dock on the north side of the River Clyde to proceed to Prince's Dock, Glasgow, in order to complete loading. The tide was flood and the weather was clear, darkness not having fully set in. The wind was from the south-west, blowing a moderate breeze. The *Bogota* was in charge of a pilot and proceeded out of the dock stern first with the assistance of her stern tug, the *Samson*, which was bow on to the *Bogota's* stern. The *Bogota's* head tug had not yet made fast. The regulation lights of the *Bogota* and *Samson* were duly exhibited and were burning brightly. Before leaving the dock the *Bogota* gave a three-blast signal, which was repeated by the *Samson*, and before getting clear of the dock a three-blast signal was again given by the *Bogota*. After her bow was clear of the dock entrance, but while the *Bogota* was still angled in the river, the *Alconda* was sighted coming up the river, rounding the bend below Renfrew Ferry, some considerable distance away. The *Alconda* was accompanied by two tugs. As the *Alconda* continued to approach, a four-blast signal was given by the *Bogota*, in accordance with the Clyde Trust Regulations, as a warning to the *Alconda*, and this signal was repeated several times, both by the *Bogota* and by her stern tug. The *Alconda*, however, ignored all these signals and continued to come on at an excessive speed, colliding with the *Samson* and throwing that vessel against the *Bogota's* stern, causing serious damage to both these vessels. With the force of the impact the *Bogota* was thrown against the steamship *War Afridi*, which was lying moored at the wharf to the westward of the entrance to the dry dock, whereby both the *Bogota* and the *War Afridi* sustained damage. The *Alconda* continued on her way up the river without slackening speed. With reference to the answer, it was impossible for the *Bogota* or *Samson* to keep clear. By the influence of the flood-tide, the stern of the *Bogota* was inclined to swing further to the southward, and the *Samson* did everything possible to prevent her doing so. It was the port anchor of the *Alconda* which was let go, but this was not done timeously as it should have been and, in fact, when it was let go, the anchor dropped on the deck of the *Samson*, causing considerable damage to that vessel.

3. Said collision was due entirely to the fault and negligence of those in charge of the *Alconda* in respect that (1) they failed to keep a proper look out; (2) they proceeded at an improper speed; (3) they failed to hold back until the *Bogota* had got straightened in the river; (4) they failed to keep out of the way of the *Bogota* and the *Samson*; (5) they failed to stop and reverse timeously if at all; (6) they failed to indicate their movements by the requisite whistle signals; and (7) they failed timeously to let go anchor. They were thus in breach of the Rules of Good Seamanship and of the Regulations for Preventing Collisions at Sea, particularly arts. 27, 28, 29, and 30, thereof. They were also in breach of the Clyde Trust By-laws, particularly arts 2 and 3 thereof. With reference to the answer, it is denied that the *Samson* was in fault and that she obstructed the channel. But for the action of the *Samson* in keeping fast to the *Bogota*, the *Alconda* would undoubtedly have collided with the *Bogota*.

4. In consequence of said collision the pursuers have sustained loss and damage to the extent of 5000*l*., the amount claimed for.

Statement of facts and counterclaim for defenders

1. On the afternoon of the 9th Dec. 1921 the *Alconda* left Greenock, bound for Glasgow, and shortly after 4 p.m. was approaching Renfrew Ferry. She was in ballast, with a tug ahead and a tug astern, and her navigation lights were exhibited and burning brightly. A pilot was on the bridge with the master, and a man at the wheel. The chief officer was on the forecastle head, and a good look-out was being kept. A fresh wind was blowing from the S.W. to W.S.W., and the tide was flood, with a strength of about two knots.

2. In these circumstances, shortly after rounding the bend at Renfrew Ferry to the west of Elderslie Graving Dock, the *Alconda* sighted the *Bogota* at the entrance of the dock, and angled in the river. It was not possible for those on board the *Alconda* to have seen the *Bogota* previously, as she was not showing any lights to those on board the *Alconda*, and also owing to the glare of lights at Elderslie Graving Dock, one long blast was blown on the *Alconda's* whistle. Immediately thereafter those on board her sighted the *Samson*, the tow boat which was assisting the *Bogota*, and was attached to her stern. One short blast was then given on the whistle of the *Alconda*, and her helm was ported to pass as close to the south bank as possible, as she had sufficient room to do. The *Botoga's* stern was about mid-channel, and the *Samson* a little to the south thereof, and had they maintained their position no collision would have occurred. They continued, however, to come out, and when close to, the *Samson* altered her position further to the southward, obstructing the channel. The helm of the *Alconda* was at once further ported, the starboard anchor let go, and the engines given a touch ahead, and then put astern, to assist in bringing her head to starboard, and three blasts given, but in spite of these precautions she struck the *Samson*, forcing her against the *Bogota*. The only signal given by the *Bogota* and the *Samson* was one signal of four short blasts by each, which were only given when the *Alconda* was approaching.

3. The collision was due entirely to the fault of the *Bogota* and the *Samson*. The *Bogota* was in fault in (1) failing to keep a proper look out; (2) failing to keep out of the way of the *Alconda*; (3) leaving the dock and obstructing the channel way when she saw the *Alconda* approaching, instead of stopping and (or) going back into the dock on sighting her and waiting until she had passed; (4) failing to give any sound signals to the *Alconda* to indicate her intention to leave the dock; (5) giving a four-blast signal to the *Alconda*, which was a misleading signal, and which did in fact mislead those in charge of her, instead of giving a three-blast signal as she should have done, when she was in fact coming astern; and (6) failing to exhibit any lights. It is believed and averred that those on board the *Bogota* saw the *Alconda* coming up to Renfrew Ferry, but commenced and (or) continued thereafter to come out of the dock instead of maintaining their position and (or) going back into the dock until the *Alconda* had passed, as they should and could have done without difficulty or danger, had she been properly handled. She was coming out of the dock with two ropes from each bow and the *Samson* keeping her stern in position, but it is believed and averred that one of the ropes parted when she was leaving the dock, and no steps were taken to put out another and keep her in position. If those on board the *Bogota* did not see the *Alconda* before she came up to Renfrew Ferry they should have done so. The *Samson* was in fault in respect that she was lying to the south side of, and obstructing, the channel, and failed to get out of the way of the *Alconda* as she was bound and had ample time to do had she been keeping a proper look out. She was further in fault in failing to give any whistle signals to the *Alconda* to indicate her manœuvres and to show any lights to the *Alconda*. Those in charge of the *Bogota* and the *Samson* were thus in breach of the Rules of Good Seamanship and of the Regulations for Preventing Collisions at Sea, particularly art. 29, and of the Clyde Trust By-law, particularly arts. 18 and 19. The pursuers' averments in answer so far as not coinciding herewith are denied. It is expressly denied that the *Bogota* was clear of the dock when the *Alconda* came round the bend.

4. As a result of the said collision, the *Alconda* was damaged. The extent of the damage amounts to one thousand pounds, for which the defenders hereby counter-claim and crave decree against the pursuers.

The sheriff-substitute found both ships equally to blame. On appeal the Second Division held that the *Alconda* was alone to blame and remitted the cause to the sheriff.

The owners of the *Alconda* appealed, giving the following reasons for their appeal: On a sound construction of the by-laws the *Bogota* had a duty to keep out of the way of the *Alconda* and failed to do so; alternatively, at common law, the *Bogota* was not entitled to enter the river and cross the course of an approaching vessel navigating up the river; it was negligence on the part of the *Bogota* to persist in entering the river so as to cause risk of collision when she saw the *Alconda* coming up the river.

Condie Sandeman, D.F. and *Bateson*, K.C. (of the English Bar), with them *W. G. Normand* (of the Scottish Bar) and *Alfred Bucknill* (of the English Bar), for the appellants, referred to:

Mackay v. *Dick*, 1881, 6 App. Cas. 251; 8 R. (H. L.) 37;
The River Derwent, 7 Asp. Mar. Law Cas. 37; 1891, 64 L. T. Rep. 509;
The Schwan, 6 Asp. Mar. Law Cas. 409; 1889, 61 L. T. Rep. 308;
The Bromfield, 10 Asp. Mar. Law Cas. 194; 1905, 94 L. T. Rep. 109;
The Mendip Grange v. *Radcliffe*, 15 Asp. Mar. Law Cas. 353; 124 L. T. Rep. 706; (1921) A. C. 556.

Macmillan, K.C. and *John Carmont* (late of the Scottish Bar), for the respondents, referred to:

Admiralty Commissioners v. *Steamship Volute*, 15 Asp. Mar. Law Cas. 530; 126 L. T. Rep. 425; (1922) 1 A. C. 129;
The Whitlieburn, 9 Asp. Mar. Law Cas. 154; 1900, 83 L. T. Rep. 748;
The Raithwaite Hall, 2 Asp. Mar. Law Cas. 210; 1874, 30 L. T. Rep. 233.

Their Lordships took time to consider their judgment.

Feb. 11. — Lord DUNEDIN. — The screw steamer *Bogota*, a ship 415ft. long, had to leave the Elderslie Graving Dock, where she had been lying, in order to proceed up the Clyde to Prince's Pier. The said dock is situate on the north bank of the Clyde, and enters the river at an angle westward of about 30 degrees. The total width of the river *ex adverso* of the dock is about 500ft. The operation of leaving the dock took place at 4.40 p.m. on the 9th Dec. 1921. At that time there was lying moored immediately to the westward of the entrance to the dock a screw steamer *War Afridi*. The *Bogota* left the dock stern first; her steam was up, but she was not propelled

by her own screw. A tug, the *Samson*, was attached to her stern with a tow rope of about 12ft. long, and pulled her out. She was attached forward by hawsers to blocks on each side of the dock, which hawsers were paid out as she proceeded. The intention of the manœuvre was, so soon as she got clear of the dock, to attach another tug to her bow, and then, when she was straightened, to tow her up the river, proceeding along the south bank to Prince's Pier. At this time there was a flood tide running at about two miles per hour. After making certain signals, which will be more particularly set forth hereafter, she had proceeded so far with the manœuvre that her stern was a little over 100ft. from the south bank, she lying still unstraightened and athwart the stream, when a steamer, the *Alconda*, which was proceeding up the river, came into collision with the tug *Samson*, inflicting damage and knocking it against the stern of the *Bogota*, which was, in consequence, injured. The effect of the blow was further to slew the stem of the *Bogota* against the *War Afridi*, causing injury to both vessels. The *Alconda* herself was also injured. Cross actions of damages were raised by the *Bogota* and the *Alconda* in the Sheriff Court of Glasgow. The sheriff-substitute, before whom the case depended, after proof led, pronounced an interlocutor, finding both vessels at fault, and apportioning the damage equally between them. Appeal was taken to the Second Division of the Court of Session, when a majority of the court recalled the interlocutor, and found the *Alconda* alone to blame. Lord Ormidale dissented, agreeing with the sheriff-substitute. Appeal has now been taken to your Lordships' House by the owners of the *Alconda*. They admit fault, but pray that the interlocutor of the sheriff-substitute should be restored.

A case of this sort is regulated by sect. 40 of the Judicature Act (6 Geo. 4, c. 120), which requires the Division of the Court of Session, before whom the case, originating in the Sheriff Court in which proof has been led, depends, to pronounce specific findings of fact and findings of law, and prescribes that on appeal to this House the findings of fact must be regarded in the same manner as a special verdict by a jury and not open to review, review being confined to the findings of law alone. The effect of these provisions has been explained in your Lordships' House on more than one occasion and notably in *Mackay* v. *Dick* (1881, 6 App. Cas. 251; 8 R. (H. L.) 37), *Shepherd* v. *Henderson* (1881, 7 App. Cas. 49), *Caird* v. *Syme* (1887, 12 App. Cas. 326), and *Gilroy* v. *Price* (1892, 20 R. (H. L.) 1). It is unnecessary to repeat what was there said, but I will add this, as I do not find it explicitly mentioned. It is not legitimate to extract a new finding of fact from the opinions of the judges, although it is legitimate to use those opinions to explain, if necessary, any ambiguity in the findings of fact. The result is that we are bound in this case to take the facts as set forth in the interlocutor of the Second Division. At the same time, as pointed out by Lord Atkinson, in *Herbert* v. *Fox and Co. Limited* (114 L. T. Rep., at p. 426; (1916) A. C., at p. 413), we are not bound to take, as a finding of fact, a finding which is called a finding of fact, but in reality is a finding of law, or of mixed fact and law.

I accordingly turn to the interlocutor to see what are the facts upon which the case falls to be decided. I need not read them all, because many of them merely set forth in distinct propositions the narrative which I have already given, but the crucial findings which are not covered by my narrative are as follows: "(8) That about 4.40 no vessels being in sight, either coming down or going up, the *Bogota* gave three short blasts with her whistle, and the *Samson* having replied with similar three short blasts, proceeded to tow the *Bogota* out of the dock stern first and that these blast signals were repeated by both vessels; (9) that the *Bogota* did not give a prolonged blast of the whistle before leaving the graving dock as prescribed by rule 18 of the By-laws and Regulations of the Clyde Navigation Trustees, but that the failure to give such a blast had no bearing on the collision which subsequently took place; (10) that the movement of the *Bogota* was hampered (*a*) by the presence of the *War Afridi*, a large vessel, which was moored to the quay just outside the dock entrance with her head pointed to the east and (*b*) by the flowing tide which operated more and more strongly upon her as she gradually came out of the dock, and had a tendency to throw her stern to the south and her bow towards the bow of the *War Afridi*; (11) that when the *Bogota* was about two-thirds out of the dock and the stern of her tug *Samson* was about mid-channel, the defenders' vessel. *Alconda*, a steamer of 381ft. over all in length, under her own steam and with two tugs attached, one ahead and one astern, was seen rounding the bend of the river below Renfrew Ferry about three-quarters of a mile away; (12) that when the *Bogota* sighted the *Alconda* she gave four short blasts of her whistle, which were repeated by the tug *Samson*, thereby indicating to approaching vessels that the river was blocked and that, as the *Alconda* came on, the four-blast signal was repeated by both the *Bogota* and the tug *Samson*; (13) that having thus given warning to vessels, including the *Alconda*, the *Bogota* was, in the circumstances, and particularly in view of the extent to which her manœuvre had been conducted, entitled to continue and complete her movement of quitting the dock and straightening herself in the channel; and that she was not bound to hold on, in the position to which she had attained, till the *Alconda* had passed; (14) that the *Samson's* bow was almost directly astern of the *Bogota*, but slightly towards the port quarter, her bow being only 12ft. from the *Bogota's* stern and that she was doing her utmost to keep the stern to the north against the influence of the tide; (15) that while these operations were going on, the *Alconda* with her two tugs was coming up the river at a speed of at least

six miles an hour and that she observed a light in mid-channel when she was about Renfrew Ferry, this light being the stern light of the *Samson*; (16) that she was continuing on her course when her pilot sighted the hulls of the *Bogota* and *Samson* about three or four ship-lengths ahead, and about the same time the master heard a four-blast whistle (which the pilot also heard but took to be a three-blast whistle) and that in reply to the master's inquiry explained that on the Clyde it meant 'I am blocking the river'; (17) that, notwithstanding, the pilot thought he could pass to the south of these vessels, and accordingly ported his helm, blew one blast of his whistle and attempted to pass; (18) that in doing so he collided at about 4.45 p.m. with the *Samson*, the bow of the *Alconda* striking her port quarter, forcing her back on the *Bogota's* rudder, which fortunately was hard-a-port at the time and so acted to some extent as a buffer, but that the *Bogota* was forced back upon the *War Afridi*, with the result that all four vessels were damaged; (19) that the collision occurred about 100ft. from the south bank, and that the *Alconda* could have manœuvred in safety to within 50ft. of that bank; (20) that the *Samson*, from the position in which she was, could not do anything to escape the collision and was at the time doing her utmost to keep the *Bogota's* stern to the north against the tide in conformity with her orders from the *Bogota*; (21) that if the *Alconda* had stopped, or held back, as she might have done, when she saw the stern light in mid-channel, or even when she first saw the hulls of the vessels outside the graving dock and heard the four or three-blast signal, the accident would not have occurred; (22) that there was fault on the *Alconda's* part in not so stopping or slackening speed and that there was no fault on the part of the *Bogota*; and (23) that the collision was due solely to the fault of the *Alconda*.

"It should be explained that the expression 'hold on' in the thirteenth finding clearly appears from the judgments of the learned judges to be used as meaning, arrest her further movement into the river by stopping the tug and ceasing to pay out the cables still attaching the *Bogota* to the dock, helped, perhaps, by a forward turn of her own screw. It is true that the thirteenth finding, which is the foundation of the judgment, may be read as not a true finding of fact, but as a determination in law of the result arising from the circumstances of the collision. In that sense it is not binding on your Lordships. But it includes, in my view, an underlying finding of fact, namely, that the *Bogota* had already so invaded the other channel that it was difficult for her to stop her manœuvre.

The appellant, as I have already mentioned, admitted fault, so that the sole question to be decided is whether the collision was due to the sole fault of the appellant, or whether any fault of the respondents contributed thereto. There are certain by-laws and regulations of the Clyde Trustees published to regulate the river traffic, which must be here set forth. The by-laws have not the force of statute, but, like the rules of the road, they form a rule of conduct, so that an infringement of them would be held to be in law a fault which, if it led to damage, would infer liability.

The rules quoted at the trial are as follows: 3. "When a Steam Vessel or a dredger is turning round, or for any reason is not under command and cannot get out of the way of an approaching vessel, which but for this it would be her duty to get out of the way of, or when it is unsafe or impracticable for a Steam Vessel or Dredger to keep out of the way of a sailing vessel, she shall signify the same by four or more blasts of the steam whistle in rapid succession, or by like strokes of her bell, and it shall be the duty of the approaching vessel to keep out of the way of the Steam Vessel or Dredger, so situated.

"19. Every Steam Vessel, under her own steam, crossing from one side of the River towards the other side shall keep out of the way of vessels navigating up and down the river."

The case of the appellants is this. They say that the *Bogota* transgressed rule 19, and was not excused by rule 3. The respondents argue that rule 19 did not apply, but that if it did, rule 3 provided the excuse. They also say that, apart from rule 3, there is in the circumstances no liability. Now it may be doubted whether rule 19 was intended to apply to such a manœuvre as was here going on; but the sense in which it is expressed raises a question of much difficulty. It would indeed be well if the rules were revised so as to remove doubts on the matter. As it is, I do not think it necessary to decide it. I will assume, without deciding, that rule 19 did apply. But what does it mean? The appellants have read it as if "keep out of the way" meant a duty which was necessarily infringed if, in any circumstances whatever, there was collision. This can scarcely be so. Suppose a vessel had begun to cross towards the other side, and another vessel left its proper water and collided with the first vessel, while in its own water. Could it possibly be said that there was fault on the part of the first vessel? I think, therefore, that "keep out of the way" must be interpreted as "not get into the way of," and whether that duty is contravened will always depend on the circumstances. Now here we have the fact, as shown in the eleventh finding, that when the *Alconda* was seen, the *Bogota's* tug had invaded the south channel, and in finding twelve, that the signal was given for blocking the river. I therefore think that the respondent succeeds on two grounds—first, that rule 19 was not really broken, and second, that if it was broken by invasion of the south channel, the fault which really caused the collision was the subsequent and independent fault of the *Alconda*. I have had the opportunity of reading the judgment to be delivered by Lord Shaw, and concur entirely in what he says as to this aspect of the case.

I would add that, if the facts were open to me, I should hold that, in my view, the *Bogota* was excused under rule 3. She did sound the four blasts. It is, I think, clear that rule 3, where there is scope for its application, will override rule 19, for as it itself states it is meant to apply just when, but for it, there would be a duty to get out of the way of an approaching vessel. There was argument as to the question of whether the *Bogota* was turning round. I do not think that she was turning round, but that, in my view, is immaterial because I read the words "and cannot get out of the way" as qualifying both the words "turning round" and the words "or for any reason is out of command." I am not entitled to make any finding but that the *Bogota* was unable to get out of the way, and I cannot extract this proposition from any of the findings by which I am strictly bound.

On the whole matter, I am of opinion that the appeal must be dismissed with costs.

Lord ATKINSON.—I approve the motion made by Lord Dunedin.

Taking, as I am bound to do, the findings of fact in this case by the sheriff as unassailable, there are, in my view, several grounds upon which the correctness of the judgment appealed from may be questioned. I propose only to deal with one of these grounds and to rest my judgment upon it—namely, the applicability, as to this case, on the facts found by the sheriff of the principle upon which the decision of the case of *Davies* v. *Mann* (1842, 10 M. & W. 546) was decided. That principle is, I think, this, that in order that a defendant should sustain a plea of contributory negligence, he must establish that he himself could not, by the exercise of reasonable care and diligence, have avoided the consequences of the plaintiff's negligence—*Tuff* v. *Warman* (1858, 5 C. B. (N. S.) 573). For the purpose of testing the applicability of this principle to the present case, I assume, of course, that the *Bogota* transgressed one or more of the Clyde Rules and was guilty of negligence in getting with her tug the *Samson* into the position in which they were when the collision took place. In Marsden on Collision, 5th edit., p. 17, it is laid down on the authority of the cases mentioned in the notes, to some of which I shall presently refer, "that there is no difference between the rules of law and those of Admiralty as to what amounts to negligence causing a collision, and that before a vessel can be found in fault for a collision, negligence causing or contributing to the collision must be proved, and that in the case of a collision a ship though guilty of negligence will not necessarily be held to blame if the ship with which she collides could by the exercise of reasonable and ordinary skill and care have avoided the collision."

In the case of *Cayzer, Irvine, and Co.* v. *Carron Company* (*infrà*) which closely resembles the present case and is directly in point, Lord Blackburn assumes, apparently, that the principle of *Davies* v. *Mann* (*sup.*) applied. In that case, a collision occurred in the Thames between two ships, named, respectively, the *Clan Sinclair* and the *Margaret*. The former ship had transgressed one of the statutory rules and regulations framed to regulate navigation on that river. This rule required that, in circumstances such as existed at the material times, the *Clan Sinclair* should have waited at a certain point in the river until the other ship, the *Margaret*, had passed up the stream. She did not ease and wait, as she ought to have done, and was guilty of negligence in that respect, but the *Margaret*, knowing that the *Clan Sinclair* was steaming up the river, attempted to pass between the latter ship and another vessel, named the *Zephyr*, where there was not room, and so brought about the collision. It was held, however, that, notwithstanding the negligence of which the *Clan Sinclair* was guilty, she was not to blame; that the *Margaret* was alone to blame because she could, by the exercise of reasonable skill and care, have avoided the collision. Lord Blackburn, in giving judgment, expressed himself thus (52 L. T. Rep., at p. 36; 9 App. Cas., at p. 883): "Then it is said that the collision was owing to the *Clan Sinclair* being where it was. Undoubtedly, in one sense that is so. If the *Clan Sinclair* had been some hundred yards higher up the river, the fact which made it a matter of rashness on the part of the *Margaret* to run where it did run, would not have existed. But that is not a sufficient ground for saying that the fact of the *Clan Sinclair* being there was the cause of the accident. The *Clan Sinclair* would not have been there at the time when it was there if it had not been that the vessel did not ease and wait so soon perhaps as it ought to have done, but that was not the cause of the accident, but that the *Margaret*, knowing where the *Clan Sinclair* was, attempted to pass between it and the *Zephyr* where there was not sufficient room." Lord Watson delivered judgment to the same effect.

The principle of this decision has been many times applied. I shall only refer to one case. It is the case of H.M.S. *Sans Pareil* (9 Asp. Mar. Law Cas. 78; 82 L. T. Rep. 606; (1900) P. 267). It was held there by the Court of Appeal that, as a matter of seamanship, it was improper for the tug and tow which collided with the *Sans Pareil* to attempt in the circumstances, as they did attempt, to pass across and ahead of the fleet of which the *Sans Pareil* formed part, but the appeal was dismissed on the ground that the common law doctrine of contributory negligence, as applied in *Cayzer, Irvine, and Co.* v. *Carron Company* (*sup.*), applied here, and that, although the tug and tow had been guilty of negligence in keeping on, yet the defendant was not hampered by the other vessels of the fleet, and might, by the exercise of ordinary care and diligence, have avoided the collision. A. L. Smith, L.J., refers to the law of contributory negligence as laid down by Lord Penzance in *Radley* v. *London and North-Western Railway* (35 L. T. Rep. 637; L. Rep. 1 H. of L. 754) and said it was qualified thus (82 L. T. Rep., at p. 609; (1900) P.,

at p. 283): "namely, that though the plaintiff may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." The case of *Cayzer* v. *Carron Company* (*sup.*), shows that the common law doctrine is applicable to such a case as that now before us."

Even, therefore, if I assume that the *Bogota* and her tug, the *Samson*, had transgressed one or more of the Clyde Navigation rules, and were therefore guilty of negligence in getting into the position in the river in which they lay when the collision occurred, I have to ask myself, as Lord Blackburn had to ask himself in the case of *Cayzer, Irvine, and Co.* v. *Carron Company* (*sup.*), Was this negligence the cause of the collision? In this case the position of the *Bogota* must have been known to those navigating the *Alconda*. The *Bogota* had given the proper whistle to indicate that the river was blocked by her and her tug. The pilot on the *Alconda* heard the signal, knew what it meant and communicated his opinion to the captain, yet, with all this knowledge that the river was blocked, the *Alconda* did not check her speed, but recklessly steamed ahead as if the river in front of her was perfectly clear, relying, apparently, on the chance that she might have been able to pass through the gap fifty feet wide which separated the tug *Samson* from the southern bank of the river. That was a wrong and reckless proceeding on her part. In the result, her commander had not the skill or courage to effect his purpose. There was, apparently, nothing to prevent her slowing down or stopping to give the *Bogota* time to get turned up stream and get out of her way. That might have amounted to the exercise on her part of ordinary care, caution and diligence to avoid the consequences of the *Bogota's* contributory negligence which I have assumed existed, but the *Alconda* made no effort to do anything of the kind. The cause of the collision was, therefore, in my view, the reckless and dangerous action of the *Alconda* in steaming up stream at the rate and in the way she did, in utter disregard of the warning which she had received.

I therefore think that she was alone to blame, and the appeal fails and should be dismissed with costs.

Lord SHAW.—In my view, the construction placed upon rule 19 by Lord Dunedin is sound—namely, that the rule truly and only forbids vessels, even if one assumes them to be engaged in the operation of crossing the river, from getting into the way of upgoing or downgoing craft. Such a construction appears to me further to be consistent with the other provisions of the local code, and with the fair requirements and combination of dock and river traffic. I cannot see my way to hold that the *Bogota*, which had 265ft. of her length emerging into the river and 150ft. of her length still within the dock gates, the river being both up and down clear up to that point, was engaged in crossing the river towards the other side. She was, in point of fact, being manœuvred in order to straighten up. Nor can I see my way to hold that such a vessel being towed out from her stern, and not even free from the attaching ropes handled from the dock side, and not under her own steam, can be reckoned to be a vessel crossing to the other side of the river under her own steam. So that upon both of these fundamental points I also hold that rule 19 does not apply to the situation under consideration. But in truth, in the view which I take of this case, it is really unnecessary to pronounce upon that rule.

I venture to hold that the action of the *Alconda* was wholly and solely to blame for the collision which occurred, and that for the following reason. The *Bogota* had only partially emerged from the dock as above described up to the moment when the river both up and down was clear. At that point, however, the *Alconda* hove into view, and at once the *Bogota* sounded four blasts signifying that she was an obstruction, the tug *Samson* repeating these blasts. These signals were heard by the *Alconda;* they were not mistaken; and it was known to the *Alconda* that *de facto* an obstruction was in the river. No question of collision came into play prior to that moment; and the problem only began to arise when the *Alconda* came up the river to all intents and purposes regardless of the obstruction altogether. The court below most properly held, in my opinion, that the *Alconda* was solely to blame. My opinion is that partial or contributory blame can only be assigned to the *Bogota* if, subsequent to the given and accepted notice of her being an obstruction, the *Bogota* did something to contribute to, or fail to minimise, the collision which was being precipitated by the reckless advance of the *Alconda*. It is not, in the view which I take, sufficient in law to say that the *Bogota* should not have been, on the view that rule 19 applies, crossing the river, for it is not suggested that she was crossing the river, in any sense which was faulty, and, so far as the *Alconda* and the collision are concerned, the *Bogota*, from the time when the vessels saw each other, was in the river as an obstruction, known by the *Alconda* to exist, and therefore to be avoided.

The principle does not apply to shipping law alone, but to all the law of contributory negligence, from *Davies* v. *Mann* (10 M. & W. 546) downwards, and I take the principle to be that, although there might be—which, for the purpose of this point, I am reckoning that there was—fault in being in a position which makes an accident possible, if the position is recognised by the other party prior to operations which result in an accident occurring, the author of that accident is the party who, recognising the position of the other, fails negligently to avoid an accident which, with reasonable conduct on his part, could have been avoided. Unless that principle be applied, it would be always open to a person, negligently and recklessly approaching and failing to avoid a known danger, to plead

that the reckless approach to encountering danger was contributed to by the fact that there was a danger to be encountered. There is a period of time during which the casual function of the act or approach operates, and it is not legitimate to extend that cause backwards to an anterior situation. The anterior situation may be brought about either innocently or by some mistake, but if it has nothing to do with the subsequent operations which contributed to produce an accident or collision, it is not legitimate to treat it as a contributory in liability for the result thus produced.

In *Admiralty Commissioners* v. *Volute (owners)* Lord Birkenhead, L.C., in a valuable judgment, applies this principle (15 Asp. Mar. Law Cas., at p. 534 ; 126 L. T. Rep., at p. 429 ; (1922) 1 A. C., at p. 138) : " In all cases of damage by collision on land or sea, there are three ways in which the question of contributory negligence may arise. A. is suing for damage thereby received. He was negligent, but his negligence had brought about a state of things in which there would have been no damage if B. had not been subsequently and severably negligent. A. recovers in full : . . ." That appears to me completely to fit the situation of the *Bogota*, even on the assumption that she had contravened rule 19, as I do not think she had. The whole cause of collision arose from a subsequent and severable negligence on the part of the *Alconda*, that is to say, negligence arising subsequent to the known existence of the obstruction, and severably caused by the *Alconda's* approach to and collision with that obstruction.

I therefore think it right to set down again the language of Lord Selborne, L.C., on this topic, used also in a case of shipping collision : (*Spaight* v. *Tedcastle*, 44 L. T. Rep., at p. 590 ; 6 App. Cas., at p. 219) : " Great injustice might be done, if, in applying the doctrine of contributory negligence to a case of this sort, the maxim, *causa proxima, non remota, spectatur*, were lost sight of. When the direct and immediate cause of damage is clearly proved to be the fault of the defendant, contributory negligence by the plaintiffs cannot be established merely by showing that if those in charge of the ship had in some earlier state of navigation taken a course, or exercised a control over the course taken by the tug, which they did not actually take or exercise, a different situation would have resulted, in which the same danger might not have occurred. Such an omission ought not to be regarded as contributory negligence if it might in the circumstances which actually happened have been unattended with danger but for the defendant's fault, and if it had no proper connection as a cause with the damage which followed as its effect."

In the present case, accordingly, I think that the question which is truly relevant on the point of partial liability is whether the conduct of the *Bogota* and her tug in the river, subsequent to the stage when they were there recognised to be obstructions, did something to precipitate or practically to cause the collision. It is for this reason that I think that the House is greatly helped by two findings, which establish—first, that the *Bogota*, even although she had been crossing the river, did so leaving quite enough of room—namely, 100 feet—within which the *Alconda*, if she was determined to pass her, could have done so with complete safety ; and secondly, that there was nothing which the *Bogota* or her tug did or could have done to avoid the collision being swiftly brought about by the *Alconda's* approach. These findings are as follows : " That the collision occurred about 100 feet from the south bank, and that the *Alconda* could have manœuvred in safety to within fifty feet of that bank " ; and " that the *Samson*, from the position in which she was, could not do anything to escape the collision and was at the time doing her utmost to keep the *Bogota's* stern to the north against the tide, in conformity with her orders from the *Bogota*."

It therefore appears to me that the judgment of the court below was completely justified to the effect that the *Alconda* was solely in fault.

Upon the point of procedure, this case having originated in the Sheriff Court, and raising questions as to findings of fact, or mixed law and fact, as to our duty in this House in such circumstances, I fully agree with Lord Dunedin. I should like to add to the authorities which he cited the decision of Lord Kinnear in *Black* v. *Fife Coal Company* (106 L. T. Rep. 161 ; (1912) S. C. (H. L.) 33) in this House.

I think that the appeal should be dismissed with costs.

Lord PHILLIMORE.—I have read the opinion of Lord Dunedin, and I concur with his conclusion, and upon the whole with his reason for it. It may be a refinement of thought ; but I should reach the same conclusion by a slightly different way, more nearly resembling the reasoning of Lord Shaw.

All rules relating to navigation by one ship with reference to another ship—rules to prevent collision—assume the existence, and the duty of knowing of the existence, of the second ship, as being sufficiently near in time and space to require consideration. If there is no other ship on that part of the Clyde, a vessel may cross, or proceed up or down, in any part of the channel, may keep her course or change it, go ahead or astern, festoon herself with lights or proceed with none, scream with her whistles, or be entirely silent.

Now in this case, when the *Bogota* started from the dock, there was, according to the findings of the court below, by which we are bound, no vessel in existence sufficiently close for the *Bogota* to have any duty towards her ; or, one might qualify this by saying that if there was any such vessel in existence, she had not given such notification of her presence as to make it the duty of the *Bogota* to know of her existence. The *Bogota*, therefore, lawfully came out of dock, although coming out of dock may have meant, as I should think, that

she would be crossing the river and crossing under steam; and she was entitled to go on with her manœuvre until the time came when it was her duty to be conscious of the existence of another vessel. That time, according to the findings—one may be allowed some private doubt whether they are correct, but we are bound by them—did not arrive until the *Bogota* had got into such a position that she was helpless to do anything on her part to avoid a collision; and, therefore, although she may have been "crossing the river under steam," and therefore within the apparent compass of rule 19, she had never come under rule 19 before the time came when that rule was superseded by rule 3, and the duty of avoiding collision was shifted from her to the other vessel.

Lord BLANESBURGH.—As explained by Lord Dunedin, the effect of sect. 40 of the Judicature Act has been to withdraw from your Lordship's cognisance many matters which were in controversy between the parties in the Court of Session, and the appellants now face this House with the admission that, unless they establish that rule 19 of the Clyde Regulations was applicable to the *Bogota* when she first saw the *Alconda,* they can no longer contend with success that the *Bogota* was in any way responsible for the collision which ensued.

In the view which I take of the whole facts found by the court below, the appellants would be no nearer success in their appeal if they were to establish the proposition on which they stake its fortunes. Accordingly, I hesitate to follow them in their argument. Their appeal must, I think, fail, whether it is well-founded or not, and if I do go into the question it is only out of deference to the fulness with which it was canvassed before your Lordships by counsel on both sides.

Now, although one must be struck with the inaptness of the language of rule 19 to describe the operation in which the *Bogota* was engaged at the time, I am prepared to hold, as a mere matter of words, that the *Bogota*, under her own steam, was then crossing towards the other side of the river. My own opinion, however, is that if you consider rule 19 in its relation to the other Regulations of the Clyde Trustees, you find that it was not rule 19 with its attendant responsibilities, but rule 18 with its implied attendant privileges, which then applied to the *Bogota.* It must, I think, be agreed, as I have said, that the operation on which the *Bogota* was engaged is not described with any aptness in rule 19. She was not in real truth crossing towards the other side of the river. She was, in fact, coming out of dock. For such a vessel as she, it is rule 18 which makes provision.

The significance and necessity of such a general regulation as rule 18—to the terms of which I will presently return—is illustrated by the position of the *Bogota* at the moment when the *Alconda* was seen by her. She had then emerged from the dock, stern first, to the extent of from one-half to two-thirds of her length. She could have held on by her ropes still attached to the quay, or she could proceed with her manœuvre. But one thing she could not do—and this is all important—she could not return to the dock, or withdraw from the northern half of the river any part of her hull which had passed into it. In other words, in the course of a common and ordinary evolution she was powerless to keep out of the way of any vessel coming down the river, and so soon as her stern had crossed the middle line of the stream, she was powerless to keep out of the way of any vessel coming either up or down until her manœuvre had been completed.

Now rule 18 applies to all vessels coming out of any dock on the river. The *Bogota* is 415ft. in length. There must be many vessels using graving docks on the Clyde of equal, and even greater, length. The river at Elderslie is 500ft. wide. There must be other docks on the Clyde where the river is no wider. This dock enters the river at an angle of 30 degrees to the west. There must, I should suppose, be other docks where the angle of approach is more direct. In other words, rule 18 deals with an operation which time and again cannot be completed without an obstruction quite unavoidable being occasioned to the river traffic, both up and down, and as the emerging vessel can on these occasions only avoid causing obstruction by not emerging at all, the necessary assumption, in the absence of a regulation prohibiting all emergence whatever from a dock unless the river is clear in each direction, must be that the passing traffic is to keep clear of the emerging vessel, and this, as I read it, is the foundation on which rule 18 rests. The rule is as follows: "Vessels coming out of dock shall signify the same by a prolonged blast of the steam whistle of not less than five seconds' duration, and, in cases where a vessel is not under steam, the tug boat in attendance shall make the same signal." The rule, it will be seen is in the most general terms. Unlike rule 19, it applies indifferently to all vessels—whether sailing vessels or steamships, whether under steam or not under steam. It places no restriction upon a vessel's emergence from a dock, but it requires every such vessel to announce its approaching advent into the river by a prolonged warning blast. Why, it may be asked, is that obligation imposed? The answer surely is in order to give to all passing vessels an opportunity of keeping out of her way, and that as much if she is a steamship "under steam," as if she is not a steamship at all. But why, again, should these vessels be required to think of her, if, being a steamship "under steam," she, upon the hypothesis that rule 19 applies to her, is bound to keep out of their way? The answer, as it seems to me, again must be that rule 19 has no application to such a case. Even standing alone, the necessary implication of rule 18, I think, would be that, to every vessel coming out of dock, vessels navigating up and down the river and duly warned shall give place. But

that that is the true implication of it is confirmed by rule 103 of the Clyde Regulations to which I have referred since the argument at your Lordships' Bar. That rule in its last sentence provides as follows: No vessel when being taken into or out of a graving dock or ship basin or to or off a slip dock shall be allowed unnecessarily to obstruct the navigation or interrupt the passing of other vessels." The right of such a vessel to obstruct or interrupt, so far as is necessary, is, it will be seen, there assumed.

Now if the necessary implication of rule 18 be what I have stated, it becomes apparent that a vessel under steam cannot be governed both by rule 18 and by rule 19 at the same moment. The rules are quite inconsistent. Her express obligations under the latter rule would be destructive of, and would render nugatory, her privileges under the former. If, then, a choice must here be made between rule 18 and rule 19 as the rule applicable to the *Bogota*, there can, I think, be no doubt where the choice lies. Rule 18 in terms covers her case; rule 19 only barely touches it. This conclusion imports that rule 19, notwithstanding the apparent generality of its terms, is really restricted in its range. A perusal of the Clyde Regulations as a whole shows that this is the fact. A striking illustration may be taken from an observation made by the sheriff-substitute in the note to his interlocutor. "Rule 19," he says, "is of course not limited to ferry boats." The learned sheriff-substitute not perhaps unnaturally, assumed that the rule was primarily applicable to them. A perusal of the regulations, however, shows how far this is from being the case. Steamships on the Clyde have to keep clear of ferry boats at their peril. Reg. 102 provides as follows: "Every master or other person in charge of a steam vessel when approaching any of the ferries on the river, shall, at least 200 yards from the ferry, slow the engines and proceed dead slow until the ferry is passed." It will, I think, be agreed that general as is the language of rule 19, it has much less relation to the operation in which the *Bogota* was engaged on this afternoon than it has to the crossing of a ferry boat. This last, however, is not apparently intended to be covered by it.

In regard to the position on the river of a vessel coming out of dock, there is a passage in the Lord Justice Clerk's judgment which is not without interest in this connection. It is where he refers to a statement made in evidence by the pilot of the *Bogota* that, in his experience, he had never seen a vessel trying to pass another which was in course of coming out of dry dock. This statement, of course, even if your Lordships could treat it as a fact found—and that is not open to your Lordships—could not affect the true construction of printed regulations. I refer to it only as describing what I may call the normal courtesy of the river extended to vessels more or less hampered in their movements in the course of an experience which every vessel is from time to time called upon to undergo. If so, this is not the first time that rules of courtesy have been based upon and go only a little beyond the rules of obligation which by the regulations, as I construe them, are imposed upon these passing vessels. I mention, merely to show that I have not overlooked the fact, that the *Bogota* did not give a prolonged blast of the whistle before leaving the graving dock as prescribed by rule 18: she and her tug each gave three short blasts instead. It is found, however, that the failure to give the long blasts had no bearing on the subsequent collision. In other words, if rule 18, with its necessary implications, is the rule applicable, the *Alconda* derives no advantage from the fact that its provisions were not in this respect observed by the *Bogota*. In the application, therefore, of rule 18 to the case, you have a complete answer to the appeal.

But there is, to my mind, still another. There is, I think, in the stated circumstances enough to dispense the *Bogota* from the obligations of rule 19 if, contrary to my own view, that rule really applied to her. I have already stated what the position of the *Bogota* was at the moment when the *Alconda* was first seen by her. It results from that statement, if correct, that she was then, in relation to any vessel coming down the river, in the language of rule 3, "out of command," if, by the compelling force of rule 19, she stood bound by remaining stationary to keep clear of the *Alconda* coming up the river. Was she so bound? I have some difficulty in seeing how, to a vessel so placed, rule 19 continued to apply. Like all similar rules, the rule must be construed reasonably. Its proper sphere, as I hope that I have shown, is a narrow one. But of it this can, I think, at least be said, that the rule implies that the crossing steamer which is by its terms obliged to keep out of the way of all vessels whether navigating up or down the river, shall not be entitled to require any of these vessels to keep out of her way, shall not be entitled, in other words, to hold them up. For note the consequences if the rule applies to a vessel so entitled. However crowded the traffic in her own half of the stream, however insignificant the traffic in the other half, it would remain her duty, indefinitely to block the first flow of traffic, in order that, under the rule, the second trickle might have free course and passage. The rule does not, in words, cover such a state of things. On the contrary, it imposes upon the crossing vessel obligations which negative its existence, and if, for instance, the approach to the Elderslie Dock on this afternoon of the Spanish steamer the *Artivi Mendi*—coming down the stream had, instead of preceding, synchronised with the approach of the *Alconda* coming up, I cannot myself doubt that it would, under rule 3, have been the duty of the *Artivi Mendi* to keep clear of the *Bogota*—which thereupon became dispensed from any obligation under rule 19 of keeping clear either of her or of the *Alconda*. In the present case, however, there was no vessel actually coming down the stream at the time. The *Bogota* delayed coming out

of dock until the river was clear in both directions, and, by the time that she was committed to her manœuvre, it was a vessel coming up the river, and not one coming down, which first presented itself. Does this fact alter the whole case? For myself, I think that it should not. I take the effect of rule 19 to be that where a manœuvre, such as the *Bogota's*, has in propriety been commenced, and where it has so far proceeded as to make withdrawal to the *status quo ante* out of the question, the possibility even of approaching traffic on her own side of the river from which she is neither able nor bound to keep clear except by completing her manœuvre is sufficient, on due warning under rule 3 being given, to exclude her from the obligations of rule 19 in relation to all vessels whether coming up or down. I cannot doubt that it was on this view of her position that the *Bogota* acted when she sounded her four blasts and proceeded with her manœuvre, and I am not surprised that those on board the *Alconda*, apparently without hesitation, conceded that position to her.

I am of opinion, therefore, that, for one reason or another, rule 19 is out of the case.

But I fully recognise that in this matter there is room for difference of opinion. I will accordingly now assume, contrary to my own view, that the *Bogota* on this occasion was bound by rule 19, and that, in view of the *Alconda's* approach, she was in fault under that rule in advancing over the middle line of the river. Even so, I am of opinion that the *Alconda* was, on the facts stated by the Inner House, alone to blame for the subsequent collision between herself and the *Samson*. These facts have, as I have already indicated, been set forth. I need not repeat them. There is no dubiety as to their effect. They show, on the part of the *Alconda*, a complete appreciation of the position of the *Samson* and her tow; an acquiescence in their claim, after signal given, to block the river, and a decision notwithstanding to go on at the same speed, instead of stopping, as was quite feasible. All this was done in the belief that the *Alconda* could pass to the south of the two vessels in safety. The collision was the direct result either of the failure on the part of the *Alconda* to stop and hold back as she could and ought to have done, if there was no room to pass, or it was due to her negligent navigation in not taking advantage of the passage sufficiently wide to enable her to pass in safety. Her liability, this passage being sufficiently wide, differs in degree, and not in kind, from what it would have been had the stern of the *Samson* been to the north of the middle line of the river, and had the *Alconda* negligently starboarded into her.

The Volute (15 Asp. Mar. Law Cas. 530; 126 L. T. Rep. 425; (1922) 1 A. C. 129) in your Lordships' House is now the *locus classicus* on this subject. It has made no alteration in the law, as previously understood, in relation to the facts like these. Lord Shaw has referred to the passage from the Lord Chancellor's speech in which he reaffirms the law. Applying that language, I cannot doubt on the facts stated, that even if the *Bogota* were originally at fault, "there would have been no damage had not the *Alconda* been, as she was, subsequently and severably negligent," She is therefore liable for the whole damage.

I have only to add that had I felt constrained to hold that the *Bogota* was partly to blame for this collision, I should, in restoring the order of the learned Sheriff-Substitute, have desired to modify it as suggested in the opinion of Lord Ormidale, with whom alone in the Second Division the contentions of the *Alconda* found favour. On any view of the case the fault of the *Bogota*, as contrasted with that of the *Alconda*, was venial and slight. From first to last the proceedings of the *Alconda*, whether they be regarded subjectively or objectively, were without justification or excuse; the blame attaching to her greatly preponderated, and I should have agreed with Lord Ormidale in thinking that she should bear three-fourths of the resulting damage.

On the whole, however, I am of opinion that she was alone to blame, and that this appeal should be dismissed. *Appeal dismissed.*

Solicitors for the appellants, *William A. Crump* and *Son*, for *J.* and *J. Ross*, Edinburgh, and *Maclay*, *Murray*, and *Spens*, Glasgow.

Solicitors for the respondents, *Godfrey Warr* and *Co.*, for *Webster*, *Will*, and *Co.*, Edinburgh, and *Johnston* and *Mackenzie*, Glasgow.

March 6, 7, 10, *and May* 23, 1924.

(Before Lords BIRKENHEAD, FINLAY, DUNEDIN, SUMNER, and CARSON.)

LA COMPANIA MARTIARTU *v.* ROYAL EXCHANGE ASSURANCE CORPORATION. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Insurance (Marine)—Scuttling—Loss of insured vessel—Claim on policy—Perils of the sea—Connivance of owners—Inferences to be drawn from facts proved.

The plaintiffs had insured their vessel with the defendants against (inter alia) *adventures and perils of the sea and barratry of the master and mariners. The vessel having been totally lost during the currency of the policy, and a claim having been made against the defendants under the policy, the defendants refused to pay upon the ground that the vessel had been intentionally cast away by the captain and crew with the connivance of the owners.*

Held, the proper inference to be drawn from the evidence was that the ship had been scuttled with the connivance of the plaintiffs.

Judgment of the Court of Appeal (ante, *p.* 189; 129 *L. T. Rep.* 1; (1923) 1 *K. B.* 650) *affirmed.*

APPEAL from the judgment of the Court of Appeal (Bankes and Scrutton, L.JJ., and

(a) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

Eve, J.), allowing the respondents' appeal from the judgment of Bailhache, J., in favour of the appellants. The action was brought by the appellants to recover the sum of 10,000*l.* and interest under a time policy of insurance dated the 7th June 1920, for 10,000*l.* (part of 150,000*l.*) subscribed by the respondents, at the premium therein stated, on the hull and machinery of the steamship *Arnus*. The appellants were a company incorporated under the laws of Spain, and were the owners of the *Arnus* and interested to the full extent in the said policy. The risks covered by the said policy included those "of the seas, . . . barratry of the master and mariners and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment or damage of the said . . . ship, &c., or any part thereof."

The steamer loaded a cargo of iron ore at Vivero in the North of Spain, and sailed from that port for Rotterdam at 9.30 p.m. on the 26th April 1921. On the 28th April at about 5 a.m. she sank and was totally lost at a point sixty miles S.W. by W. from Penmarch.

The facts are set out in the judgments.

Bailhache, J. held that the loss was caused by a collision with some floating wreckage, which was a peril of the seas under the policy, and gave judgment for the plaintiffs. On appeal the Court of Appeal held upon the facts that it was impossible to say that the plaintiffs had established that the loss of the vessel was due to a peril covered by the policy. The presumption might well be, when nothing was known except that the ship had disappeared at sea, that her loss was by perils of the sea. But, when, although it was known she had sunk, there was evidence on each side which left the court in doubt whether the effective cause of the admission of sea water was within or without the policy, the plaintiffs, the assured, failed, for they had not proved a loss by perils insured against and the defendants were, therefore, entitled to judgment..

The plaintiffs appealed to the House of Lords on the grounds (*inter alia*) that Bailhache, J. had properly found that the ship was lost by perils of the sea; if the ship was cast away by those on board her, there was a loss or barratry within the policy; it was not proved that the appellants connived at or were privy to the casting away of the ship; and the Court of Appeal were wrong in law in holding that the presumption that the ship (being a seaworthy vessel) was lost by perils of the sea was displaced by the evidence of the respondents' witnesses, which left the court in doubt as to the cause of the loss.

Sir *John Simon*, K.C., *Stuart Bevan*, K.C., the *Earl of Halsbury*, and Sir *Robert Aske* for the appellants.

Sir *Douglas Hogg*, K.C., *C. R. Dunlop*, K.C., *G. P. Langton*, and *J. R. Ellis-Cunliffe* for the respondents.

Their Lordships took time to consider their judgments.

Lord Birkenhead.—In my opinion this case is a particularly clear one.

The appellants, a Spanish company, brought an action against underwriters for the loss by perils insured against of the steamer *Arnus*. They allege that the vessel sank through the entry of water by reason of a collision with floating wreckage. The underwriters retorted that she sank, on the contrary, because she was scuttled in the interests, and with the privity, of the owners.

The case was tried at first instance by Bailhache, J., who found in favour of the owners. The learned judge did not reach this conclusion without "the gravest anxiety"; and he had apparently formed the view that his decision, being based almost entirely upon facts, was not open to review. Indeed he spoke of it with some degree of sanguineness as practically "unappealable." Unhappily the learned judge had made an error which would not be lacking in humour if it had not been so costly to the parties.

The second officer of the vessel was one Felipi Ybarra, of whom the learned judge observes, "He gave his evidence on commission, and repeated it here, and I was impressed with his demeanour and his frankness." This impression was somewhat surprising having regard to the fact that Felipi Ybarra gave no evidence before the learned judge at all, and enjoyed, therefore, small opportunity of exhibiting either his demeanour or his frankness. The learned judge having thus founded himself upon a faulty recollection of the facts, the whole matter is plainly open to review. I have no doubt that the Court of Appeal was right and that the learned judge was wrong.

The facts may be very shortly stated. On the 26th April 1921, at 9.30 p.m., the steamship *Arnus* left the Spanish port Vivero bound for Rotterdam and carrying a cargo of iron ore. The appellant company, the owners, a Spanish corporation, purchased the vessel in May 1920 for 160,000*l.* On the night she put out to sea she was worth less than 14,000*l.*; but she was happily insured for a total sum of 174,000*l.* on policies which expired in less than a month. If, therefore, the vessel was to be lost at all during the pendency of this policy, this voyage afforded the last opportunity.

I find it necessary in the first place to state the conclusion that this vessel was wilfully scuttled by the chief engineer and the captain, with the almost certain complicity of many other persons on board. If the owners were not privy to this fraud they can evidently support a claim for a barratrous loss. But of course, if they themselves were accomplices in the fraud, the case is not one of barratry. Every judge who has hitherto applied his mind to the case has reached the conclusion that if the ship was scuttled the owners directed the scuttling. I agree with this view.

We were much pressed by counsel with the gravity of this conclusion. It is very grave.

We were told of the respectability and responsibility of those involved in this accusation; and we were reminded with reiteration that an onus, carrying with it a criminal charge, must be discharged by those who undertake it with meticulous completeness. The case must, of course, be proved. So must every other case. But some offences admit of much more direct proof than others. It was no doubt for this reason that the principle of circumstantial evidence was admitted into our law. Those who contrive crimes do not as a rule summon witnesses. There are certain crimes which are specially easy to conceal and therefore specially difficult to discover. In fact, many would be entirely undiscoverable unless the law permitted inferences to be drawn. The question in such cases is always whether the facts of the case, taken as a whole, render the general inference proper to be drawn from those facts so irresistible that the matter, though not established by direct evidence, has escaped from the atmosphere of reasonable doubt. I cannot doubt that this is such a case.

The appellants carried on their affairs in a pleasant family atmosphere. Their managing director was Juan de Longaray. He, his two brothers, and his ten step-children held the bulk of the 4800 shares of 500 pesetas each issued by the company. On the night when the *Arnus* commenced her last voyage the only assets of the company were the ship and the sum of about 400*l*. And there were outstanding liabilities in respect of loans amounting to 986,986 pesetas. The company was insolvent; there was not the slightest prospect of paying its creditors—if such indeed was its purpose. The intimate family atmosphere which was so striking a feature of the company is not altogether lost when we pass to consider the vessel. She was commanded by Thomas Enciendo. The captain was in a position somewhat singular in that he had no shares in the company. The first mate was Jose Ybarra. The second was Felipi Ybarra. Both these men were nephews and also step-sons of Longaray, the managing director. The chief engineer was one Gomeza, who held eighty shares in the company. Each of the Ybarras was the owner of seventy-two. The enterprise had all the elements of co-adventureship.

The voyage and the loss of the ship which followed presented remarkable incidents. The course from Vivero to Rotterdam would, in normal circumstances, be laid by a competent navigator so as to pass clear of the dangers of Ushant. A course, in fact, was set which, if prolonged, would have taken the vessel ashore inside Armen Rock; a course altogether unexplained; out of the track of ships passing from Finisterre to Ushant; but presenting the advantage to anyone who had by good fortune foreseen the casualty, that it would bring the vessel nearer the fishing fleet south of Penmarch. This fleet, in fact, by a happy coincidence, picked up the crew when in their boats. On the night of the 27th April, in fine weather, with a smooth sea, and little or no wind blowing, the vessel sank in deep water. The vessel did not actually founder for five hours after the crew had prudently taken to their boats. No attempt was made to attract attention or secure assistance by wireless or by rockets. To complete a singular chapter of maritime misfortune, we are assured that all the ship's logs and papers perished in an attempt, which failed, to launch the first boat. No evidence whatever was offered at the hearing of any casualty to which the sinking of the ship could be attributed except the influx of sea water. The second mate indeed says that he saw some wreckage. But his evidence is valueless because he evidently had not formed the view that the *Arnus* was struck by it. Other evidence there was none.

I find myself, as I have already indicated, in complete agreement with all the judges who have reached the conclusion that the vessel was scuttled. Bailhache, J. alone has taken a different view.

It becomes necessary, therefore, to ask what motive influenced those on board, and particularly the captain and the engineer, in so scuttling her. The captain in particular had no pecuniary interest in adopting a course so little likely to advance his professional reputation. It is not suggested that they had any quarrel with, or cherished any spite against, the owners. They were comparatively small men, with a relatively small interest in the venture. The owners, on the other hand, had a gigantic interest in the scuttling. The loss of the vessel at that particular moment meant indeed the difference to the company between solvency and insolvency. When once the fact of deliberate scuttling is established, the probability which remains to be balanced is as to whether such scuttling took place with or without the privity of the owners. Their counsel pressed upon us the terms in which the minutes of the meetings were couched in the period immediately preceding the loss. I find this argument particularly unconvincing. If a man who has an immense pecuniary interest in casting away his ship has decided to commit this fraud, I should not expect any hint of it to be contained in his papers. On the contrary, unless besides being a rogue he was also a fool, I should expect his papers carefully to convey the impression that he was engaged in arranging for the further employment of his vessel. Applying the general test which I have already indicated, I am satisfied that the respondents have discharged the task which this case imposed upon them. In other words, they have proved facts from which there springs an irresistible inference that the owners were accomplices in the fraudulent destruction of the vessel. There would have been ample evidence to place before a jury upon this issue; and I have no doubt as to the conclusion which a jury would have reached.

The appeal, therefore, in my judgment, fails, and I move your Lordships in this sense.

Lord SUMNER.—The facts in this case make it quite plain that the steamship *Arnus* was

wilfully cast away by some of those on board of her. The persons mainly concerned were the chief engineer and the captain. How many others were actually privy at the time is uncertain, nor is it material, but I have no doubt that the whole crew knew what had happened before they got ashore.

Accordingly, though the assured cannot claim for a loss by perils of the seas (*Samuel* v. *Dumas*, *ante*, p. 305; 130 L. T. Rep. 771; (1924) A. C. 431), it is open to them to claim for a loss by barratry. If, however, they were privy to the scuttling of the ship, their claim is defeated, for conduct to be barratrous must be in fraud of the shipowners and not in complicity with them. All the members of the Court of Appeal, and Bailhache, J. also, treat it as obvious, beyond any need of argument, that, if the ship was scuttled, the owners were privy to it, and for my part I do not believe a jury could have been found to decide otherwise. The question on this part of the case is therefore whether there is any evidence of the privity of the owners, that is, as the ship belonged to a company, of one or more of those who managed the company. If there is, the judgment stands.

Of course the charge is grave and should not lightly be made, nor should it be accepted on mere suspicion, but generalities like these are of no assistance. The question is whether the case has been proved; but that must also be the question in any other case.

The fallacy (an unconscious one, of course) of the appellants' argument on this point was, I think, that the two issues, "scuttling or not," and "with owners' privity or not," were treated as separate from one another for probative purposes. In truth, the whole case is one; and the whole of it is open for the purpose of substantiating any issue arising in it. Looked at in this way, I think, it presents no difficulty.

Ships are not cast away out of lightness of heart or sheer animal spirits. There must be some strong motive at work, and this is usually the hope of gain. In the present case there was no operative motive to lead the engineer and captain to sink the ship on their own account. The engineer, it is true, had eighty shares in the appellant company, but he is not shown to have had any knowledge of the state of the company's finances and insurances, such as would be requisite if he is to be taken to have had an eye to improving the value of his shares. The captain was not a shareholder at all. Both lost their effects and their employment, and both risked their lives while at sea and their liberty, I hope, when they got ashore. It is idle to suppose that they—strangers to one another, as they were, and one of them quite recently unemployed—would have cast the ship away except at the instigation of others interested, since they had no motive of their own; and in the company we find a full interest, and an overwhelming motive. In their case and in theirs alone there was a golden prize in the case of complete success and complete insolvency if the ship was not got rid of on this very voyage. There was further full opportunity for arranging the plot with all the advantage given by the relation of employer and employee. Nothing was easier than to pass the necessary word before the ship left Bilbao, and it seems to me a matter of just and inevitable inference from the circumstantial evidence, of which the whole case is full, that the word was, in fact, passed by someone charged with the management of the company's affairs.

We were told that the principal shareholders were rich and respectable men. Don Jesus de la Roca had a jute mill; Don Luis Leguizamon was brother to a Spanish senator; Mr. Longaray had been his college friend; and Bilbao thought highly of them all. I do not know if the proposition intended really was that rich and respectable men do not commit crimes, even for money, but that mariners and seafaring men do so and for nothing at all, but, at any rate, my experience does not bear it out. It is not necessary to name particular persons as the culprits, and as for generalities I am sure the loss of the ship, and of the action, too, will bite deeper than any censure. I will only say that I think the decision of the Court of Appeal was right.

Lords Finlay, Dunedin, and Carson concurred.

Appeal dismissed.

Solicitors for the appellants, *Botterell and Roche*.

Solicitors for the respondents, *Holman, Fenwick, and Willan*.

July 1 and 31, 1924.

(Before Lords Buckmaster, Atkinson, Sumner, Wrenbury, and Phillimore.)

Hansen v. Gabriel Wade and English Limited. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party — Reduction in freight "if and when the price of good class bunker coals . . . is reduced" — Construction of clause.

The respondents chartered a Norwegian steamer to carry a cargo of timber from Sweden to Wisbech, the freight to be paid at specified rates depending upon the nature of the timber carried. The charter-party further provided that "if and when the price of good class bunker coals ordinarily used in this trade is reduced to 80s. per ton the freight is to be 10s. per standard less."

Held, that the price referred to was the price actually paid by the shipowner for the coals and included the cost of carriage and also the amount properly payable as commission by the owner of a foreign ship.

Held further, that the words "if and when" pointed to a variation of price after the date of

(a) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

the contract, and in fact there had been no reduction after that date.

Decision of the Court of Appeal reversed.

Appeal by the shipowner from an order of the Court of Appeal (Bankes and Atkin, L.JJ.; Scrutton, L.J. dissenting) whereby it was ordered that the judgment of Bailhache, J. given in favour of the respondents as charterers be affirmed. The short point in the case was whether the respondents, the charterers of the Norwegian steamship *Agga*, were or were not entitled to a reduction in the freight of 10*s*. per standard. The action was brought by the shipowner claiming a sum for balance of freight payable under the charter-party which provided that "if and when the price of good class bunker coals ordinarily used in this trade is reduced to 80*s*. per ton the freight to be 10*s*. per standard less.

The facts appear sufficiently from the judgments.

Jowitt, K.C. and Sir *Robert Aske* for the appellant.

Claughton Scott, K.C. and *Stranger* for the respondents.

The House took time for consideration.

Lord Buckmaster.—The appellant in this case is the owner of a Norwegian steamship known as the *Agga*, chartered by the respondents under charter-party dated the 12th June 1920. By the terms of this document it was provided that the vessel should be chartered from Middlesbrough to Denmark, from whence she was to proceed in ballast to Uleaborg and there load from the agents of the charterers a cargo of sawn deals and boards, and, being so loaded, proceed to Wisbech Town. The freight was fixed for the different classes of timber at so much per St. Petersburg standard as set out in the charter-party. The voyage, according to the charter, was duly completed and the action out of which this appeal has arisen was an action for the balance of the freight due on the agreed figures. The defence was that, according to one of certain conditions which had been attached to the charter-party the freight ought to be reduced by 10*s*. per standard, and the whole question on this appeal is whether that contention is well founded or no. The clause in question is in these terms: "If and when the price of good class bunker coals ordinarily used in this trade is reduced to 80*s*. per ton the freight is to be 10*s*. per standard less." It was one of eight clauses fastened on to the charter-party and headed as follows:

"Additional clauses agreed to under the Anglo-Scandinavian Agreement dated the 17th Feb. 1920, otherwise the conditions of 'Scanfin' or 'Backrut' charters to apply." This addition appears to have been a common form taken from the agreement referred to and added at will to charter-parties covering the Anglo-Scandinavian trade. The seventh clause, which was expressly struck out in the present case, being in these terms: "All other terms and conditions of the Anglo-Scandinavian Agreement dated the 17th Feb. 1920, not mentioned herein and those of the 'Scanfin' or 'Backrut' charter to be incorporated herein."

The first question that was argued was whether, in these circumstances, it was possible to construe the critical clause by considering the whole terms of the Anglo-Scandinavian Agreement dated the 17th Feb. 1920, and thus attributing to the clause a meaning which it was contended it would properly bear if so regarded. I am of opinion that this cannot be done. The heading of the added clauses is nothing but a statement of the source from which they were derived, and the express exclusion of the general provisions of the agreement of the 17th Feb. 1920, shows that the parties did not intend that the general effect of that agreement was to be introduced into the charter-party they made. The clause in question has to be construed just as though it had formed a part of the actual body of the charter-party. Even if it be so regarded, it is urged on behalf of the respondents that the price of coal had, in fact, been reduced to 80*s*. per ton, and consequently the freight had to suffer a corresponding reduction.

The facts with regard to the coal supply are these. The coal industry was at the date of the charter-party under the control of the Controller of Coal Mines, and directions had been issued regulating the supply of coal. The directions applicable at the material date were those issued on the 8th May 1919. These provided that coal should not be delivered for bunkering ships at ports in the United Kingdom at prices less than those which were specified in the schedule; that where coal was sold to a broker or merchant his commission on a re-sale was to be charged by way of addition to the colliery price; that the prices were net f.o.b. at the nearest shipping place to the collieries, and if the coal were shipped at a more distant place the extra railway rate and shipping dues might be charged. On the 22nd March 1920, a circular was issued by the United Coal Trade Association of the North of England which contained a statement as to the arrangements made by the coal owners themselves with the Coal Controller, by which they voluntarily fixed the rates of charge for coal at ports in the United Kingdom. These figures were as follows:

South Wales.	80*s*. f.o.b. large.
Do.	60*s*. f.o.b. small.
Do.	75*s*., mixture containing 25 per cent. small.
Tyne and other English districts and North Wales	75*s* unscreened.
Scotch ports	72*s*. 6*d*. unscreened.

The appellants bunkered at Middlesbrough—the place which, according to the charter-party, was the port whence the vessel was to proceed to Denmark—coal known as Browney coal, which came under the head of coal "from Tyne and other English districts," the price of which, unscreened, was fixed at 75*s*. This

coal was sold to them by the firm of W. A. Souter and Co. Souter and Co. had bought it from Joseph Walton and had paid the rate of 75s. plus 1*s*. 6*d*., the added cost for what is described as "leadage." This was the addition contemplated by the directions of the 26th Oct. 1918, and to this sum 5 per cent. was added as the broker's or merchant's commission being the sum properly payable by the owner of a foreign ship to whom the colliery owners and factors sold through agents and not direct, bringing the total price up to 80*s*. 4*d*. The actual price, therefore, paid by the shipowner was not below 80*s*., but it is contended that the price mentioned in clause 8 is the price contained in the collieries' circular, or, at any rate, the price at the colliery and not the price at the ship. I am unable to accept this view. It appears to me that the essence of the bargain was that if at the time of bunkering the cost of the coal should have been reduced so that the shipowner paid less than 80*s*., as his expenses would have fallen, so, also, there should be a reduction in freight. There was, in fact, no change whatever in the price of coal as between the date of the charter-party and the date when the ship's bunkers were filled. According to the strict language of the clause, there had been no reduction at all; it had remained constant; but even if the clause meant reduction from a price antecedent to the agreement down to less than 80*s*. so that if the price were proved to be less than that at the date of the charter-party the reduction in freight would operate, I am still unable to see that in fact the price ever sank below that level.

In my opinion clause 8 relates to a ship of the character of the chartered vessel starting from the port specified in the charter-party, and the price is the price to the owner of such a vessel. This price, in the conditions of the present case, included the extra sum of 1*s*. 6*d*. and the broker's commission. It is said that the 1*s*. 6*d*. might have been saved by taking the vessel to Newcastle-on-Tyne; but that was not what the charter-party contemplated, and the owner was under no obligation to proceed there. The added sum of 5 per cent. was the normal commission of the coal broker or merchant selling to a foreign owner. They were both charges which, under the then existing regulations affecting the supply of coal, it was right and proper to make and which the shipowner was bound to pay.

In my opinion, therefore, the price never was below the standard figure mentioned in clause 8; there was consequently no justification for the claim that the freight should be reduced, and the appellants are entitled to the full freight they claim.

Lord Atkinson.—I have had the advantage and pleasure of reading the judgment prepared by Lord Sumner. I fully concur in it, and consequently deliver no judgment of my own.

Lord Sumner.—If this charter is to be read simply as an instrument *inter partes*, drafted by the contracting parties themselves for the purposes of a particular adventure and expressing the stipulations of their unaided minds, I think that its construction presents no difficulty. A certain freight was agreed, and, the cargo being duly carried and delivered, was earned and became payable. The charterers, however, set up a clause under which in a defined event the amount so agreed is to be reduced, and a less sum is to be paid. The whole question then is whether, on the true construction of this clause by itself, the event on which the agreed freight was to be reduced ever occurred.

Clearly it did not. The words are "if and when the price of good class bunker coals ordinarily used in this trade is reduced to 80*s*. per ton, the freight to be 10*s*. per standard less." This grammatically speaks from the date of the charter and refers to an event to happen thereafter, at any time between that date and the time when the freight becomes payable according to the agreed terms. In the present case, this event happened, if at all, before the date of the charter, and certainly not afterwards. Again, on the scheme of this charter taken as a whole but apart from other documents, the only principle on which an agreement to reduce the agreed freight while the agreed service remains the same can be justified, is that the charterers, anticipating a fall in the working costs of the voyage by a reduction in the price of coal to the shipowner, stipulate that, if this reduction occurs, it shall enure to their benefit; and that the shipowner, content with a freight which, *rebus sic stantibus*, gives him a recompense for his outlay with a sufficient profit, agrees to a reduction in the freight to the extent of the anticipated reduction in his coal bill. In this view the price referred to is the price which he may reasonably pay in the ordinary course of business in prosecuting the chartered voyage, and is not a price payable by others, in circumstances and under contracts to which he is a stranger, and from which he cannot benefit upon the voyage in question. If the price referred to is taken in any other sense the shipowner would be liable to have his agreed freight cut down after all his work had been done and all his outlay made, if there should occur, just before the freight becomes formally payable, a change in a market price, from which he neither does nor can derive any benefit at all. Now the price payable by the shipowner in fact remained over 80*s*. throughout.

The charterers, however, are entitled to prove the circumstances under which the charter was entered into, for these constitute an instrument for testing the meaning of the language which the parties used. The charter itself introduces the reduction of freight clause, among others, by the following heading or preface: "Additional clauses agreed to under the Anglo-Scandinavian Agreement, dated the 17th Feb. 1920. Otherwise the conditions of 'Scanfin' or 'Backrut' charters to apply." It appears that there was, among the general

trade agreements which came into existence under the peculiar conditions of the shipping trade in 1920, an agreement so dated and described, and, as its actual terms were made use of in the Court of Appeal, they may be referred to again, without deciding whether they were either formally admissible or strictly proved. The words of the clause in the charter which provides for the reduction of freight are taken textually from the Anglo-Scandinavian Agreement, and, as documents of this kind do not verify their quotations for the mere purpose of acknowledging their indebtedness to other authors, I assume that the reference to that agreement is of some significance in the construction of it. The question now is, how far, if at all, the construction of the charter-party sued on is to be modified in view of the reference to this agreement which it contains?

The import of it, according to the respondents, may be shortly put as follows. At the beginning of 1920 the supply of ships for the carriage of Baltic timber to this country was much less than the demand. Accordingly, the timber import trade, which is highly and intelligently organised, came to terms with representatives of steamship owners in Norway, Sweden and Denmark, with the object of securing "that the latter would allocate tonnage to lift during the Baltic season 1920" specified quantities of timber—the quantity to be dealt with by Norwegian shipowners, of whom the plaintiff is one, being 100,000 standards, and the total quantity being 260,000. Clause 3 of this agreement provided for an elaborate system of rates of freight varying according to the ports of loading and discharge, the size of the ship, and the particular description of timber carried. Its scheme is that standard rates are fixed, and extra rates, measured by sums to be added to the standard rates, are provided to meet these variations. The clause itself concludes with this provision: "all Scanfin and Backrut charters to have the following alterations," and the fifth and final paragraph of these alterations is in the words which constitute the reduction of freight clause in the present charter. It is on a "Scanfin" form and has apparently adopted the system of rates of freight laid down in the Anglo-Scandinavian Agreement, though, unless Wisbech, the port of discharge, is to be classed with King's Lynn and Boston, and to have the extra freight which the agreement provides for those ports without naming Wisbech, it would seem to have taken as its standard freight a rate 5*s.* per Petersburg standard above that of the agreement itself.

If, however, the terms of the Anglo-Scandinavian Agreement had been strictly followed, those who made out the present charter would have modified the rates of freight which are set out in it, in view of the reduction in the "price of good class bunker coals ordinarily used in this trade," which was announced and brought into force on the 22nd March 1920. In the Anglo-Scandinavian Agreement the provision for reducing freights if the price of bunker coal falls is one to be given effect to whenever charters are made after such a fall takes place. There is no scheme for inserting in subsequent charters the rates agreed in Feb. 1920, and also making them subject to future abatement in a certain event. The plan is to prepare and confirm charters at the rate fixed in the agreement till the price of bunkers falls to the named figure, and thereafter to prepare them at rates reduced in accordance with the agreement. I think this view of the true intent of the Anglo-Scandinavian Agreement is confirmed by the way in which effect has been given to its other requirements in making out this charter-party. It says in clause 3 "all Scanfin and Backrut charters to have the following alterations," and then follow one paragraph about payment of the freight in two instalments, three with regard to demurrage, and the clause now under discussion. Clause 9 is altered to read thus: "The freight to be paid as per attached clause," and clause 3 so as to read also "demurrage shall be paid as per attached clause per day." It is only the rates of freight in clause 1 that are not modified or made to take effect "as per attached clause," and the paragraph beginning "if and when the price, &c.," has been treated as if it came under clause 9 of the agreement, which begins "All charter-parties to contain the following clause"—namely (*A*) time for discharging, (*B*) report to Central Chartering Bureau; and these are duly incorporated in the present charter.

It is perfectly possible that this variation from the scheme of the Anglo-Scandinavian Agreement was inadvertent or arose from a misunderstanding of its intent. We have, however, to look at the language of the instrument for its construction, and I think it is important to note that in this regard the parties to this charter took their own line and did not simply implement the prescriptions of the Anglo-Scandinavian Agreement. It is important, first of all, in this respect. If the agreement had been faithfully followed, it might have been possible to argue that the date from which the freight reduction clause speaks is the date of the Anglo-Scandinavian Agreement of Feb. 1920, to which it refers, and not the date of the charter itself, of which it is an operative part. I do not, however, see how this can be affirmed, as soon as it is clear that the parties have broken away from the Anglo-Scandinavian Agreement and have taken their own course. Accordingly, although the judgments below do not seem to deal with this point, I think that the clause speaks from the date of the charter only. No material reduction of price having taken place since that date, the clause has no operation and accordingly the defence fails.

Again it may be argued that under the general agreement or collective bargain of the 17th Feb. 1920, the "price" therein referred to was a general price prevailing or automatically fixed in the coal trade for the

shipping district in question, and was not the price which under the circumstances of any particular adventure the shipowner might have to pay to bunker his ship for the voyage. The basis for this contention I suppose to be that the cost of bunkers is so intimately connected with the freight, and so largely governs it, that any index which fairly denotes the general movement of bunker prices will also fairly serve to measure the proper fluctuations of the bill of lading freight to be paid on right delivery. The agreement does not say to whom the price is charged or by whom it is payable, or whether it is gross or net or where the bunkers are to be delivered in consideration of that price, or specify what "this trade" is, but speaks in terms so general that in themselves they carry indefiniteness to the verge of ambiguity. It is true that agreements have been made between large combinations of employers and large federations of employees by which standard wages fall in conformity with named reductions in the Board of Trade index figures of the cost of living. It is, however, pure guesswork whether any such analogy is valid for a mere agreement to provide ships to lift 260,000 standards of timber during a single Baltic shipping season, and I think that the Anglo-Scandinavian Agreement itself must be read in the normal way and with reference to the circumstances of the parties to it. Two facts must, therefore, be particularly taken into account.

(1) The Coal Control System which was in force at the time recognised the division of Great Britain into a considerable number of coal districts, in which prices varying from district to district were to be charged. It also recognised a trade practice followed for the time being by which collieries would not sell bunker coal to a foreign shipowner direct, but only through some middleman, whose remuneration would then have to be added to the colliery price. In the present case the documents and the evidence show that the middleman employed bought from the colliery the quantity required and resold to the ship at an enhanced price, and it seems to me that this must be the normal, if not the exclusive, mode of complying with the practice. Now all the shipowners who were parties to the Anglo-Scandinavian Agreement were foreigners and had to conform to this practice, and I, therefore find it impracticable, as a matter of construction, to suppose that they were asked to agree or were willing to agree to any sliding scale of freights except one that would slide with reference to the prices they must themselves pay for bunkers. It is not reasonable to construe their submission to a reduction of freight already contracted for in accordance with changes in prices charged by the collieries to customers among whom they themselves could not be numbered. That a man may be willing to agree to take a speculative risk with regard to the movements of coal prices at the time when he is bargaining for his freight I can understand, for then he can estimate the probabilities of a change in the market, and of special circumstances affecting himself, and protect himself accordingly; but that he should first submit to a freight fixed for him by a general agreement and then accept a reduction clause for the charterer's advantage, which throws all the risk on him and brings him no possibility of any corresponding benefit, is a thing that passes my understanding. No doubt the middleman's addition to the colliery price remains uniform in practice though the colliery price itself may fall, though, as I understand the evidence, that is not necessarily so; but this does not make fluctuation in the colliery sale price the same thing for present purposes as fluctuation in the foreign ship's buying price, for there is a limit fixed at which the freight is to alter, and it is fixed at a named colliery price. The result is that the freight to the foreign ship might be reduced, because the pit price had fallen below 80*s*. by less than 5 per cent., the price payable by the ship to the middleman remaining something higher than 80*s*. Accordingly, if I had to construe the Anglo-Scandinavian Agreement by itself, I should read the word "price" as the price payable by the ship to the middleman.

(2) In practice it is agreed, as is fairly obvious, that the ship must bunker in Great Britain for the round Baltic voyage out and home; and that, as far as practicable, she must do so at the British port (if any) at which she discharges her previous inwards cargo, or else at the British port (if any) where she takes her cargo outwards for a Baltic port, whichever is the more suitable for economical coaling. In the present case the *Agga* was to load outwards from Middlesbrough to a Danish port, and proceed thence in ballast to Uleaborg to lift her timber cargo. Of course she had to conform to the circumstances of the moment, and, as there is nothing expressed in her charter to require her to go to an extra port to coal, in order thereby to give the charterers the benefit of the freight reduction clause, I take it that the parties contemplated that what was reasonable should be done. In the events that happened, in order to get delivery at Middlesbrough of bunker coal from the only available colliery, a "leadage" or extra transport charge was duly made and paid, which, being added to the middleman's price for the coal, brought the whole over 80*s*.

I think it is evident that the Anglo-Scandinavian Agreement did not mean by the "price" mentioned in the last paragraph of its third clause, the total sum which in the accidental circumstances of a particular future adventure a single shipowner might have to pay per ton of bunkers shipped, but, when parties make a bargain of their own, into which they transfer the actual words of the Anglo-Scandinavian Agreement for a new purpose and with a different effect, I think we must read these words, albeit identical, in accordance with the altered scheme of the particular bargain so entered into. Accordingly, I construe the charter in question as including in the word

"price" between these parties not merely the middleman's commission or profit on resale added to the colliery price, but also the "leadage," which under the circumstances of this case formed part of the price to the ship. If so, the event in which the agreed freight was to be reduced did not happen, in fact, apart from any question as to the time at which the change occurred.

Although, in my opinion, the same result is arrived at, after giving effect to the Anglo-Scandinavian Agreement and the other cirstances known to and affecting the parties to this charter, as would have been arrived at on the bare language of this charter standing by itself, I feel that we probably know less about these circumstances than might have been desired. Decisions on somewhat similar facts appear to have been given by Roche, J. (*Maatschappij Kralingen* v. *Newsum and Co.*, 7 Lloyd's List Rep. 137) and McCardie, J. (*Boyazides Brothers* v. *Gabriel Wade and English*, 10 Lloyd's List Rep. 248), which, not being reported in publications accessible to me, I regret that I have not been able to see. Further, at or about the time when he heard this case, Bailhache, J. had had before him other cases dealing with a similar subject-matter, which, also, are not before your Lordships, and his decision was in favour of the charterers in this case and was affirmed by a majority in the Court of Appeal. I have throughout been sensible that both courts in this case, and certainly both counsel, knew a great more about the course of business and the state of trade in the early part of 1920 than the mere documents and evidence disclose, and, with this feeling of being at a disadvantage, I should not be at all surprised if to both sides of the trade a decision in favour of the ship in this case should appear something of an unmerited windfall. I regret that the summary procedure of the Commerical Court does not always enable us to be as much up-to-date on the ultimate appeal as those more in touch with recent commercial changes were on the trial, but it cannot be helped. When controlled trade and collective bargaining have practically eliminated individual choice from any moulding of the contract, and have only left to the parties the option of contracting in the standard terms or of not contracting at all, a good part of the considerations hitherto prevailing in the interpretation of mercantile contracts will have become obsolete, and we may, for example, have to ask what the negotiators of the standard form may be supposed to have meant or to have taken into consideration, and not what circumstances or interests must have affected the minds of the ship's brokers and the chartering agents in the actual case in suit. The Central Chartering Bureau, London, though it signed in this case as charterers' agents, is obviously much more a trade organisation for working the Anglo-Scandinavian Agreement than a private agency firm, and I should not be surprised if the excerpts from that agreement which were pasted on to this Scanfin charter were mechanically incorporated without the agents on either side being conscious that, in effect, another contract was being made than that which the main agreement had contemplated. Quite probably, also, the shipowner had no real choice and no personal concern in the matter. Still, all we can do is to construe this instrument according to the existing law and under the view of the circumstances which the evidence presents; and so viewed, I think it must be read in the shipowner's favour.

Lord Wrenbury.—We are not here concerned with the construction of the Anglo-Scandinavian Agreement. We are concerned with the construction of this contract. It contains in clause 8 a provision which is found in the Anglo-Scandinavian Agreement and it identifies the clause as finding its origin in the Anglo-Scandinavian Agreement. On the other hand, it contains and deletes words providing that all other terms and conditions of the Anglo-Scandinavian Agreement are incorporated in the contract. We have not to ascertain the true meaning of clause 8 when found in the Anglo-Scandinavian Agreement, but its meaning when found in this contract and with the setting in which it is found.

The words to be construed are "If and when the price of good class bunker coals . . . is reduced to 80*s*. per ton." There is no one price of coals which is the same to every buyer and in every place. The price at the pit head will be one figure, the price of the same coal delivered at a port some miles distant will be another. The price to a broker or middleman will be one figure, the price of the same coal to a consumer who buys through a broker or middleman will be another. In this contract I think that, for the reasons assigned by the judgments which have preceded my own, "the price" means the price which this shipowner under the circumstances disclosed by his contract would have to pay, and that his freight is reducible if and when the market is such that his expenses of performing the contract are reduced. The 1*s*. 6*d*. "leadage" was the cost of bringing the coal to Middlesbrough. The 5 per cent. was commission payable to a broker whom this ship as a foreign ship was compelled to employ and pay. Both the one and the other form I think part of "the price of good class bunker coals" to this contracting party for the purposes of this contract. On these grounds I think this appeal succeeds.

Further, I think that the words "if and when" point to a variation of price after the date of the contract, and inasmuch as there was no reduction after that date the appeal again succeeds on this ground.

Lord Phillimore.—I agree. Counsel for the respondents pressed your Lordships to refer to the Anglo-Scandinavian agreement. I see no objection to its being looked at, and I find that it is one of that class of agreements between merchants and shipowners in the same line of business which have been common

in recent years. It is not a form of charter-party, but an agreement that certain clauses should be inserted in charter-parties; and in pursuance of this agreement some of these clauses have been printed on a slip and pasted on to the charter-party which is under discussion in the present suit, some words of clause 2 and the whole of clause 7 having been cancelled in ink.

The charter-party itself is a common form of charter-party, also agreed, as its title shows, at a conference of shipowners and merchants.

But when all this has been said, it remains that the printed clauses or words derived from either source must be construed together and with the special clauses as all parts of one instrument of contract between the parties to it; and it does not seem to me to help the case of the respondents very much to say that any particular clauses have been inserted in deference to the Anglo-Scandinavian Agreement.

There is an argument drawn from the fact that the Anglo-Scandinavian Agreement is introduced as bearing a certain date with which I would deal later.

Now the clause which your Lordships have to construe, being No. 8 of the clauses pasted on, is as follows: "If and when the price of good class bunker coals ordinarily used in this trade is reduced to 80*s.* per ton, the freight to be ten shillings (10*s.*) per standard less."

The respondents contend that the prices fixed by the circular issued by the North of England United Coal Trade Association on the 22nd March 1920, established the price of good-class bunker coals ordinarily used in the trade at 75*s.* or less, and that therefore they are entitled to the 10*s.* reduction of freight. They contend, and the view has prevailed in the courts below, that there is one general price, and that no regard must be paid to any differentiation by reason of peculiarity of port of loading or nationality of ship.

Now the business idea of the clause must be that if shipowners have to pay less for their coal they should charge less freight. First of all then as to the leadage. I assent to the view of Bailhache, J. that it must be added to the 75*s.* price. The phrase used in the Board of Trade directions of the 8th May 1919, is "the extra railway and shipping dues as compared with those for shipment at the nearest shipping place to the colliery." That circular said that they must be always charged; and it seems clear that the addition contemplated in those directions is always made. This would raise the price from 75*s.* to 76*s.* 6*d.*

Then as to the five per cent. I agree with Scrutton, L.J., though not exactly for his reasons.

It may be, as Bailhache, J. suggests, that if there is something peculiar to the ship, such, for instance, as inability to approach a tip owing to her great draught, it could not be said that the special price which she had to pay for coals was a price within the meaning of clause 8. It must be something more general. But the right view is that there are two general prices, one for British ships and one for foreigners. The price for the foreign ships is necessarily higher by five per cent.; and this ship is, and is described in the charter-party as being, a Norwegian ship.

There is a further reason for coming to this conclusion. The circular issued by the North of England United Coal Trade Association which fixed the price at 75*s.* was issued on the 22nd March 1920. This charter-party is dated the 12th June 1920. Now the language of clause 8 is the language of futurity; the words "if and when" point to something which is to happen, and the word "reduced" is at any rate more applicable to a state of change than to a state of rest. But the reduction on which the respondents rely had taken place already. There has been no reduction since the date of the charter-party. It is attempted to meet this argument by pointing to the heading or title of the pasted-on clauses, by which they are described as "additional clauses agreed to under the Anglo-Scandinavian Agreement dated the 17th Feb. 1920," and by suggesting that these clauses are to read as if they had been constructed on the 17th Feb. This is not so. They are clauses of an agreement of the 12th June, entered into in pursuance of an anterior agreement of the 17th Feb. They date from the 12th June.

I do not say that the argument from these words of futurity is very strong, but it is helpful, and it is certainly not met by the counter suggestion.

I conclude, therefore, that the appellant is right.

Appeal allowed.

Solicitors for the appellant, *Botterell and Roche.*

Solicitors for the respondents, *Trinder, Kekewich, and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

July 10 and 11, 1924.

(Before Bankes, Scrutton, and Atkin, L.JJ.)

The Hamlet. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Discharge of timber cargo consisting of round wood—Dock dues charged by the Port of London Authority—Charge by weight—Method of calculating weight of round wood—Custom of port.

The defendants were the consignees in London of a cargo of soft round wood carried by the plaintiff's vessel under bills of lading incorporating a charter-party by the terms of which the

(*a*) Reported by Geoffrey Hutchinson, Esq., Barrister-at-Law.

defendants as consignees were required to pay two-thirds of the dock dues in the event of discharge in London. The vessel discharged in London two parcels of soft round wood, of one of which the defendants were the receivers, and one parcel of aspen wood. Aspen wood is heavier than round wood or sawn deals. The dock dues which the Port of London Authority are authorised to charge under the Port of London Act 1908 are calculated partly per ton of the net register of the vessel and partly upon the actual weight of the cargo discharged. In ordinary trade usage timber is not weighed, and therefore in order to calculate the weight of a timber cargo the following formula is adopted by the Port of London Authority: the ordinary unit of measurement of soft round wood being a fathom containing 216 cubic feet and the ordinary unit of aspen wood being a load containing 50 cubic feet, the cubic measurement of the cargo discharged is first reduced to a common denominator of cubic feet. The number of cubic feet arrived at in this manner in each cargo is then divided by 165, which is the number of cubic feet contained in a St. Petersburg standard weighing 2½ tons, and the figure so obtained is then multiplied by two and a half in order to express the result of the calculation in tons. The plaintiffs sued the defendants for their proportion of dues calculated upon this formula.

Held (1), that the meaning of the clause in the bills of lading was that the receivers were only liable to pay a proportion of the dock dues which the Port of London Authority was entitled to charge, not a proportion of the dues actually paid by the shipowners; (2) that, inasmuch as the St. Petersburg standard is a unit of measurement of sawn deals, which are rectangular in shape, a calculation of the weight of round wood based upon the weight of wood of rectangular shape contained in the cubic area of a St. Petersburg standard was necessarily erroneous, since in the case of wood cut in rectangular shape the whole of the cubic foot space is occupied by timber, there being no interstices or air spaces in each corner, as in the case of round wood. The weight of round wood as calculated by the formula therefore exceeded its actual weight, and the method adopted by the Port of London Authority was erroneous. The Port of London Authority had therefore levied dues calculated upon a weight basis in excess of those authorised by their statutory scale; (3) that this method of calculating could not be justified by the custom of the port, since it could only have existed since the Port of London Authority Act 1908, by which the scale of charges was authorised, and that there was no evidence of such a degree of notoriety of the alleged custom as would make it binding upon the parties.

APPEAL from a decision of the Divisional Court (Duke, P. and Hill, J. *infra*) reversing a decision of His Honour Judge Shewell Cooper, in the City of London Court (Admiralty jurisdiction). The appellants (plaintiffs in the County Court) were the owners of the Danish steamer *Hamlet*, and the respondents (defendants) were Messrs. T. P. Jordesen and Co., who were consignees of certain parcels of pit props discharged by the *Hamlet* in the Surrey Commercial Docks. By the terms of the charter-party incorporated in the bills of lading, the consignees were liable to pay two-thirds of the dock dues in the event of discharge in London. The respondents' cargo with other parcels was discharged in London, and they became liable for a proportion of the dues charged by the Port of London Authority under their statutory powers at the rate of 3*d.* per ton as the net register and as the dock cargo space (if any) occupied and 10*d.* per ton on the weight of the wood discharged. The appellants claimed the sum of 24*l.* 3*s.* 10*d.* The respondents paid into court the sum of 20*l.* 6*s.*, contending that the method of calculating the dues adopted by the Port of London Authority was inaccurate. Judgment was given for the plaintiffs in the County Court. The defendants appealed. On the 11th Feb. 1924 the following written judgments were delivered in the Divisional Court, from which the facts and contentions of the parties fully appear.

Feb. 26, 1924.—Sir HENRY DUKE, P. said: This is an appeal from the judgment of the City of London Court in an action brought by the owners of the steamship *Hamlet* against the defendants as consignees of certain parcels of timber delivered to them in the Surrey Commercial Dock to recover sums paid by the plaintiffs to the Port of London Authority in respect of dock dues and alleged to be due from the defendants to the plaintiffs under the terms of the charter-party and bills of lading relating to the carriage to London by sea of the timber in question—three parcels of soft round wood—from the Baltic port of Libau, where this timber was shipped by the defendants' vendors, the Jewish Colonial Trust Limited.

The sum in question was claimed as being two-thirds of the dock dues payable by the plaintiffs upon the discharge of the defendants' parcels.

The relevant provision of the charter-party incorporated by the bills of lading under which the defendants accepted delivery, is in these words: "If discharged in a dock in London the consignees to pay two-thirds of the dock dues."

The defendants by their defence denied liability, but they brought into court a sum which they alleged to be sufficient to satisfy the plaintiffs' claim on any view of the facts. Judgment was given for a sum in excess of the amount so brought into court. Upon the hearing of the appeal the appellants relied upon their alternative plea. Various difficult questions were mentioned at the hearing which are capable of being raised upon the transaction, as, for example, a question whether the *Hamlet* which was consigned successively to London and Great Yarmouth with wood cargo for both ports, was within the terms of the charter-party discharged in a dock in London, and a

question whether the obligation under the charter-party and bills of lading was such that each consignee might be required to pay two-thirds of the dock dues upon the whole cargo. These questions, however, were waived and the matter actually submitted for judgment was whether what the defendants had bound themselves to pay was two-thirds of such sum as should be demanded by the Port of London Authority, or two-thirds of the dock dues properly payable.

In respect of the timber which was discharged from the *Hamlet* in London the Authority demanded and received from the plaintiffs 79*l*. 4*s*. 7*d*. The plaintiffs claimed from the defendants 24*l*. 3*s*. 10*d*. as the proportion of that total sum which was attributable upon a tonnage basis to the defendants' consignments. What was delivered to the defendants was 72 fathoms of soft round wood, or the approximate equivalent of 94¼ standards, and the weight per standard was assumed for the purpose of calculating the tonnage to be 2½ tons. It is hardly necessary to say that the timber was not in fact weighed in course of the discharge of the cargo. Such a proceeding would obviously impede discharge to a serious extent. The defendants did not contend that actual weighing was a condition precedent to liability for dues computed by weight. They claimed to be able to demonstrate that the method of calculating weights which was shown to have been adopted is inevitably wrong, and various witnesses whom they called gave evidence that their experience showed it to be wrong to the extent of perhaps half a ton per standard. The plaintiffs had met this contention in the court below by proof of what they alleged to be a custom in the Port of London to calculate the weight of wood such as that in question in accordance with the formula which had been used, and the learned judge seems to have given effect to this finding in his judgment.

The basis of the formula on which the weight of the defendants' consignment was calculated and the mode in which it is applied were not substantially in dispute. The measurement in cubic fathoms of a cargo of soft round wood such as the pit props in question is made by piling the props to a height of six feet in a six foot square marked off by means of sticks. The number of cubic fathoms is multiplied by 216 to ascertain the number of cubic feet and the total is divided by 165 to reduce it to the customary measurement of timber in standards of 165 cubic feet. This process is not challenged by the defendants. What they complain of is the next step, namely, the conversion of standards into a theoretical weight in tons by using a multiplier of two and a half. The ground for the use of this multiplier is that a standard of sawn white wood weighs on an average 2½ tons, another fact which I think is not in dispute. I mean that the fact that that ground was the basis of calculation is not in dispute, the accuracy of it, as I have indicated, was in dispute. It is the application of the known weight of a standard of sawn white wood to determine the weight of a fathom of soft round wood of which the defendants complain. If the Port Authority is right in assuming that a fathom of sawn white wood and a fathom of soft round wood are approximately of the same weight, the judgment in the court below ought, in my opinion, to stand. So also if there is a custom of the port which entitles the Port Authority to calculate tonnage dues on round wood as though it were sawn wood. If the formula is, as is said, manifestly wrong, and if there is no valid custom the appeal ought to succeed. If the formula is manifestly wrong, or is clearly proved by the evidence given in the court below to be wrong to the extent alleged by the defendants, judgment for costs ought to be entered for the defendants. I am satisfied that the formula in question does produce in the case of soft round wood a result which must inevitably be wrong. A cubic fathom of sawn wood is a compact mass which occupies the entire area of 216 cubic feet. When poles are stacked to fill the same cubic space, there are interstices which I think necessarily occupy not less than one-fourth of the total space. This is seen upon consideration of a vertical section of one pole enclosed by a square of the smallest possible dimensions. The difference in area as between circles and square on such a section, and the difference in weight in a material of uniform texture like soft wood where cubic area is concerned are capable of ascertainment by mathematical calculation, as well as by experiment. The fallacy in the formula in question is that of assuming that the contents of a square enclosing a circle are the same as the contents of the circle. The error of assuming them to be equal seems to me necessarily to exceed one-fifth of the area of the larger figure. The same error would seem to result in the computation of weights when solid dimensions are being dealt with. Assuming there is such an error as I have indicated, in the practical operation of the formula which has been used it was contended before us on behalf of the plaintiffs that for the purposes of this appeal the error is immaterial, firstly because there is under the relevant statutes no right of appeal on matters of fact from the court below in cases where the amount involved is less than 50*l*.; and, secondly, because the learned judge has found the case to be governed by custom.

In my opinion, the subject matter of the appeal is matter of law, namely, whether by virtue of the alleged custom the authority may levy dues on a measurement based upon a manifestly erroneous formula. I think they cannot. The practice relied upon can only extend to the few years since the Authority was created by the Port of London Act 1908, and it is, as I think, unreasonable, if not illegal, since it is incident to the levying of dues unauthorised by the statute. Further, I do not see any proof in the court below of such a degree of notoriety as would properly give to

any such usage a binding effect in relation to the various parties—shippers, shipowners and consignees who may have interests in the amount of the dues leviable in the port. As to the limits within which practical experience may be applied for the ascertainment of weights of timber otherwise than by actual weighing, I will only say that if a rough and ready method of calculation has been commonly used, and is not manifestly wrong, I think its results can be accepted as matter of fact. Here, however, the usual formula is wrong.

For reasons I have already stated I think the amount charged against the defendants by the plaintiffs must necessarily be excessive by more than one-fifth. The defendants adduced evidence of actual weights upon which the learned judge if he had felt at liberty to deal with the matter apart from custom, would I think have held the defendants' payment into court to be sufficient to meet any lawful liability they are under in respect of dues paid by the plaintiffs. This seems to be a correct conclusion, upon calculation by a correct formula, or upon actual weights so far as can be ascertained. Under the circumstances justice will be done by reversal of the judgment below, a declaration that the sum paid into court is sufficient to satisfy any claim of the plaintiffs in respect of the dues in question, and an order that the costs after payment into court and upon the appeal be paid by the plaintiffs.

HILL, J.—I agree. The question is whether 24*l.* 3*s.* 10*d.* is the proportion of the dock dues upon the respondent's steamship *Hamlet* which is payable by the appellants, Messrs. Jordeson. For the purposes of this case, as the argument proceeded, it became common ground that the appellants were liable for a proportion but for no more than their proper proportion. The total dock dues levied were 77*l.* 4*s.* 7*d.* Of that amount, if properly chargeable, the respondents were entitled to recover two-thirds, 51*l.* 9*s.* 9*d.*, from the three consignees whose cargo was discharged in dock. The respondents said that the appellants' proportion was 24*l.* 3*s.* 10*d.* The appellants paid into court 20*l.* 6*s.* They do not ask to have any of it back. They say it is at least sufficient. The appellants say that the Port of London Authority calculated the dues payable by the respondents upon a wrong basis and overcharged and that the respondents apportioned the amount upon a wrong basis.

The dues are fixed by a statutory schedule of rates with an authorised addition of 150 per cent. If a ship enters dock with a full cargo of wood the rate is 1*s.* 1*d.* per net register ton. By virtue of sect. 78 of the Merchant Shipping Act 1894 to the registered tonnage is added the tonnage of the deck cargo space calculated in accordance with the Act. The basis of charge is wholly one of space tons. The shipping unit of wood is a space unit, a standard of 165 cubic feet in the case of sawn deals and boards, a fathom of 216 cubic feet in the case of round wood, a load of 50 cubic feet in the case of aspen wood. When the dues are charged upon space tons and have to be apportioned among several consignees, there is no difficulty in apportioning by reducing the several parcels to a common space denominator. As the charge is upon the space tons of the ship and not upon the space occupied by the cargo, the space measurements of the several parcels are relevant only for the purpose of apportionment, but for that purpose they provide the proper factors. If a ship enters dock with a part cargo of wood and no other cargo, the dues are fixed upon a mixed basis. The rate is 3*d.* per ton of the net tonnage of the ship with the addition of the deck cargo space—that is a charge upon a basis of space tons—with a further rate of 10*d.* per ton upon the weight of the wood discharged—that is a charge upon a basis, not of space tons, but of weight tons. With the 150 per cent. addition these rates are respectively, 7½*d.* and 2*s.* 1*d.* As regards the 7½*d.* per space ton there is no difficulty in apportionment. Given the numbers of the space units of the several parcels, the apportionment can be worked out as in the case of the ship with a full cargo. But the charge based upon weight tons discharged creates the difficulty illustrated by the present case. The Port of London Authority do not weigh—it is impracticable that they should and would be inconvenient if they could. The shipowner does not weigh, his freight is payable per space unit. In general the consignees do not weigh. But the Port of London Authority has no power to charge the 2*s.* 1*d.* otherwise than upon weight tons. And each consignee who has contracted to pay his proportion of two-thirds of what the shipowner has to pay, has contracted to pay his proportion of the 2*s.* 1*d.* charged upon a weight basis, that is to say, such part of the whole amount per ton weight discharged as the weight of his parcel bears to the total weight discharged, or, in other words, two-thirds of 2*s.* 1*d.* per ton on the weight of his parcel. I can see no justification for apportioning upon a space basis a charge which can only be made upon a weight basis. The consignee's promise, and his only promise, is to pay the dock dues payable by the shipowner, not some other dock dues which might have been payable if the Port of London Authority's authorised rates had provided for a different assessment. If this be so, the respondents' contention is wrong. They argued that as between the three consignments the two parcels of round wood and one of aspen wood, the only possible common denominator was a space unit, so many cubic feet. They took a load of 50 cubic feet as the unit. A fathom being 216 cubic feet and a load 50 cubic feet they reduced the parcels to loads and the appellants had 313.23 loads, Blumenthal 221.44 loads and Bryant and May 132 loads, making a total of 666.67 loads, and if 666.67 pays 51*l.* 9*s.* 9*d.*, 313.23 pays 24*l.* 3*s.* 10*d.* There is a very slight error in the respondent's conversion of the appellant's fathoms into loads, but

it is so slight that it may be disregarded, and I disregarded it for the rest of this judgment. But to apportion in that way is to treat the 51*l.* 9*s.* 9*d.* as if the whole of it had been charged according to space, whereas, in fact, the greater part of it was charged according to weight. The schedule of rates may present difficulties in the application, but it cannot entitle the shipowner to say to the consignee: "I have had to pay on the weight of your wood; it is not easy to say what the weight of your wood was; therefore you must pay me on the basis of the space occupied by your wood." The judgment is not very clear. So far as I can follow the judge's reasons, I do not think that he accepted the respondents' contention; I think he arrived at the same result on other grounds. If he did accept the respondents' contention, I think he was wrong in law. There are two other possible interpretations of the judgment. The first is that the judge accepted the view inherent in the formula adopted by the Port of London Authority that round wood and aspen wood are of the same weight per cubic space occupied by them and both of the same weight per cubic space as sawn wood and that that weight is 2½ tons per 165 cubic feet space. The second is that the consignees knew the method adopted by the Port of London Authority in ascertaining the weight of round wood and aspen wood, and that, whether it be right or wrong, the consignees are bound by it. If the judgment proceeded upon either of those grounds—and I think it proceeded upon the second—it was, in my opinion, wrong in law. As to the first view, I do not think the judge found that the formula gave the true weights. When he said: "They seem to adopt a rough and ready way assuming the weight, but no doubt it is substantially accurate," he was, I think, referring to the consignees and not to the Port of London Authority. But if he was referring to the Port of London Authority, there was no evidence upon which the judge could find that a quantity of round wood and a quantity of aspen wood occupying the same space of equal weight, or that either of them weighed 2½ tons per 165 cubic feet space. The evidence was all the other way, and showed (1) that aspen wood was much heavier than round wood and (2) that round wood weighed less and aspen wood weighed more than 2½ tons per 165 cubic feet space. I will deal with this evidence later on. As to the second view, if the practice of the Port of London Authority is to bind the consignees, it must be that there is a custom which can be read into the contract so that clause 12 of the charter-party should read: "Pay two-thirds of the dock dues as ascertained according to the formula usually adopted by the Port of London Authority." The plaintiffs did not plead a custom, or set it up at the trial, or seriously contend before us that such a custom was proved. If they had, it would have to be considered whether there was evidence of it, and whether a custom whereby the Port of London Authority charged in respect of round wood more than the amount authorised by the statutory rates was either reasonable or lawful. The judge has not found a custom. He thought, and it is true, that, as a matter of business, very inconvenient consequences arise from the fact that the charge is upon the weight of goods which no one in practice weighs, but that is the result of the schedule and does not bind either shipowner or consignees to accept a practice of the Port of London Authority which manifestly has no relation to actual weights. Apart from a legal custom, it is nothing to the point that the consignees knew that the Port of London Authority usually adopted a particular formula. Unless a custom can be read into the contract, the consignees have not contracted to be bound by the practice of the Port of London Authority. The question would still remain whether it was correct. It is manifestly incorrect. Because a St. Petersburg standard of 165 cubic feet of deals weighs 2½ tons, the Port of London Authority taking the space unit of round wood, which is a fathom of 216 cubic feet, multiply the number of fathoms by 216, divide by 165, and multiply the quotient by 2½, and so arrive at the tons weight of that number of fathoms. Similarly, taking the space unit of aspen wood which is a load of 50 cubic feet, they multiply the number of loads by 50, divide by 165, and multiply the quotient by 2½ and so arrive at the tons weight of that number of loads. It was upon this formula that they arrived at a total weight of 505 tons distributed thus: Jordeson 237, Blumenthal 168, Bryant and May 100, the total 505. The formula so adopted entirely ignores the fact that sawn wood packs close, while in any cubic space occupied by round wood a substantial and not a negligible part must be air spaces. If 165 cubic feet of deal planks weigh 2½ tons it necessarily follows that the quantity of deal pit props or scaffold poles which occupies 165 cubic feet weighs less than 2½ tons. The formula as applied to round wood and aspen wood also ignores the fact, which was common ground in the argument, that aspen is heavier than round wood. Apart from the Port of London Authority's representative who proved the formula applied, the respondents did not attempt to give any evidence of weight. I should have thought that experience as to the effect upon ship's displacement, according as sawn or round wood was loaded, would have enabled them to prove the comparative weights. No such evidence was given. There was no evidence to support the Port of London Authority formula, and in the nature of things that formula cannot be correct. The judge was therefore left with no evidence of weight except that called by the appellants. As I understand the judgment, the learned judge thought that that evidence was substantially correct. But be that as it may, it is in my opinion clear upon the only evidence given, that the weight of the appellant's parcel was such that the amount paid in was sufficient, and there was no evidence upon which any

other conclusion could be arrived at. It was common ground that the appellant's cargo was 72.52 fathoms of round wood and Blumenthal's 51.26 fathoms of round wood and Bryant and May's aspen wood, according to the bills of lading, was 132 loads, and the Port of London Authority charged upon 132 loads. In fact Bryant and May received according to their evidence 160.80 loads, and in argument the respondents accepted that figure. It seems to me, however, that regard must be paid to the quantities in respect of which the Port of London Authority did charge, and not to some other quantities in respect of which the Port of London Authority might have charged. But even if the aspen wood be taken at 160.80 loads the appellants paid in sufficient. I will just deal with the figures. Space ton charge: the charge per ton register plus deck cargo space at 7½*d.* came to 24*l.* 12*s.* 6*d.*, of which two-thirds equals 16*l.* 8*s.* 4*d.* Taking Bryant and May's loads at 132, the total was 666.67 loads, of which the appellants had 313.23, and the appellant's proportion of 16*l.* 8*s.* 4*d.* was 7*l.* 14*s.* 3*d.* Now, coming to the charge of weight tons, to this sum has to be added two-thirds of so much as the respondents were liable to pay in respect of the weight of the appellants' parcel. The appellants are liable for 16⅔ of a penny per ton weight of their 72.52 fathoms. The evidence was that round wood weighed 2 to 2¼ tons per fathom. Let it be taken at the higher figure and, to make every possible allowance in the respondents' favour, let it, in a further calculation, be assumed, contrary to the evidence, that it weighed 2½ tons per fathom; 72.52 fathoms at 2¼ tons equals 163.17 tons. To be precise, it equals 181.30 tons; 163.17 tons at 16⅔ of a penny equals 11*l.* 6*s.* 7*d.* The 181.30 tons at 16⅔ of a penny equals 12*l.* 11*s.* 9*d.* Add 11*l.* 6*s.* 7*d.* to 7*l.* 14*s.* 3*d.* and that means that the appellants pay 19*l.* 0*s.* 10*d.* Add the 12*l.* 11*s.* 9*d.* to 7*l.* 14*s.* 3*d.* and that means that the appellants paid into court 20*l.* 6*s.* If it is desired to show the above weight charge as a proportion of the whole weight charge properly leviable the figures are as follows: taking aspen wood as weighing 1¼ tons per load, as stated in the only evidence given about it, and taking round wood as weighing 2¼ tons, and alternatively 2½ tons per fathom, and taking it at 2¼ tons, Jordeson 72.52 fathoms at 2¼ tons equals 163.17 tons, Blumenthal 51.26 fathoms equals 115.33 tons, Bryant and May 132 loads equals 163 tons—total, 441.50 tons. Now, taking the round wood at 2½, Jordeson equals 181 tons 30 fathoms, Blumenthal 128 fathoms, and Bryant and May 163, making a total of 472.30 tons. Now applying all those figures, 441.50 tons at 2*s.* 1*d.* pays 45*l.* 19*s.* 9*d.*, of which two-thirds equals 30*l.* 13*s.* 2*d.* If 441.50 pays 30*l.* 13*s.* 2*d.*, then 163.17 tons pays 11*l.* 6*s.* 7*d.* If 472.30 tons at 2*s.* 1*d.* is the total, then 472.30 pays 49*l.* 3*s.* 11*d.* of which two-thirds equals 32*l.* 15*s.* 11*d.* If 472.30 pays 32*l.* 15*s.* 11*d.*, then 181.30 tons pays 12*l.* 11*s.* 9*d.* If the aspen wood be taken as 160.80 loads—that is equal to 201 tons—the result is still that the appellants' share is less than 20*l.* 6*s.* In that case there must also be an adjustment of the 7½*d.* per ton register as follows: Jordeson, 313.23 loads; Blumenthal, 221.44 loads; Bryant and May, 160.80 loads; making a total of 695.47 loads; and the appellants' share of 16*l.* 8*s.* 4*d.* is 7*l.* 7*s.* 10*d.* Then as to the 2*s.* 1*d.* per ton weight, the figures are (*a*) If round wood weighs 2¼ tons per fathom, Jordeson's proportion is 163.17, Blumenthal's 115.33, and Bryant and May's 201, giving a total of 479.50 tons at 2*s.* 1*d.*, which equals 49*l.* 19*s.*, of which two-thirds equals 33*l.* 6*s.* If 479.50 pays 33*l.* 6*s.*, 163.17 pays 11*l.* 6*s.* 8*d.*; add 7*l.* 7*s.* 10*d.*, and the appellants pay 18*l.* 14*s.* 6*d.* (*b*) Then taking the round wood at 2½ tons per fathom and giving Jordeson 181.30, Blumenthal 128, and Bryant and May 201, the total of 510.30 tons at 2*s.* 1*d.* pays 53*l.* 3*s.* 1½*d.*, of which two-thirds equals 35*l.* 8*s.* 9*d.* If 510.30 pays 35*l.* 8*s.* 9*d.*, then 181.30 pays 12*l.* 12*s.* 2*d.*; add 7*l.* 7*s.* 10*d.*, and the appellants pay 20*l.* On this last basis alone would the total charge of the Port of London Authority be justified? It would, indeed, be about 11*s.* too little. But that is on the assumption of 2½ tons per fathom. And even if the total were justified the appellants, upon a true apportionment, pay less 20*l.* 6*s.* I should add that the appellants argued that the whole amount payable by the consignees should be apportioned on a weight basis. I do not agree. But if it should, then, whether the weight per fathom be taken at 2¼ or 2½ tons, and whether the loads of aspen be taken as 132, or 160.80 and the weight of aspen at 163, or 201 tons, the appellants' share is less than 20*l.* 6*s.* I have worked out the figures, but it is not necessary to give them. No possible view of the figures can show the appellants liable to an amount in excess of 20*l.* 6*s.* The court ought to say, as it says, that the payment in was sufficient.

The plaintiffs appealed.

Dunlop, K.C. and *Trapnell*, for the appellants, contended that the formula adopted by the Port of London Authority was substantially accurate, and was so found by the judge in the County Court. There was no error in law in the judgment of the judge below. The question of the weight of the wood was a question of fact, and the finding of the judge should not, therefore, be disturbed. It was further contended the consignees were liable to pay their proportion of the amount actually paid by the shipowners, notwithstanding that such amount had been inaccurately calculated by the port authority. [Reference was made to *The United States Shipping Board* v. *Durrell and Co.*, *Same* v. *Duffell*, *Same* v. *Butt and Co.* (16 Asp. Mar. Law Cas. 112; 129 L. T. Rep. 750; (1923) 2 K. B. 739.]

Mackinnon, K.C. and *Stranger* for the respondents, *contra.*

July 11, 1924.—Bankes, L.J.—This is an appeal from a Divisional Court reversing the judgment of the learned judge of the Mayor's

and City of London Court. The action was brought by shipowners against the consignees and holders of bills of lading for what was said to be their proportion of dock dues, and the ultimate amount of the claim was 24*l.* odd. The defendants paid into court the sum of 20*l.*, and ultimately the case which was discussed and tried was whether the amount paid into court was or was not sufficient. We have nothing to do with what the inconvenience resulting from the decision of the Divisional Court may be. It may be necessary to make some alteration in the system which is carried on in the Port of London with reference to measuring timber cargoes and arriving at the amount of the dock dues actually payable. I say nothing about that. All we have to decide is what were the contractual rights of these parties in view of the contract into which they entered.

The contract is contained in the bill of lading, which incorporated the conditions of the charter-party; and the only material condition which it is necessary to consider is the condition that if the vessel was discharged in a dock in London the consignees were "to pay two-thirds of the dock dues."

I want only to say in reference to that condition that it applies merely to the dues in respect of discharge in a dock in London, and that the consignees are to pay, not two-thirds of the amount which may be demanded of the shipowner, and which he pays *bonâ fide*, but two-thirds of the dock dues. It seems to me, in those circumstances, that when the shipowner comes to demand from the consignee the latter's proportion of the dock dues, the shipowner is under an obligation to show that the dock dues which were charged, and in respect of which he claims two-thirds, were dock dues properly charged.

I do not know that it is very clear, but the dock dues in respect of this vessel are, for the purposes of this case, said to be contained in that part of the Port of London Authority's rates on shipping which provides that vessels with part cargoes of wood and carrying no other cargo will be charged 3*d.* per ton on the net register and on the deck cargo space (if any) occupied, and 10*d.* per ton on the weight of the wood discharged. There was in addition to that an increase of 150 per cent. which was allowed as a war charge. As Hill, J. points out in his judgment, the effect of that 150 per cent. increase is that the 3*d.* charge became a 7½*d.* charge, and the 10*d.* charge became a 2*s.* 1*d.* charge, and as he also very justly points out, the one is a charge on the basis of space tons, and the other, the larger one, is a charge upon the basis of weight tons.

The claim was brought in the Mayor's and City of London Court, and the main question is whether the money paid into court was sufficient. The points which were taken before the learned judge included all the questions which have been raised here, although the points are summarised, because Mr. Stranger took as his second point, "Vessels with part cargoes, 10*d.* per ton weight. The defendants are overcharged and Bryant and May undercharged," and as his third point, "Dock dues are payable on weight; they must not be proportioned on a space basis." I understand that contention to be mainly in reference to the 10*d.* charge, because the smaller charge is not mentioned.

The matter came before the learned judge of the Mayor's and City of London Court, and evidence was laid before him to this effect, that in reference to soft wood cargoes the Port of London Authority have what is called in the evidence by some of the witnesses a "rule of thumb" calculation, and this rule of thumb calculation, which adopts a weight of 2½ tons for every standard of wood, applies to all classes of soft wood, whether it is round timber or whether it is sawn timber, and it was contended that that was a calculation which ought to be accepted, as I understand it, for all purposes in this case; that is to say, not only for the calculation of the dock dues, but also for the apportionment as between the holders of the different bills of lading of the amounts properly payable. It is material when a case is tried in the County Court to ascertain what the points of law laid before the learned judge were; what his decision upon them was, and what his findings, if any, upon questions of fact were; because, upon material questions of fact his findings are conclusive, and cannot be challenged.

I have read the judgment of the learned judge of the Mayor's and City of London Court carefully more than once for the purpose of satisfying myself whether he did find any material question of fact which would bind this court, and upon which this court should act in favour either of the one party or of the other. But I confess I cannot find any such finding of fact. It seems to me very difficult to be quite sure of the grounds upon which the learned judge did come to his decision, and I agree with Hill, J. that the conclusion which seems the most likely one is that the learned judge had in his mind that this general practice of measuring according to this rule of thumb calculation was so universally known that it had the effect of a custom. But that really was no part of anybody's case, and it is not in this court, or in the court below, made a part of the case. I think myself that the points which have been argued here were really before the learned judge of the Mayor's and City of London Court and were, therefore, proper subject-matter of appeal to the Divisional Court. I entirely accept the reasoning upon which Hill, J. bases his judgment, and I cannot put it more clearly than he puts it. I will just summarise what he says. He begins by pointing out that the basis of charge is wholly one of space. That, of course, has reference to so much of the charge as is in respect of registered tonnage. Then he goes on to say that, if a ship enters dock with a part cargo of wood and no other cargo, the dues were fixed upon a mixed basis: "The rate is 3*d.* per ton of the net tonnage of the ship with the addition of the deck cargo

space—that is a charge upon a basis of space tons—with a further rate of 10*d*. per ton upon the weight of the wood discharged—that is, a charge upon a basis not of space tons, but of weight tons."

Then he goes on a little lower down: "The Port of London Authority has no power to charge the 2*s*. 1*d*., otherwise than upon weight tons; and each consignee who has contracted to pay his proportion of two-thirds of what the shipowner has to pay, has contracted to pay his proportion of the 2*s*. 1*d*. charged upon a weight basis; that is to say, such part of the whole amount per ton weight discharged as the weight of his parcel bears to the total weight discharged, or, in other words, two-thirds of the 2*s*. 1*d*. per ton on the weight of his parcel. I can see no justification for apportioning upon a space basis a charge which can only be made upon a weight basis."

With that statement I entirely agree. The result is that it established the main part of the defendants' contention, and that is, that in respect of the greater portion of this charge it can only be apportioned as it is charged on a weight basis, and, without going into the figures in any detail—they have been closely gone into by Hill, J.—it cannot be disputed, subject to a point to which I will refer in a moment, that if these dock dues are apportioned on a weight basis the amount paid into court is sufficient.

The only other point is whether it should be 505 or 480 tons, or thereabouts, which should be the amount on which the dues are payable. Upon that again I agree with Hill, J. There really was no evidence here that 2½ tons was the equivalent in weight of a standard of this class of goods. It is practically nothing but a bad guess of what the real weight is likely to be, and the learned judge has shown that, upon the evidence, whether 2½ tons is taken as representing a fathom, or 2¼ tons, in either case it will work out at a figure which, if the dues are apportioned on a weight basis, will result in the amount paid into court being shown to be sufficient.

For these reasons I think that this rather troublesome little case should be decided as Hill, J. decided it in his judgment, and that the appeal must be dismissed, with costs.

Scrutton, L.J.—There seems to be something in the timber trade, particularly where timber merchants are concerned, that leads to the most vigorous fights in the courts over cases which involve very small sums of money, but which are said to involve tremendously important principles; and it is a peculiarity that in most of these cases it is difficult to find out what the parties are fighting about, or why the question is of such importance to them. This case is a very good illustration of that. So far as I can make out, the parties are fighting about 3*l*., or thereabouts, but it is said to involve, and I dare say it does involve, very important consequences to the timber trade in London.

Certain consignees of portions of soft timber have, under their bill of lading, incorporated a clause in the charter-party to this effect: "If discharged in a dock in London the consignees to pay two-thirds of the dock dues." That clause in itself is very obscure, particularly when applied to a case where the ship goes to another port as well as London. I think it means, "If discharged in dock in London, the consignees of the cargo discharged in London to pay two-thirds of the dock dues charged in respect of each consignee's own cargo."

If that is so, the next question is, what are the dock dues charged in respect of this particular consignee's cargo—Messrs. Jordeson's? Then we come to another very obscure point. The Port of London rates provide, first, for rates on wood-laden vessels entering to discharge whole cargoes of wood (other than hard wood or furniture wood). The rate which the shipowner pays there is a rate per ton net register of the ship. Then it goes on to vessels with part cargoes of wood and carrying no other cargo. That again is very vaguely expressed, but I think it must mean "vessels with part cargoes of wood as above"—that is, excluding hard wood—"for discharge in London and carrying no cargo for discharge in London other than wood, and such vessels are to pay, not a rate per registered ton entirely, but 3d. per ton on the net register as against 1*s*. 1*d*. under the previous clause, and 10*d*. per ton on the weight of wood discharged."

The Port of London Authority, who have got that clause authorising them to charge dues, find themselves and the trade in the position that nobody ever does weigh the cargo, and that, if they want dues on the weight of the cargo discharged, they will not get them by actual weighing, because nobody ever does it, and it is not very practicable to weigh all the wood as it comes out of a vessel, and so they appear to have had recourse to a formula which can only be of any value if it enables them to ascertain the weight of the wood discharged. That is the only thing on which they are entitled to levy dues; they are not entitled to levy dues on the space which the wood occupies, or anything of that sort; it must be on the weight of the wood discharged.

The formula which they seem to have used is one which starts from the fact, which may be, for aught I know, all right, that a standard of wood weighs 2½ tons, and, as I understand it, the St. Petersburg standard in timber measurement is applied to sawn goods. From that they assume that, because sawn wood may weigh 2½ tons per standard, therefore rough wood also weighs 2½ tons per standard, although the term "standard" is not used in respect of round wood, but "fathom"; and that aspen wood also weighs 2½ tons per standard, although the term "standard" is not used in respect of aspen wood, but the term "load." And so when they get anything that is not sawn wood they reduce it to standard and then assume that the standard of aspen wood, or of round wood, pit props, weighs 2½ tons. In that way

they arrive at the weight, and claim on the ship. As between the Port Authority and the ship no question of apportionment arises. They simply go to the ship for the whole of the cargo discharged in London.

It seems to be admitted, and it is pretty clear on the evidence that aspen wood and round wood do not weigh 2½ tons per standard. Aspen wood weighs about a ton and a quarter per load, and round wood weighs 2¼ tons per fathom. If that is so, the Port Authority are, in order to get at weight, using a formula which does not get at weight in the case of goods other than sawn goods, and are charging dock dues on an alleged weight of timber which is not the real weight of timber. They may have a rough-and-ready way of getting at it, but it is the real weight of the timber that they must charge on, so long as they keep to a rate which puts the rate on the weight of timber.

Now it is said, as I understand, in the first place, by the shipowners here, who are claiming from the consignees repayment of the dock dues which they have paid to the Port Authority, that the learned judge of the Mayor's and City of London Court has found as a fact in the shipowners' favour and that the court is bound by that finding of fact. That involves looking at the judgment of the learned judge to see what in fact he has decided. I have had great difficulty in making out what he has decided. But so far as I can read the judgment, I think the learned judge is saying this: "The defendants, the consignees, gave a good deal of evidence about the weight of the round wood and the aspen wood. It is a rough-and-ready way of getting at it. No doubt it is substantially accurate, and I think that everybody who deals in wood must be taken to know the principle adopted at the docks. It may or may not be accurate, but it is the principle adopted at the docks, and the parties must be taken to have contracted in respect of it."

I do not think that the County Court judge has put it so high as saying that there is a custom. I think he has put it on the ground that if anyone sends timber to the docks he must be taken to know that the weight would be ascertained in a particular way, and whether it is right or wrong, he must be taken to have agreed to buy on the weight as ascertained in the way in which the Port Authority do ascertain it. I think that is what the learned judge's judgment comes to. If that is so, that is not a finding of fact; it is law, or the principle of assessment, and I am not able to get out of this charter-party any obligation to pay dock dues as ascertained by the Port Authority in practice though that way of ascertaining them is wrong; because the Port Authority are governed by statutory regulations as to what they may charge, and if the principle on which they proceed violates their statutory regulations, I do not see anything binding the consignees to pay something which is contrary to the law governing the docks.

Secondly, there arises the question of the apportionment between the shipowners and the consignees, because, in the view that I have taken of the charter-party, each consignee is not liable to pay the whole of the dock dues paid by the ship, but only his apportioned share. Two opposite views of the method of apportionment have been put forward by the two sides. The shipowners claim that the apportionment ought to be made on the space occupied by the goods; while, on the other hand, the consignees contend that the dues should be apportioned on weight.

I agree with Hill, J. that neither of those grounds can be supported, and the only way in which the matter can be dealt with properly, in my view, is the way adopted by Hill, J.; that is to say, so far as these dock dues are charged on space, apportion those dock dues according to the space occupied; and so far as they are charged on weight, apportion those dues charged on weight according to the weight of the respective parcels.

Those are the principles on which I think this case should proceed, and that being so, it follows that I am entirely in accordance with the principles of the judgment of Hill, J. The result of the figures is that the amount paid into court by the consignees is sufficient, and it follows that this appeal must be dismissed.

ATKIN, L.J.—I agree. The Port of London Authority have a statutory power to charge dues, and the relevant dues in this particular case are based on weight. Therefore they must be ascertained by weight. It does not follow that because the Port Authority can only charge by weight that they have actually to put the goods on to a weighing machine, because weight can be ascertained by the well-known weights of certain commodities according to their measurement. It is quite common to ascertain the weight of different articles in commerce in reference to their measurement.

The weight of liquids can be ascertained by reference to their liquid measure, and there are well-known formulæ for ascertaining the weights of other articles. The weight of a cubic foot of a great many articles is thoroughly well ascertained; for example, the weight of a cubic foot of clay is very well ascertained for building purposes, and provided that the weight is accurately ascertained in respect of those factors thoroughly well known to science the dues will be properly ascertained by the Port of London Authority. But the formula must be a correct formula—that is to say, it must be sufficiently correct for business purposes, and accepted by persons engaged in the business as being correct.

Now, coming to the formula in this case, it is quite demonstrably absurd, because it is based on the idea that a cubic foot of solid material weighs the same as a cubic foot of material which is not solid, and has a large amount of air space in between; that is to say, a cubic foot of round materials stowed together. It appears from the evidence that the Port of London Authority are charging on the footing of 50cwt. in the case of round wood, which in

fact only weighs 38cwt., and in the case of aspen wood, as against themselves they are treating it as weighing 50cwt. when it in fact weighs 53cwt. It is perfectly obvious that such a measure as that is an erroneous measure and cannot be treated as a proper exercise by the Port of London Authority of their statutory power to charge on weight. They are charging on something which is not weight.

Those facts were before the learned judge of the Mayor's and City of London Court, and it appears to me that there was no evidence before him on which he could find that the weight of the goods in question—either the round wood or the aspen wood—was in fact properly ascertained by taking 2½ tons to the standard. That appears to me to be the material part of the case.

With regard to everything else that has been said in the judgment of Hill, J. I entirely agree. I think he proceeded on a perfectly right footing, and it follows, therefore, that this appeal should be dismissed.

Solicitors, *Botterell* and *Roche*; *Trinder, Kekewich*, and *Co*.

June 30 *and July* 15, 1924.

(Before BANKES, SCRUTTON, and ATKIN, L.JJ.)

THE CHRISTEL VINNEN. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Damage to cargo — Leaking rivet — Unseaworthiness—Damage by failure to take proper soundings and use pumps—Exceptions— " . . . perils of the sea . . . or by other accidents arising in the navigation of the steamer even when occasioned by negligence, default . . . of . . . master, mariners or other servants of the shipowners"— Damage caused by unseaworthiness.

The plaintiffs claimed for damage to a cargo of maize caused by the flow of sea water into the hold of the defendants' vessel. The cause of the leak was a defective rivet. By the terms of the charter-party incorporated in the bills of lading, of which the plaintiffs were holders, it was provided that " The steamer shall not be liable for loss or damage occasioned by . . . perils of the sea . . . any latent defects in hull . . . or by other accidents arising in the navigation of the steamer even when occasioned by the negligence, default . . . of the master, mariners or other servants of the shipowners."

It appeared that owing to the failure of the master of the defendants' vessel to take proper soundings, and his neglect, in consequence of such failure, to use the ship's pumps which would have been capable of keeping the water in check, the damage to the plaintiffs' cargo was substantially increased. Some damage would, however, have been sustained by the cargo irrespective of such negligence.

Hill, J. held that the vessel was unseaworthy but that the defendants were nevertheless entitled to rely upon the exceptions in respect of such damage as was caused by the negligence of the master in failing to pump, because such damage was caused by an excepted peril occasioned by negligence and not by unseaworthiness. He held that approximately half the damage was due to unseaworthiness, for which the defendants were liable, and half to negligence in respect of which they were protected by the exception, and he accordingly gave judgment for the plaintiffs for half the amount claimed.

Held, on appeal, that the warranty of seaworthiness was not qualified by the exception of latent defects in hull, and that, the vessel being unseaworthy, the defendants were not protected against so much of the loss as was due to unseaworthiness.

Held, reversing Hill, J., that as to that part of the damage which Hill, J. had held was caused by an excepted peril occasioned by negligence and not by unseaworthiness, the true interpretation of the clause was that the excepted peril, and not the loss, must be occasioned by negligence to enable the shipowner to claim the protection of the exception. If the alleged excepted peril was the entry of sea water, it was caused by unseaworthiness and not by negligence, and the shipowners were liable for the whole of the damage.

Decision of Hill, J. (*reported* 16 *Asp. Mar. Law Cas.* 292; 130 *L. T. Rep.* 767; (1924) *P.* 61) *reversed.*

Observations of Lord Finlay in Samuel *v.* Dumas (16 *Asp. Mar. Law Cas., at p.* 314; 130 *L. T. Rep., at p.* 780; (1924) *A. C., at p.* 455) *applied and followed. The courts should look to the direct and dominant cause (in the present case unseaworthiness) and it is immaterial that another cause assists.*

APPEAL and cross-appeal from a decision of Hill, J., reported 16 Asp. Mar. Law Cas. 292; 130 L. T. Rep. 767; (1924) P. 61.

The respondents (plaintiffs) were holders of a bill of lading for 2,480,000 kilos of maize shipped at San Nicolas on the appellants' (defendants') schooner *Christel Vinnen*, which incorporated the terms of a charter-party by which it was provided: " The steamer shall not be liable for loss or damage occasioned by . . . perils of the sea . . . or any latent defect in hull . . . by collision, stranding or other accidents in the navigation of the steamer, even when occasioned by the negligence, default, or error of judgment of the pilot, master, mariners or other servants of the shipowner . . ."

The *Christel Vinnen* sailed from San Nicolas for the Azores on the 10th Dec. 1922, but on the 20th Dec. it was found that she was making water and that there was water to a depth of 9ft. in her. She accordingly put into Rio Janeiro where her cargo was discharged. It appeared that soundings were at first taken regularly twice a day, but according to the evidence of the master, when it was found that

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

no water was being made, he decided that it was unnecessary to take regular soundings. Soundings were recorded in the log at noon on the 18th. At noon on the 19th "no water" was recorded in the log, but at 8.50 a.m. on the 20th 9ft. of water was discovered in the *Christel Vinnen.*

Hill, J. held that the damage was due in part to the negligence of the master in failing to make proper use of the pumps, and in part to unseaworthiness. In view of the difficulty of determining with accuracy how much damage was respectively attributable to each cause, he gave judgment for the plaintiffs for one-half of the amount claimed, representing approximately the amount of the damage caused by unseaworthiness against which the defendants were not protected.

The defendants appealed and the plaintiffs cross-appealed.

Bateson, K.C. and *G. St. C. Pilcher* for the appellants.—The shipowners are protected by the exceptions in the bill of lading unless the damage was caused by unseaworthiness. The damage was caused by negligence, and could have been avoided if soundings had been taken at proper intervals. The exception of latent defect must qualify the warranty of seaworthiness, since a latent defect could scarcely arise after the commencement of the voyage. Reference was made to:

The Cargo ex Laertes, 6 Asp. Mar. Law Cas. 431; 57 L. T. Rep. 502; 12 Prob. Div. 187;

Owners of the cargo on board the steamship Waikato v. *New Zealand Shipping Company*, 8 Asp. Mar. Law Cas. 442; 79 L. T. Rep. 326; (1899) 1 Q. B. 56;

Jackson v. *Mumford*, 9 Com. Cas. 114;

Hutchins Bros. v. *Royal Exchange Assurance*, 12 Asp. Mar. Law Cas. 21; 105 L. T. Rep. 6; (1911) 2 K. B. 398;

The Dimitrios N. Rallias, 16 Asp. Mar. Law Cas. 62; 128 L. T. Rep. 491;

The Europa, 11 Asp. Mar. Law Cas. 19; 98 L. T. Rep. 246; (1908) P. 84;

Kish v. *Taylor, Sons, and Co.*, 12 Asp. Mar. Law Cas. 217; 106 L. T. Rep. 900; (1912) A. C. 604.

R. A. Wright, K.C., *Stephens*, K.C., and *Van Breda* for the respondents and appellants in the cross-appeal contended that the warranty of seaworthiness was not qualified by the exception of latent defects and relied upon the decision of the United States courts in *The Carib Prince* (1898, 170 U. S. Reports 655). [They were stopped.]

The sole cause of the damage was unseaworthiness, which was merely aggravated by the negligence of the master. There was no *novus casus interveniens.* Reliance was placed upon:

Leyland Shipping Company v. *Norwich Union Fire Assurance*, 14 Asp. Mar. Law Cas. 258; 118 L. T. Rep. 120; (1918) A. C. 350;

Steel v. *State Line Steamship Company*, 3 Asp. Mar. Law Cas. 516; 37 L. T. Rep. 333; 3 App. Cas. 72;

Gilroy, Sons, and Co. v. *Price and Co.*, 7 Asp. Mar. Law Cas. 314; 68 L. T. Rep. 302; (1893) A. C. 56;

Hedley v. *Pinkney and Sons Steamship Company*, 7 Asp. Mar. Law Cas. 135; 70 L. T. Rep. 630; (1894) A. C. 222;

Atlantic Shipping and Trading Company v. *Louis Dreyfus and Co.*, 15 Asp. Mar. Law Cas. 566; 127 L. T. Rep. 411; (1922) 2 A. C. 250.

G. St. C. Pilcher replied.

July 15, 1924.—Scrutton, L.J. delivered the judgment of the court.—The judgment I am about to read is to be taken as the judgment of the court. The *Christel Vinnen*, a steel motor-schooner built by Messrs. Krupps, on her first cargo carrying voyage, sprang a leak and put back to Rio. Water entering through the leak damaged her cargo of maize, but much less damage would have been done (the judge finds only half the actual damage) had those on board been ordinarily careful in taking soundings. They were negligent and did not discover water in the hold until long after they ought to have been aware of it.

The leak was through a rivet hole from which the rivet had dropped out. As there was no sign of straining on any adjacent rivets, I agree with the view of the judge below that the rivet was a defective rivet when the voyage started, and that, therefore, the ship was unseaworthy.

The shipowner, sued by the cargo-owner for damage to the maize, replies that he is protected by the exceptions "damage occasioned by a latent defect in the hull . . . even where occasioned by the negligence of the servants of the shipowner." It is clear law that exceptions do not apply to protect the shipowner who furnishes an unseaworthy ship, where the unseaworthiness causes damage, unless the exceptions are so worded as clearly to exclude or vary the implied warranty of seaworthiness. *The Waikato* (8 Asp. Mar. Law Cas. 442; 79 L. T. Rep. 326; (1899) 1 Q. B. 56) is an instance of ambiguity defeating the shipowner's probable intention; see the judgment of Collins, L.J. In the case of *The Laertes* (6 Asp. Mar. Law Cas. 174; 57 L. T. Rep. 502; 12 Prob. Div. 187) the words which protected the shipowners were: "latent defects in machinery even existing at the time of shipment." Such words are absent in the present case and latent defects may come into existence during the voyage. In my view the shipowner here had not clearly excluded or modified the implied warranty of seaworthiness, and consequently the exception does not apply to protect him when water entering through unseaworthiness causes the damage, as is undoubtedly the case as to half the damage here. The shipowner's appeal against the judgment below, holding him liable for half the damage, therefore fails.

But the judge below has excused the shipowner from liability from the other half of the damage on the ground that this loss was occasioned by the negligence of the shipowner's servants, and therefore that the admitted unseaworthiness did not cause the loss. This raises, in my view, a novel point, and unfortunately raises it on a badly worded exception clause. The negligence exception is frequently a separate exception against loss by negligence; in the present case, it is dependent on separate exceptions as to perils causing loss. The shipowner is protected from loss occasioned by collision, even when the collision is occasioned by negligence. I think this, and not "even when the loss is occasioned by negligence" is the true reading of the clause. He is protected against loss caused by perils of the sea even though the peril of the sea is occasioned by negligence. But in this case the peril of the sea is not occasioned by negligence; if the entry of sea water is the alleged peril, it is occasioned by unseaworthiness. Lord Finlay says in *Samuel* v. *Dumas* (16 Asp. Mar. Law Cas. 314; 130 L. T. Rep., at p. 786; (1924) A. C., at p. 455): "The view that the proximate cause of the loss when the vessel has been scuttled is the inrush of sea water, and that is a peril of the sea, is inconsistent with the well-established rule that it is always open to the underwriter on a time policy to show that the loss arose not from perils of the seas but from the unseaworthy condition in which the vessel sailed (see Arnould on Marine Insurance, s. 799). When the vessel is unseaworthy and the water consequently gets into the vessel and sinks her, it would never be said that the loss was due to the perils of the sea. It is true that the vessel sank in consequence of the inrush of water, but this inrush was due simply to the unseaworthiness. The unseaworthiness was the proximate cause of the loss." The shipowner is trying to read the exception as if it were: "even if the loss consequent on the perils of the sea was occasioned by negligence." Another way of putting the point is that under recent decisions you look at the direct and dominant cause, and it is immaterial that another cause assists it. In *Samuel* v. *Dumas* the direct cause was the scuttling; it was immaterial that entry of sea water, usually a peril of the sea, caused the loss. In *Leyland's* case (118 L. T. Rep. 120; (1918) A. C. 350) the direct cause was the explosion of the torpedo; it was immaterial in the view of the House of Lords that a subsequent storm, which might or might not have happened, completed or increased the loss. In *Reischer* v. *Borwick* (7 Asp. Mar. Law Cas. 493; 71 L. T. Rep. 238; (1894) 2 Q. B. 548) the collision was the direct cause, and subsequent negligence in stopping the hole did not prevent the sinking being caused by the collision. I am aware that these are policy cases, but they are now established by the highest tribunal, and I think their *ratio decidendi* governs this case. The water which entered and did the damage entered through unseaworthiness; its effects when in the ship might have been partially remedied by due diligence which the shipowner's servants did not take. But in my view the cause of the resulting damage is still unseaworthiness; the shipowner cannot show any exception to protect him from any part of the damage. In the case of tort no doubt the plaintiff complaining of damage done cannot recover for any part of that damage which he could have prevented by reasonable care. But here the man who has by his original breach of contract caused the opportunity for damage has by the negligence of his servants increased it. He cannot show any exception to protect him, and cannot show that the dominant cause of the damage was not the unseaworthiness which admitted the water into the ship. In my view, therefore, the cross-appeal must be allowed and the shipowner held liable for all the damage, instead of for half of it.

As the shipowner has broken his contract and is not protected by any exception in the bill of lading, it follows he cannot recover for any sacrifice or expenditure rendered necessary by his own breach of contract; his counterclaim therefore fails and should be dismissed. The appeal of the shipowner should be dismissed with costs, and the appeal of the cargo-owner allowed with costs here and below.

Appeal dismissed.
Cross-appeal allowed.

Solicitors for the plaintiffs (appellants and respondents in cross-appeal), *Richards* and *Butler*.

Solicitors for the defendants (respondents and cross-appellants), *William A. Crump* and *Son*.

Wednesday, July 30, 1924.

(Before Bankes, Scrutton, and Sargant, L.JJ.)

Brocklebank (T. and J.) Limited v. The King. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Crown—Indemnity Act—Shipping control—Sale of ship to foreigner—Licence to sell—Condition of licence—Percentage of purchase money to be paid to Shipping Controller—Legality of condition—Voluntary payment—Recovery of money paid—Petition of right—British Ships (Transfer Restriction) Act 1915 (5 *Geo.* 5, *c.* 21, *s.* 1) *—Indemnity Act* 1920 (10 & 11 *Geo.* 5, *c.* 48), *s.* 1, *sub-s.* 1 (b), *s.* 2, *sub-s.* 1 (b).

The suppliants claimed to recover 34,920*l. as money received to their use, which had been paid by them to the Ministry of Shipping in Feb.* 1920. *In* 1919 *the suppliants wished to sell a ship to a foreign purchaser, which could not be done without the licence of the Shipping Controller, who declined to grant it unless* 15 *per cent. of the purchase price should be paid*

(a) Reported by W. C. Sandford, Esq., Barrister-at-Law.

by the suppliants to the Ministry of Shipping. On the 6th Jan. 1920, *notwithstanding objection raised by the suppliants, this condition was finally insisted upon. On the 27th Jan. the Shipping Controller gave his consent to the sale of the ship to an Italian firm, and the suppliants, on receipt of the purchase money, paid* 34,920*l. as directed to the Accountant-General of the Ministry of Shipping. The suppliants contended that this sum was paid in discharge of a demand illegally made under colour of his office by the Shipping Controller, and they claimed repayment of the money.*

Held, (1) *that the exaction of the* 15 *per cent. was a "levying of money for the use of the Crown without grant of Parliament," and was illegal.*

Attorney-General v. Wilts United Dairies Limited (1922, 127 *L. T. Rep.* 822) *applied.*

Held, (2) *that the payment was not a voluntary payment.*

But held, (3) *that the suppliants' claim was barred by sect.* 1 *of the Indemnity Act* 1920, *as being a claim for compensation which could have been brought under sect.* 2 *of the Act. The claim was not, within the proviso to sect.* 1, *a proceeding "in respect of any rights under, or alleged breaches of, contract."*

Judgment of Avory, J. (ante, *p.* 340 ; 130 *L. T. Rep.* 824 ; (1924) 1 *K. B.* 647) *reversed on the third point.*

APPEAL from a decision of Avory, J. on a petition of right, in which the suppliants claimed 34,920*l.* alleged to have been illegally exacted from them by the Shipping Controller.

The British Ships (Transfer Restriction) Act 1915 (5 Geo. 5, c. 21), which was subsequently extended and remained in force for three years after the war, provided by sect. 1 that "A transfer . . . of a British ship registered in the United Kingdom, or a share therein to a person not qualified to own a British ship, shall not have any effect unless the transfer is approved by the Board of Trade on behalf of His Majesty. . . ." The place of the Board of Trade was subsequently taken by the Shipping Controller, and eventually the powers, duties and liabilities under the Act reverted to the Board of Trade.

The suppliants in 1919 wished to sell one of their ships, the *Marwarri*, to a foreign purchaser, and applied for a licence to do so. The Shipping Controller, as a condition of granting the licence, required compliance with certain conditions, of which the most material was: "(2) A sum of money accrues to the Exchequer with respect to the sale ; this is usually 15 per cent. of the purchase price." The suppliants agreed to the other conditions, but asked under what Parliamentary authority a percentage of the price was demanded. No answer was given to this question, and eventually as the only means of getting the licence the suppliants agreed to it. The *Marwarri* was sold to an Italian firm for 240,000*l.*, and the suppliants paid to the Ministry of Shipping 34,920*l.*, which they now sought to recover.

The Indemnity Act 1920 (10 & 11 Geo. 5, c. 48) provides :

Sect. 1, sub-sect. 1. No action or other legal proceeding whatsoever, whether civil or criminal, shall be instituted in any court of law for or on account of or in respect of any act, matter or thing done . . . during the war before the passing of this Act, if done in good faith, and done or purported to be done in the execution of his duty . . . by a person holding office under . . . the Crown in any capacity. . . . Provided that, except in cases where a claim for payment or compensation can be brought under section two of this Act, this section shall not prevent . . . (*b*) the institution or prosecution of proceedings in respect of any rights under, or alleged breaches of, contract. . . .

Sect. 2, sub-sect. 1. Any person . . . (*b*) who has otherwise incurred or sustained any direct loss or damage by reason of interference with his property or business in the United Kingdom through the exercise or purported exercise, during the war, of any prerogative right of His Majesty, or of any power under any enactment relating to the defence of the realm, or any regulation or order made or purporting to be made thereunder, shall be entitled to payment or compensation in respect of such loss or damage. . . .

Avory, J. held (*inter alia*) that the claim fell within the proviso to sect. 1 of the Indemnity Act 1920 and was not the subject of a claim for compensation under sect. 2 of the Act, and gave judgment for the suppliants.

The Crown appealed.

Sir *Patrick Hastings* (A.-G.) and *Russell Davies* for the appellant.

Sir *John Simon*, K.C. and *A. Hildesley* for the suppliants, the respondents.

The following cases were referred to :

Attorney-General v. *Royal Mail Steam Packet Company*, 15 Asp. Mar. Law Cas. 574 ; 127 L. T. Rep. 533 ; (1922) 2 A. C. 279 ;
Attorney-General v. *Wilts United Dairies Limited*, 1922, 127 L. T. Rep. 822 ;
Black v. *Admiralty Commissioners*, 130 L. T. Rep. 711 ; (1924) 1 K. B. 661 ;
Calland v. *Loyd*, 1840, 6 M. & W. 26 ;
Cree v. *St. Pancras Vestry*, 80 L. T. Rep. 388 ; (1899) 1 Q. B. 693 ;
Greenway v. *Hurd*, 1792, 4 T. Rep. 553 ;
Heilbut v. *Nevill*, 1869, 22 L. T. Rep. 662 ; L. Rep. 5 C. P. 478 ;
Midland Railway v. *Withington Local Board*, 1883, 49 L. T. Rep. 489 ; 11 Q. B. Div. 788 ;
Morgan v. *Palmer*, 1824, 2 B. & C. 729 ;
Moss Steamship Company v. *Board of Trade*, *ante*, p. 250 ; 130 L. T. Rep. 354 ; (1924) A. C. 133 ;
Phillips v. *Homfray*, 1883, 49 L. T. Rep. 5 ; 24 Ch. Div. 439 ;
Selmes v. *Judge*, 1871, 24 L. T. Rep. 904 ; L. Rep. 6 Q. B. 724 ;
Steele v. *Williams*, 1853, 8 Ex. 625 ;
Umphelby v. *Maclean*, 1817, 1 B. & Ald. 42 ;
Waterhouse v. *Keene*, 1825, 4 B. & C. 200.

Cur. adv. vult.

The following judgments were read :

BANKES, L.J.—By their petition of right the respondents complained that the Shipping Controller had, in Jan. 1920, illegally exacted from them a payment amounting to 15 per cent. upon the selling price of one of their steamers as a condition of granting them permission to sell the vessel to an Italian firm. The Attorney-General, on behalf of the Crown, demurred to the petition on the ground that, by reason of the Indemnity Act 1920, the court had no jurisdiction to entertain the claim. An answer was also filed setting up a case that the demand was not an illegal one, and that the payment by the respondents was voluntary. The learned judge by whom the petition was tried decided in favour of the respondents, and the Crown appeal.

The office of Shipping Controller was the creation of the New Ministries and Secretaries Act 1916 (6 & 7 Geo. 5, c. 68), which provided (*inter alia*) for the making of regulations under the Defence of the Realm (Consolidation) Act 1914, conferring powers upon the Shipping Controller. Reg. 39cc made under this power prohibited anyone without the consent in writing from the Shipping Controller from entering into, or offering to enter into, any agreement or any negotiations with the view to an agreement for the purchase of any ship or vessel. Having regard to the language of the Indemnity Act which applies to acts done by persons purporting to act under a regulation, as well in accordance with a regulation, it is unnecessary to discuss the true construction of this regulation or to consider whether it should be held to include vendors as well as purchasers of vessels. In the present case the contention for the Crown is that whether the Shipping Controller acted rightly or wrongly in the matter, he purported to act under this regulation.

What happened was this. The respondents were anxious to sell one of their vessels. They applied for the necessary permission. They were informed that no permission could be given except upon what were described as the usual terms, which included a payment to the Exchequer of 15 per cent. of the purchase price. A firm of Italian buyers were prepared to give what appears from the respondents' description of the vessel to have been a very attractive price. Negotiations were completed by the 26th Jan. 1920, on which date the respondents informed the secretary of the Ministry of Shipping that they had sold the vessel to the Italian firm for 240,000*l*., and they reminded the secretary of an interview which had taken pla.. earlier in the month, at which the respon-s had agreed to pay to the Ministry 15 per cent. of the sale price in satisfaction of the condition imposed. In reply to this letter the respondents were informed that the Shipping Controller gave his permission to the purchase of this vessel by the Italian firm, and a request was made that a cheque for 36,000*l*. should be remitted, made payable to the Accountant-General of the Ministry of Shipping. The sum paid was 34,920*l*., and it is for recovery of this amount that the petition of right is brought. The whole of the facts relating to the demand of this sum of money are contained in a few letters, and in what passed at the above-mentioned interview.

The learned judge came to the conclusion, after considering the evidence, and the authorities which were cited to him and to us, that the payment was not a voluntary one. I entirely agree with this view. The payment is best described, I think, as one of those which are made grudgingly and of necessity, but without open protest, because protest is felt to be useless. I do not propose to go through the evidence or to discuss the authorities, as, upon the materials before the court, it seems to me impossible to disturb the judge's conclusion on this point. Before dealing with the Indemnity Act 1920, it is necessary to consider whether the demand for the payment was an illegal demand or not. Reg. 39cc in terms recognises the granting of permission subject to conditions ; it is said that the demand for a portion of the purchase price of a vessel as a condition of the grant of permission is perfectly lawful. In my opinion this question is covered in principle by the decision of this court, affirmed in the House of Lords, in *Attorney-General* v. *Wilts United Dairies* (*sup.*).

I pass now to what seems to be the real question in the case, namely, whether the claim is barred by the Indemnity Act 1920. The operation of the Act is confined to acts, matters, and things done. The first point taken for the respondents is that what they complain of is not the act of the Shipping Controller in exacting the payment, but the refusal of the Crown to return the money so exacted. Avory, J. accepted this argument on the authority of *Umphelby* v. *Maclean* (*sup.*). A number of cases were cited by the Attorney-General in support of this proposition that it was the act of the Shipping Controller which was the governing feature in the case, and which formed the substantial part of the claimants' cause of action. In my opinion none of the authorities are directly in point. In their order of date the cases referred to were *Greenway* v. *Hurd* (*sup.*), *Waterhouse* v. *Keene* (*sup.*), *Selmes* v. *Judge* (*sup.*), *Midland Railway* v. *Withington Local Board* (*sup.*) and *Cree* v. *St. Pancras Vestry* (*sup.*).

These were all cases in which the question was either whether the action had been commenced within the time limited by statute, or whether the defendant was entitled to notice before action as prescribed by statute. In all of them it was material to consider whether the matter of complaint was an act done within the meaning of the particular statute, and in some of them whether it made any substantial difference that the plaintiff had elected to sue in *assumpsit* after waiving the tort. Some of the opinions of the learned judges who decided those cases are of value, though they cannot be decisive, as they are

dealing with statutes passed for very different objects from that aimed at by the Indemnity Act. In *Waterhouse* v. *Keene* the action was in *assumpsit* to recover back money illegally exacted, and the point taken was that the statute relied on applied only to acts done in pursuance of the Act. Both Bayley and Holroyd, JJ., in giving judgment expressed a strong view that in such an action the court must look rather to the substance than to the form of the action. Holroyd, J. says (4 B. & C., at p. 213): "The action in form is for money had and received to the plaintiff's use, but in substance it is brought to recover money alleged by the plaintiff to have been unlawfully taken by the defendant as toll, under colour of authority of the Act. The demanding and taking the toll was an act done in pursuance of the Act." In *Cree* v. *St. Pancras Vestry*, Brice, J., after dealing with the authorities, comes to the conclusion that although in the case before him the payment of the money was an essential ingredient in the cause of action, yet the cause of action depended upon the request for payment. The decision in *Midland Railway* v. *Withington Local Board* (*sup.*), to which I shall have to refer in another connection, is to the same effect. These expressions of judicial opinion given, it is true, under different circumstances from those in the present case, confirm me in the view to which, apart from any authority, I should undoubtedly have come, namely, that in the present case an essential part of the claimants' cause of action consists of the illegal act of the Shipping Controller in exacting the payment as a condition of granting permission for the purchase of the vessel, and that it is impossible to get rid of that fact for the purpose of escaping the provisions of the Indemnity Act by electing to sue in *assumpsit* after waiving the tort. Sir John Simon argued that the claimants were entitled for the present purpose to ignore the tort altogether, and to sue for the recovery of the money upon an implied contract to return money obtained as this money was. The case of *Umphelby* v. *Maclean* affords some justification for this contention. The claim in that case was to recover the amount of an excessive charge made by the defendants as collectors of taxes for their expenses upon a distress upon the plaintiff's property for an arrear of taxes. Objection was taken both on the ground of want of notice of action and that the proceedings were out of time. The excessive charge having been proved, the trial judge directed a verdict for the plaintiff with leave to move. Counsel for the defendants in showing cause took two points—first, that the action was brought not in consequence of an act done, but of the defendants omitting to do that which they ought to have done, that is, return the money; and, secondly, that the statute deals only with actions brought within six months after the "fact committed," and that no fact had been committed. The judgments as reported are not convincing. Ellenborough, C.J. bases his judgment upon the language of the statute. He merely says that in the case before him there was neither act done nor fact committed. The judgments of Bayley and Abbott, JJ. are of no assistance as supporting the respondents' contention. If the decision is treated as one confined to the language of the particular statute it is unnecessary to consider whether it has any application to the present case. If it is relied on in support of the first branch of the counsel's argument who showed cause, I do not think that it supports the proposition, particularly having regard to the fact that Bayley, J. was one of the judges who expressed an exactly opposite view in *Waterhouse* v. *Keene* (*sup.*).

In my opinion the Indemnity Act does apply to the present claim, and that unless the claimants can bring themselves within the proviso to sect. 1, sub-sect. 1, their claim is barred. The exemptions from the operation of the statute contained in the proviso include the institution or prosecution of proceedings in respect of any rights under, or alleged breaches of, contract, but only in a case where a claim for payment or compensation cannot be brought under sect. 2 of the Act. The material provisions of this section are contained in sub-sect. 1 (*b*). In my opinion the claimants have sustained direct loss or damage by reason of interference with their business through the purported exercise during the war of the power conferred upon the Minister of Shipping by reg. 39cc. I cannot see how the action of the Shipping Controller can be otherwise described than as an interference with the claimants' business, which must include the disposing of obsolete ships. They have therefore *primâ facie* a claim for compensation. Then counsel attempted to avoid the position thus created by saying that the compensation, if any, falls to be assessed under Part II. of the Schedule, the language of which excludes the claim of the respondents, because the loss or damage has arisen from the enforcement of a regulation of general application. There appear to me to be two answers to this contention. The first is that the compensation payable to the claimants would fall to be assessed under sub-sect. (*a*), of sub-sect. 2 (iii.) and not under sub-sect. (*b*). The second is that on further consideration I think that Lord Cave's view as to the construction of Part II. of the Schedule as expressed in the *Moss Steamship Case* (*ante*, p. 252; 130 L. T. Rep., at p. 356; (1924) A. C., at p. 141) is preferable to my opinion as expressed in the same case (*ante*, pp. 142, 143; 128 L. T. Rep., at p. 717; (1923) 1 K. B., at p. 454). The conclusion at which I have arrived as to the claimants' right to compensation under the Indemnity Act is sufficient to dispose of this appeal.

So much, however, has been said upon the question of whether the present petition of right is a proceeding in respect of rights under a contract that I will give my opinion upon that point. It appears to me

what the Legislature is intending to preserve under the proviso is the case where parties have actually entered into a definite contract and one of them is seeking to enforce it, and not to a case where the law will allow a remedy arising out of an assumed contract. The language of Brett, L.J., in *Midland Railway* v. *Withington Local Board*, exactly expresses my view on this point. He says (49 L. T. Rep., at p. 491 ; 11 Q. B. Div., at p. 794) : "It has been urged that the section does not apply when the action is for money had and received and the tort is waived. I think that view too narrow ; and I am of opinion that wherever relief is sought in respect of anything done or omitted to be done under an intended exercise of the powers of this Act, this section applies. It has been contended that this is an action in contract, and that whenever an action is brought upon a contract, the section does not apply. I think that where an action has been brought for something done or omitted to be done under an express contract, the section does not apply ; according to the cases cited an enactment of this kind does not apply to specific contracts. Again, when goods have been sold, and the price is to be paid upon a *quantum meruit*, the section will not apply to an action for the price, because the refusal or omission to pay would be a failure to comply with the terms of the contract and not with the provisions of the statute. It may be said that this is a case of implied contract. I think that argument fallacious. No contract was intended to be entered into ; but where money was paid under a mistake of fact, the judges held that under the old forms of procedure it might be recovered back in an action *quasi ex contractu*. This is not a case where the parties intended to contract without saying so in express terms."

For these reasons the appeal, in my opinion, succeeds. The judgment must be set aside, and the Crown must have the costs here and below.

SCRUTTON, L.J.—A well-known shipping company, T. and J. Brocklebank Limited, bring a petition of right asking for the return of some 35,000*l.* demanded from them by the Shipping Controller as a condition of his granting them a licence under which one of their ships could be purchased by a foreign buyer, which sum was paid over to the Exchequer. Avory, J. has decided in favour of the petitioners and the Crown appeal.

While some points in the case are of considerable difficulty, some seem fairly clear. The demand of a payment to the Crown as a condition of granting a licence seems on the authority of the *Wilts Dairy* case to be "levying money for the use of the Crown without consent of Parliament" contrary to the Bill of Rights and, therefore, illegal. I am unable to see any distinction between the present case and that decision of the House of Lords. Further, I am clear that the payment by the petitioners in this case was not a voluntary payment so as to prevent its being recovered back. It was demanded by the Shipping Controller *colore officii* as one of the only terms on which he would grant a licence for the transfer. It was a case where in Abbott, C.J.'s language in *Morgan* v. *Palmer* (2 B. & C., at p. 735) : "But if one party has the power of saying to the other 'that which you require shall not be done except upon the conditions which I choose to impose'" ; or, in the language of Littledale, J. (2 B. & C., at p. 739) : "The plaintiff was merely passive, and submitted to pay the sum claimed, as he could not otherwise procure his licence." In fact the petitioners made several enquiries and protests as to the legality of the claim.

Next comes the question whether before the Indemnity Act the sum illegally exacted by the Shipping Controller could be recovered from the Crown by petition of right. It could clearly be recovered from the Shipping Controller in an action against him personally for an illegal act, or waiving the tort he could be sued in *assumpsit*. The common *indebitatus* count of money had and received to the defendants' use was a regular remedy for money paid in consequence of an illegal demand *colore officii*—Bullen and Leake (3rd edit.), p. 50, *Morgan* v. *Palmer* (*sup.*), *Steele* v. *Williams* (*sup.*). But it is said that the money was obtained by a wrong, and that the Crown could do no wrong, wherefore petition of right could not lie for an alleged wrong and, therefore, there was no tort to waive, and, therefore, I gather it was argued that the Crown who had taken the money obtained by the wrong of its servants into its Exchequer could keep the money so obtained. I hope this is not accurate, as it does not seem a very creditable position for the Crown by its advisers to take up. I do not see why the fact that the Crown could not be sued for damages for the wrong of its servants prevents proceedings by petition of right based on the implied contract to return resulting from its taking possession of the money of the plaintiff obtained by the wrong of its servant. The executors of a dead man are not liable in damages for his tort, but may be liable if money or property has been taken from the plaintiff's estate and retained in the estate of the deceased. Bowen, L.J., in his learned judgment in *Phillips* v. *Homfray* (49 L. T. Rep., at p. 11 ; 24 Ch. Div., at p. 461), explains this, and limits the application of waiving the tort to cases where, independently of the wrong, the plaintiff can make a title to relief, as he can in *assumpsit* where the defendant had taken the benefit of money illegally obtained from the plaintiff. Salmond on Torts, 6th edit., p. 199, states the principles thus : "There is, however, one rule which may be laid down with confidence ; when the defendant has by means of a tort become possessed of a sum of money at the expense of the plaintiff, the plaintiff may at his election sue either for damages for the tort or for the recovery of the money thus wrongfully obtained by the defendant, and this latter action (an action for money had and received by the defendant to

the use of the plaintiff) is based on an implied contract of agency, the defendant being fictitiously assumed to have rightfully received the money as the plaintiff's agent, and to have failed to pay it over to his principal." In my view in *Steele* v. *Williams* (*sup.*) the rector, if he received the fees illegally demanded, could be sued in *assumpsit* as well as the clerk. And in my opinion the Crown could, before the Indemnity Act, be sued by petition of right in *assumpsit* for money received and kept by the Exchequer which had been obtained by an illegal demand of the servant of the Crown. I think it would be lamentable if this were not so.

So far the case is, in my opinion, clear. The difficulty arises from the language of the Indemnity Act, which undoubtedly in many cases has abolished petitions of right against the Crown, and actions against the servants of the Crown with their common law results, and substituted proceedings before the War Compensation Court with different measures of relief. And it is said that proceedings in this case by petition of right have been barred by the Act, and the petitioners, having mistaken their remedy, have lost all right to redress because they are out of time for a claim before the War Compensation Court. The Indemnity Act, by sect. 1, prohibits any legal proceeding, including petition of right, in respect of any matter done or purported to be done by a servant of the Crown in good faith in the execution of his duty. This appears to me to cover the exaction of an illegal money claim for granting a licence, and any petition of right based on *assumpsit* on account of such demand. I do not think the retention of money by the Exchequer so illegally demanded by the Shipping Controller can be said not to be an act, matter, or thing done. So far the petition of right is barred.

But there are exceptions to the bar. There is a proviso that the section shall not prevent the institution of proceedings in respect of any rights under contract. The right to sue in *assumpsit* is an obvious right under contract. *Assumpsit* for money received to the use of the plaintiff is one of the common *indebitatus* counts by which "simple contracts express or implied resulting in mere debts" were sued for—Bullen and Leake, 3rd edit., p. 35. The language of Brett, L.J. in *Midland Railway* v. *Withington Local Board* (49 L. T. Rep., at p. 491; 11 Q. B. Div., at p. 794), does not seem to me to touch this point. He was construing an Act which made no express reference to contracts at all. We have here an Act which expressly excludes actions on "contracts." It was argued that contracts must be limited to express contracts, and not allowed to cover "implied contracts based on fictions" but I can see no reason for such limitation of the ordinary meaning of the word "contract." Are the implied contracts to do a thing in reasonable time or that a ship is seaworthy to be excluded? And if it is said "only exclude implied contracts based on fictions," we are legislating, not interpreting. But the exception itself is subject to an exception, "excepting cases where a claim for payment or compensation can be brought under sect. 2 of this Act," and it is said that, as persons who have incurred or sustained any direct loss or damage by reason of interference with their property or business through the exercise or purported exercise of any power under any enactment relating to the defence of the realm can proceed in the War Compensation Court to recover payment or compensation for that damage, these petitioners who have had to pay money illegally demanded to obtain a licence to sell their ships to a foreigner can proceed for compensation in the War Compensation Court.

The position is rather curious. The petitioners desired to sell four ships to the foreigner. The Shipping Controller refused permission for three of the ships and granted it for one, on dition (*inter alia*) of payment of the 35,000*l.* claimed in this case. The statutory position was that by the Act of 1915 no transfer of a British ship to a person not qualified to own it should be made without the consent of the Board of Trade. By the New Ministries and Secretaries Act 1916 (6 & 7 Geo. 5, c. 68), s. 6, the Shipping Controller was appointed to take such steps as he thinks best for maintaining an efficient supply of shipping, with such powers as he may obtain by Orders in Council transferring him the powers of other Government departments or under Defence of the Realm Regulations. No Order in Council was made transferring the powers of the Board of Trade to the Shipping Controller, but in practice the Board of Trade did not give assent unless they had the consent of the Shipping Controller. The latter purported to act under reg. 39CC of the Defence of the Realm Regulations which forbade purchase of ships without his consent. When the petitioners applied to the War Compensation Court for compensation for interference with their business by the prohibition of sale of the three ships, they were refused on the grounds: (1) That the loss was caused by the provisions of the statutes and not by the action of the Shipping Controller. This, I think, was correct. (2) That the petitioners were not purchasers, and, therefore, the Shipping Controller's refusal could not have been under Regulation 39CC. If this is right the Controller's imposition of conditions can hardly have been under 39CC, but I think it was wrong as, in my view, the Controller purported to act under Regulation 39CC. (3) That the refusal of the Shipping Controller was not under any regulation. I also doubt the accuracy of this. (4) That a refusal to permit a prohibited transfer is not a direct and particular interference within the meaning of the Indemnity Act. This reason, if valid, would seem to apply to the present case.

However, the question is not what the War Compensation Court would have done with this claim. I suspect they would have rejected it, and there would have been an appeal. The

question is whether the action of the Shipping Controller comes within the language of sect. 2 of the Indemnity Act. It is clear from the decisions of the House of Lords in the *Moss Steamship Company* v. *Board of Trade* (*sup.*), and of this court in *Black* v. *Admiralty Commissioners* (*sup.*), that these words have to be strictly construed, and from the decision of the House of Lords in *Attorney-General* v. *Royal Mail Steam Packet Company* (*sup.*), that it is impossible to exclude from them claims in contract based on wrongful acts. But giving the best consideration I can to the meaning of the Indemnity Act I think to refuse permission to sell one's property except on the unjustified terms of paying a sum of money, is interference with property or business which causes direct loss or damage, that is the sum illegally demanded. I also think that the demand of money was made in purported exercise of a Defence of Realm Regulation.

The result is that as a claim for compensation could be brought under sect. 2 of the Indemnity Act, the exception to sect. 1 of claims in contract does not apply, and, therefore, the petition of right is barred by sect. 1 of the Indemnity Act, and the claim in the War Compensation Court would be barred by lapse of time. I regret that the claimants, who, in my view, have suffered a wrong at law, should be deprived of their remedy by a misunderstanding of the obscure language of the Indemnity Act, and I may be permitted to regret that the Government in these circumstances should keep money illegally obtained, but I can do no more than regret. The appeal must be allowed with costs here and below.

SARGANT, L.J.—As regards the first two questions raised on this appeal, I am in complete accord with the judgment of Avory, J. The illegality of the demand by the Shipping Controller is established by the decisions of this court, and of the House of Lords, in *Attorney-General* v. *Wilts United Dairies* (*sup.*) And that the payment by the suppliants was made under compulsion, and was *primâ facie* recoverable by them, follows from the principles of the judgment in *Morgan* v. *Palmer* (*sup.*). It seems to me unnecessary to say more on these points.

The real strength of the case for the appellant lies in the protective provisions of the Indemnity Act 1920. In my judgment, and here I think I am not differing from the learned judge, the illegal exaction by the Shipping Controller of the percentage in question was "an act done in good faith and done or purported to be done in the execution of the duty" of the Shipping Controller, and so is *primâ facie* within the exemption of sect. 1, sub-sect. 1, of the Act; and accordingly the Crown is protected unless in the argument the case can be brought within the saving terms of the proviso to sect. 1, sub-sect. 1. Now as to this argument on behalf of the Crown is two-fold. In the first place it is contended before us, as it was contended before the learned judge, that the case is one in which a claim for payment or compensation could have been brought under sect. 2 of the Act, and, accordingly, that the case is one within the exception to the proviso to sect. 1, sub-sect. 1; and, in the second place, it is argued before us for the first time that the present proceedings are not, in their true view, proceedings in respect of "rights under or alleged breaches of contract" within sub-head (*b*) of the proviso.

As regards the first of these arguments the learned judge has found against the Crown on the ground that there is not sufficient evidence of the suppliants having suffered any loss, and accordingly that a claim for compensation could not be brought by them under sect. 2 of the Act. But I cannot agree with this reasoning, which seems to me to destroy altogether the initial fundamental right of the suppliants to recover anything whatever. In my judgment, it is a condition precedent of any right on the part of the suppliants to recover from the Crown in the present proceedings that they should have suffered loss from the illegal exaction of the Shipping Controller, and the absence of proof of that loss is as fatal an objection to any claim in the present proceedings, as to a claim for payment or compensation under sect. 2 of the Act.

An additional argument, however, has been been put forward by the suppliants to show that their claim was not capable of being brought under sect. 2 of the Act. They say, and say truly, as a major premise that, having regard to Part II. of the Schedule to the Act, those losses can only be recovered under sect. 2 which result from a direct and particular interference with the business or property of claimants. And they allege by way of minor premise that, even if the exaction by the Shipping Controller was a direct interference with the business of the suppliants, it was nevertheless an interference resulting from a general code or regulation of the Shipping Controller, and so cannot properly be regarded as a "particular interference such as to justify an award of compensation under sect. 2." In my judgment, however, this argument fails as to its minor premise. It is true that in exercising his discretion as to permitting the sale of the *Marwarri* the Shipping Controller professed to and did deal with the suppliants in accordance with certain general principles enunciated in the secretary's letters of the 3rd and 5th Dec. 1919. Any fair exercise of discretion in a great number of somewhat similar cases must almost necessarily involve the formulation of certain general principles of the kind, as a guide to the conduct of the authority exercising the discretion. But nevertheless the actual decision of the Shipping Controller in the suppliants' case, involving as it did the waiver of the first of the three conditions, namely, that as to new construction, and the fixing of the percentage at the maximum rate of 15 per cent., was in my judgment a particular individual decision, amounting to a direct particular interference with the supplaints' business by imposing as conditions on the sale of the

Marwarri that she should trade with the United Kingdom for a year, and that 15 per cent. of the purchase money should be paid to the Shipping Controller. The reasoning of this court in the recent case of *Black* v. *Admiralty Commissioners* (*sup.*) seems to support this view. It was there intimated that as against a claim by the builders as distinguished from the shipowners the action of the Ministry would have been held to be a direct particular interference.

As against this view, however, attention was called to the fact that in the War Compensation Court the suppliants had attempted to obtain compensation for the refusal of the Shipping Controller to allow the sale of three other vessels of theirs similar in many respects to the *Marwarri*, and have had their claim dismissed. But that claim was obviously quite different from the present. There the Shipping Controller had kept entirely within his strict legal position by simply refusing permission, and any loss to the suppliants arose from the general restriction imposed on the sale of vessels under statutory authority, and could not properly be attributed to a more discretionary refusal of the Shipping Controller to remove that restriction in particular cases. In my judgment, therefore, the suppliants' present claim is barred by sect. 1 of the Indemnity Act 1920, as having been one that could have been brought under sect. 2 of the Act.

The second contention of the Crown—namely, that to put it shortly the present claim is not in respect of rights under contract, was not raised in the court below; but it is one of some importance and deserves careful consideration. To appreciate it, one must first of all realise the way in which the suppliants put their claim. This is, as I understood counsel's argument, as follows: The claim against the Shipping Controller himself was in tort. But the Crown cannot commit an actionable tort, and the Shipping Controller cannot have been the agent of the Crown for this purpose. Hence the only cause of action of the suppliants against the Crown arose by reason of the Crown having received from the Shipping Controller the proceeds of his tort with notice thereof, or, at any rate, without being a purchaser for value without notice—see *Calland* v. *Loyd* (*sup.*); *Heilbut* v. *Nevill* (*sup.*). And this sole remedy is by way of *assumpsit*, that is, by virtue of at least an implied contract. Therefore, it is said the case falls within subhead (*b*) of the proviso to sub-sect. 1 of the Act; and, proceedings having been instituted within one year from the termination of the war the right of the suppliants is not barred. Even if, which is not admitted, an action against the Shipping Controller himself, had he not parted with the money, could not have been sustained, because the first and principal remedy against him was in tort, and, therefore, was barred by the Act, and even if therefore the action against him on an implied contract could only have been pursued secondarily, and upon a waiver of tort, the case against the Crown on implied contract is said to be stronger, because there never was any other remedy against the Crown.

To this it is replied by the Corwn that whether the claim in implied contract is pursued against the Crown or, had the proceeds been retained by him, against the Shipping Controller, the main and necessary constituent of the cause of action is tort; that unless the suppliants pleaded (as they did in fact plead) and proved this tort their action, whether against the Crown or against the Shipping Controller, must necessarily fail; that according to any ordinary use of language there never was in fact any contract at all between the suppliants and the Crown; that it was contracts in the ordinary sense that were being dealt with by sub-head (*b*) of the proviso; and that the main and principal cause of action —namely, that against the Shipping Controller for tort having been barred by the general words of sect. 1 it would be defeating the general purpose of the section to preserve either against the Shipping Controller (had he retained the proceeds) or, as things are, against the Crown an alternative remedy based upon an implied contract or quasi-contract merely introduced by resting on a legal fiction.

In my judgment this reply of the Crown is sound and should prevail. I cannot think that the saving by sub-head (*b*) of "rights under an alleged breach of contract" extends to anything but definite substantive contracts, or includes rights arising from implication of contracts under legal fictions; particularly when these implications arise incidentally from transactions which in themselves primarily constitute torts, and are in that regard dealt with by the Act and rendered non-actionable. And this view of the matter derives considerable support from the decisions in *Waterhouse* v. *Keene* (*sup.*) and *Midland Railway* v. *Withington Local Board* (*sup.*). It is no doubt true that in the latter case the bar extended not only to acts but to omissions, while in the Act of 1920 "acts, matters or things done" alone are mentioned and protected. But here the exaction of the percentage was clearly an act or thing done, and I cannot assent to the claimant's proposition that the cause of action against the Crown was its omission to refund the percentage. If that argument were sound the cause of action in the case of any tort might be said to be the omission to make good the loss occasioned thereby. The case of *Umphelby* v. *Maclean* (*sup.*), which was much pressed by the respondents, is not so close to the present case as the two just previously referred to. And apart from the rather unsatisfactory and conflicting character of reason given for the decisions, it is to be observed that the language of the Act there was very different from that of the Act now in question. The Act there gave no general protection, but barred claims against the parish only and not against the defendant; and further stress was laid in at least one of the judgments on the use in the Act of the word "amends" as indicating

that any claim barred must have been one for unliquidated damages only, and so could not include a claim against the parish for the definite ascertained amount actually received by them.

On both these grounds I think that the Indemnity Act applies, and that the appeal should be allowed with costs.

Appeal allowed.

Solicitors: for the appellant, *Solicitor to the Board of Trade;* for the respondents, *Rawle, Johnstone,* and Co., for *Hill, Dickinson,* and Co., Liverpool.

Thursday, July 31, 1924.

(Before Bankes, Scrutton, and Atkin, L.JJ.)

H. A. Brightman and Co. v. Bunge y Born Limitada Sociedad. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party — Demurrage — Delay due to labour troubles—Government prohibition of export—Charterer's option as to cargo—Charterer's duty to ship alternative cargo.

A ship was chartered to proceed to the River Plate and there to receive a full and complete cargo of wheat, and (or) maize and (or) rye. The ship was to be loaded at a certain rate otherwise demurrage to be paid by the charterers. And it was further provided that if the cargo could not be loaded " by reason of obstructions . . . beyond the control of the charterers on the railways " no claim for demurrage should be made by the owners, and in the event of the export of grain being prohibited the charter was to be null and void. The ship began to load wheat, but owing to labour troubles delay was caused and before the loading was completed the Government prohibited the export of wheat. Thereupon the charterers began loading maize and completed the cargo therewith. The owners thereupon claimed demurrage and the matter went to arbitration. The umpire found that a " ca'canny " movement of men on the railway caused a delay of six days which were coincident with the delay caused by the prohibition of export and he held that the charterers were not bound to load maize until a reasonable time had elapsed to enable them to see whether the prohibition of the export of wheat would be withdrawn. Accordingly he held them liable for demurrage for a period of four days and nineteen hours.

In an appeal by the charterers:

Held, that the charterers were not protected by the exception clause: per Bankes, L.J. upon the ground that they could not rely on the "ca'canny" movement since the refusal by the men to work to their full did not prove an obstruction on the railway within the meaning of clause 30; and per Scrutton and Atkin, L.JJ. upon the ground that the " ca'canny " movement and the obstruction it caused to the loading did not come within the exceptions which referred to the railways in the port of loading directly connected with the actual loading which were obstructed.

Held further, that the charterers were entitled to a reasonable interval of time in order to enable them to deal with the altered conditions.

Decision of Bailhache, J. varied.

Appeal by the charterers from the decision of Bailhache, J., reported 156 L. T. Jour. 51, upon a special case stated by an arbitrator.

By a charter-party dated the 14th April 1920 the steamship *Castlemoor* was to proceed from Monte Video to Rosario and there to receive from the charterers or their agents a full and complete cargo of wheat, and (or) maize and (or) rye. The charterers were bound to ship a full cargo, but they had the option of shipping other lawful merchandise. Lay-days were not to commence before the 10th May. The ship was to be loaded at the rate of 500 tons per running day, otherwise the respondents were to pay demurrage at the rate of 250*l.* per day. It was provided by clause 30 that if the cargo could not be loaded by reason of riots, civil commotions, or of a strike or lock-out of any class of workmen essential to the loading of the cargo, or by reason of obstructions or stoppages beyond the control of the charterers on the railways or in the docks or other loading places, the time for loading should not count during the continuance of such causes, and in case of any delay by reason of the before-mentioned causes no claim for demurrage should be made by the owners. In the event of the export of grain being prohibited from the loading port the charter was to be null and void. The *Castlemoor* proceeded to Rosario. Her lay-days began to run at midnight on the 19th/20th May, and ran for eleven days sixteen hours. Loading began on the 20th May and finished on the 15th June. The owners claimed demurrage from the expiry of the lay-days at 4 p.m. on the 4th June to the completion of the loading. The charterers claimed that the delay was due to causes provided for by the charter, and contended that no demurrage was due. The facts as to the causes of delay found by the umpire or agreed were that from the 4th to the 11th June 1920 the loading of wheat was prohibited by the Argentine Government, and that from the 15th May to the 6th June there was a " go slow " or " ca'canny " movement of men on the Central Argentine Railway, which caused delay in bringing the cargo down to Rosario, but did not affect the actual process of loading, although it caused a delay of six days which were coincident with the delay caused by the prohibition of export. The umpire found that the charterers were entitled to load wheat and were not bound to load maize until a reasonable time had elapsed to enable them to see whether the prohibition of the export of wheat would be withdrawn, and that the reasonable time had not elapsed by the 10th June when in fact they began to load maize, and he awarded the owners demurrage for the

(a) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

period from the 10th June to the 15th June at the rate agreed, amounting to 1198*l.* In a special case stated for the opinion of the court, the umpire found the foregoing facts and also that there was no congestion of shipping at Rosario at the material time, and there was no reason why the charterers should not have had a full cargo ready for the steamer on her arrival.

Bailhache, J. held that as the charterers could have had a full cargo ready before the ship arrived, the delay on the railway was no excuse for their delay in loading. Even if they did not have a cargo ready, they could have loaded from shore instead of from truck. The Government prohibition of the export of wheat was no defence either, as the charterers had under the contract the alternative of loading maize. The owners were therefore entitled to demurrage for the six days covered by the period of prohibition and of the railway trouble in addition to the demurrage awarded by the umpire.

The charterers appealed.

R. A. Wright, K.C., *Jowitt*, K.C., and *Van Breda* for the appellants.

MacKinnon, K.C., *A. T. Miller*, K.C., and *Le Quesne* for the respondents.

Cur. adv. vult.

BANKES, L.J.—The appellants are the charterers and the respondents are the owners of the steamship *Castlemoor*, which the appellants chartered to carry a cargo from Rosario to Europe. The vessel arrived at Rosario, and her lay-days commenced to run at midnight on the 19th May 1920. At the rate of loading provided for in the charter-party the lay time expired at 4 p.m. on the 4th June. Loading was not, in fact, completed until the 15th June, at 11 a.m. The respondents claimed demurrage for ten days nineteen hours at the agreed rate. The claim was referred to arbitration. The umpire stated his award in the form of a special case. Subject to the opinion of the court, he allowed demurrage from 4 p.m. on the 10th June to 11 a.m. on the 15th June, viz., four days nineteen hours. The appellants moved to set aside the award, and this motion came on for hearing before Baillhache, J. at the same time as the special case. The learned judge dismissed the motion, but varied the award by allowing demurrage for six additional days. From this decision the present appeal is brought. I see no reason for interfering with the judge's view that no ground was shown for setting aside the award. Whether the umpire's original view, or the judge's amended view, as to the allowance of demurrage is right depends upon the construction to be placed upon the charter-party, and its application to the facts as found by the umpire.

The material provisions of the charter-party are (*a*) that the shipowners bound themselves to receive a full and complete cargo of wheat and (or) maize and (or) rye with an option to the charterers of shipping certain other lawful merchandise; (*b*) that the steamer should be loaded at the rate of 500 tons per running day, Sundays and holidays excepted, otherwise demurrage should be payable; and (*c*) that the loading should be subject to the exceptions contained in clause 30, the material part of which is in the following terms: "If the cargo cannot be loaded by reason of . . . a strike . . . of any class of workmen essential to the loading of the cargo or by reason of obstructions or stoppages beyond the control of the charterers on the railways or in the docks or loading places . . . the time for loading . . . shall not count during the continuance of such causes."

The appellants contend that they are completely protected by the provisions of this clause, and that no demurrage is payable. Their contention upon the facts as found by the umpire is that any delay in loading the cargo was due to obstructions or stoppages beyond the appellants' control on the railways or in the docks or other loading places. It lies upon the appellants to satisfy the court that the umpire has found the facts in such a way as to bring clause 30 into operation. The question whether the clause applies only to the operation of loading, or whether it extends to a bringing down of a cargo does not arise unless the umpire has found that a cargo existed and that an obstruction on the railways existed, to both of which the clause could apply. In my opinion the appellants' case breaks down on this last point. The finding of the umpire on both questions is contained in paragraph 19 of the special case. He finds: "On the 15th May 1920 there broke out on the Central Argentine Railway a movement on the part of the men, which was described as a 'go slow' or 'ca'canny' movement, and lasted till the 6th June. It was a concerted scheme on the part of the employees of the company, designed to force the company to withdraw certain regulations which the Government had compelled them to impose, and which were obnoxious to the men. The method adopted by the men was to continue at work during proper working hours, but by means of an extravagantly strict adherence to the various rules of the company in regard to the working of traffic and the performance of their ordinary duties, so to delay the working of the traffic as to reduce it to a minimum, without at the same time giving to the railway company any specific ground for dismissal. I hold that this was an 'obstruction' on the railway, and I find that it caused in all a loss of six days. It caused delay, however, only in bringing cargo to the port of Rosario and in no way affected the actual process of loading."

Without attempting to define wh constitute an obstruction on a rail think that a good deal more must be shown than is indicated in this paragraph. Men may refuse to work to their full, or even their normal capacity, for a variety of reasons. It may be because of some dispute with the employer, it may be from a general policy of reduction of output, it may be from

climatic considerations, extreme heat or extreme cold. If all that can be said in the case of a railway company is that such a refusal delays the working of the traffic, I do not think that an obstruction on the railway is proved. A delay in working the traffic may or may not produce, or amount to, an obstruction on a railway. It is not enough, in my opinion, for the party on whom the onus of proving the existence of an obstruction on a railway lies to give evidence of a state of things which may or may not have amounted to an obstruction. I do not read the umpire's award as a finding that the state of things he describes resulted in obstruction, I read it as an expression of the umpire's opinion that as a matter of law the state of things he describes is sufficient evidence of obstruction. I am not able to agree with this view.

On the other question of fact, I feel considerable doubt whether the umpire has found that a cargo existed to which clause 30 could apply. I think from the conclusion at which he arrived that he must have intended so to find, and I deal with the remaining question raised by the case on the assumption that he has so found. On this last question the contention for the appellants is that, the obligation on the charterers being to ship a cargo of wheat and (or) maize and (or) rye, it was the charterers' duty, as soon as the delay upon the railway became apparent, immediately to substitute maize, which was available, for the wheat, which was not available, and that no time can be allowed the charterers to consider whether the substitution was necessary or to complete the alteration of arrangements. I do not so read the contract. The obligation of the charterers is to supply a full and complete cargo of wheat and (or) maize and (or) rye, or other named lawful merchandise. It may well be that the charterers cannot escape a claim for breach of contract to supply such a cargo by saying that no wheat was procurable, if maize and (or) rye were procurable. That conclusion is, however, a long way removed from the contentions of the shipowners, which is that, even if the charterers have decided to ship a cargo of wheat and have made the arrangements to secure the same, which, apart from some unforeseen event, would have enabled them to fulfil their contract, yet, if without default on their part, the unforeseen event occurs and compels them to substitute maize and (or) rye for wheat, they are not to be allowed the necessary time to make up their minds what is best to be done and to alter their arrangements accordingly, but are bound by the fixed time for loading laid down in the charter-party. I cannot so read the contract. I think that a term must be implied giving the charterers a reasonable interval of time to enable them to deal with the altered conditions.

If this view is correct there can be no reason for disturbing the umpire's view of what constituted a reasonable interval. For these reasons I think that the appeal succeeds to the extent that the judgment should be varied by striking out so much thereof as gives the shipowners a further allowance in respect of six days disallowed by the umpire. The appellants must have the costs of the appeal, but there must be no costs before the judge, and the order of the court is that the award of the umpire as stated in the special case stands.

Scrutton, L.J.—This is a claim by shipowners on charterers for demurrage of a ship at Rosario, in which the arbitrator has given the shipowners four days nineteen hours' demurrage and stated a special case. Bailhache, J. has given the shipowners an additional six days' demurrage; and the charterers appeal to this court. The charter is on the form known as the "Chamber of Shipping River Plate Charter, 1914," which was agreed between the Chamber of Shipping and the representative body of the Argentine shippers. It contains phrases not easy to construe, as is often the case when parties with conflicting interests adopt an ambiguous form, which each side dare not make precise for fear the other party should disagree with their meaning if stated precisely. The ship was chartered to load at one or two ports in the River Parana, and the charterers named Rosario. She was chartered to "receive a full and complete cargo of wheat and (or) maize and (or) rye," with an option to charterers to load other lawful merchandise. The maximum cargo to be loaded was 5830 tons. She had fixed lay-days amounting to eleven days sixteen hours, with an exception clause. She came on time at midnight on the 19th/20th May, and if no exceptions applied her lay-days finished on the 4th June at 4 p.m. The charterers began to load wheat, but by the 3rd June had only put on board 1900 tons. They began loading maize on the 10th June, and finished on the 15th June at 11 a.m., having then loaded a full cargo. The shipowners claimed demurrage from the 4th June to the 15th June.

The charterers relied before the arbitrator on a number of causes of delay; the arbitrator negatived the existence in fact of all of them except two: (*a*) a prohibition by the Government of export of wheat from the 4th June to the 11th June; and (*b*) a "ca'-canny movement" on the Central Argentine Railway, one of the five railways bringing wheat from the interior to the port of Rosario. In this "warlike operation" the workmen, while working their full working hours and doing nothing which would give the railway company a legitimate excuse for dismissing them, so punctiliously and conscientiously obeyed the letter of the railway company's rules that work did not proceed with that speed that less conscientious workmen might have attained. The movement existed up country on this one railway from the 15th May to the 6th June, and as the arbitrator finds, caused six days' delay from ordinary working. In other words, the loading which would have been completed on the 3rd June, by the operation of the strike would not be completed until the 9th June. But on the 4th

June the prohibition of wheat export began; on the 10th June the charterers began to load maize. The arbitrator has found that the strike would have delayed loading six days; and for the last six days of that period there was also the illegality of loading wheat, but as these two periods in his view coincided he only gave one six days' excuse from demurrage, and allowed demurrage from the 10th June to the 15th June, four days nineteen hours. Bailhache, J., agreeing with a previous decision of Rowlatt, J. on the same charter, holds that where charterers undertake to load a mixed cargo of various named kinds, the fact that they are prevented from loading one ingredient of the cargo does not excuse them from loading the other ingredients which they are not prevented from loading. I agree with this view, which appears to follow from the decision of this court in *The Rookwood* (10 Times L. Rep. 314). If when the ship arrived the loading of wheat was forbidden, I do not think the charterers could say: "We are excused from loading any cargo, for we are prevented from loading the cargo that we intended to load." The shipowners' answer would be: "You have contracted to load a full and complete cargo of wheat and (or) maize and (or) rye. If you cannot load wheat, load maize or rye which you can load." If the charterers failed they would have to pay dead freight; similarly, if the shipowners claim demurrage because the charterers have not loaded the cargo which they have contracted to load in the agreed time; it is no answer to the charterers to say: "We were prevented from loading one sort of that cargo." They were not prevented from loading other kinds of that cargo. If it is said that the charterers had the right to select the cargo which they would put on board, and when they had selected it, it became the only chartered cargo, I can see nothing in the facts found to bind the charterers to ship only wheat. No doubt they intended to do so, but if they had changed their mind and shifted from wheat to maize how could the shipowner have objected? I disagree, therefore, with the arbitrator's view that because the charterers intended to ship wheat they were not bound to ship maize or rye. Of course they were not bound to ship maize if they shipped a full and complete cargo of wheat; but if they could not do this, they still had contracted to ship a full and complete cargo of wheat and (or) maize and (or) rye, and must make up their full cargo of goods they could ship. But I do not go the full length of Bailhache, J.'s judgment. If the charterers were shipping a contract cargo of a particular kind, and were stopped by an excepted cause from shipping that kind of cargo, I think they are allowed, as the consequence of that excepted cause, a reasonable time to consider the position and change their cargo, and may say that to the extent of that time they were delayed by the cause which prevented shipment of the first kind of cargo. This must be on the assumption that they had the first kind of cargo ready for shipment but for the excepted cause; and I am not sure, in view of the fact that when the cause—prohibition—stopped they shipped only maize and not wheat, that they had wheat available; but the experienced arbitrator has found that the six days they waited was not unreasonable, and while I do not think I should have given so long, it is a question of fact on which I cannot interfere with the arbitrator.

This, however, assumes that the cause of delay was within the exceptions. The exceptions clause 30 is as follows: "If the cargo cannot be loaded by reason of riots, civil commotions or of a strike or lock-out of any class of workmen essential to the loading of the cargo, or by reason of obstructions or stoppages beyond the control of the charterers on the railways, or in the docks, or other loading places"—and then there is the clause about discharge—"the time for loading or discharging, as the case may be, shall not count during the continuance of such causes." And it is said that the "ca-canny movement" is "an obstruction . . . beyond the control of the charterers on the railways" by reason of which the cargo cannot be loaded. I have had some doubt whether men working their normal hours and observing the rules of the railway in such a way that the railway company cannot say the men are breaking their contract can be said to be an "obstruction" within the meaning of the clause, any more than a goods train running to its scheduled time could be said to be "an obstruction," but the arbitrator has found the movement or strike and its results to be an "obstruction," and I think it was a matter for him. But a more serious difficulty is the question whether anything outside the port of Rosario which prevents the cargo being brought down to the port of loading is within the exception clause at all. It is a well-recognised rule of construction that the exception clauses only apply to protect a charterer who has his cargo ready at the port of loading, unless they are clearly worded so as to include matters outside the port of loading. This is the result of *Grant and Co.* v. *Coverdale, Todd, and Co.* (5 Asp. Mar. Law Cas. 353; 51 L. T. Rep. 472; 9 App. Cas. 470), and *Arden Steamship Company* v. *Weir and Co.* (10 Asp. Mar. Law Cas. 135; 93 L. T. Rep. 559; (1905) A. C. 501); it is so stated in the late Mr. Carver's work in par. 257. The language of Lord Dunedin in *Arden Steamship Company* v. *Mathwyn and Son* (1912, S. C., 215) puts it very clearly: "It is amply settled that, *primâ facie*, there is an absolute duty upon a charterer to provide a cargo, and if he fails in that duty he undoubtedly will have to pay demurrage. Doubtless the charter, after all, is a bargain, and the charter-party might be so framed as to give an excuse from this duty of providing a cargo. But if that is to be so, the excuse must be very clearly expressed in the charter, because, unless this is very clearly expressed, the duty is, as I have phrased it, an absolute duty." And again: "It is amply settled by authority that loading

is one thing and providing a cargo is another, and an accident which may prevent a cargo coming forward is not to be construed as an accident which delays the loading, although, of course, unless the cargo is forward the loading cannot go on." But if there is only one way of bringing cargo to the port of loading, the exceptions may be taken to extend to that way, as in the case of *Hudson* v. *Ede* (18 L. T. Rep. 764; L. Rep. 3 Q. B. 412). This extension does not apply if, as in the present case, there is more than one route by which cargo can come and only one route is obstructed. (See the explanation of *Hudson* v. *Ede* in *Grant and Co.* v. *Coverdale, Todd, and Co.* (*sup.*), at p. 477; and the decision of this court in *Stephens* v. *Harris and Co.* (6 Asp. Mar. Law Cas. 192; 57 L. T. Rep. 618), also Carver, par. 257b.) So also if the exceptions in terms extend beyond the port of loading, as where, in the case of coal and mineral cargo, they refer to miners, and obstructions in getting the cargo, the ordinary rule is displaced. But in my view the exception which is read against those relying on it must be clearly worded to displace the ordinary presumption. As Lord Macnaghten said: "An ambiguous clause is no protection." Clause 30 is to apply to all sorts of ports on the Parana. It speaks of railways and docks, and is to apply to ports which may or may not have railways and may or may not have docks. Rosario has railways in the port, but no docks. In my view the ordinary presumption limits the word "railways" to railways in the port of loading, obstructions on which delay a charterer who has a cargo ready for loading. As a considerable portion of the loading at Rosario is done by chutes from trucks on the railway along the cliff or wharf, ample meaning can be given to "railways" without extending the term to railways up country, especially when there are five such railways and only one is obstructed. In my view, therefore, the "ca'-canny movement" and the obstruction it caused do not come within the exception clause. It was suggested that the sentence beginning "in case of any delay" extended the operation of the clause. So far as claims by charterers or receivers of cargo are concerned they could only be against the shipowners for delay in loading or discharging, the shipowners having nothing to do with up-country matters, and the mention of the shipowners only seems to me to be an extra cautious repetition of the earlier part of the clause, and only on the ordinary presumption to relate to causes at the port of loading. The effect of this view is to prevent the time for which the "ca'-canny movement" obstructed the loading from being deducted from the lay-days, and at midnight on the 3rd and 4th June there were sixteen hours left of lay-days. The ship began loading again on the 10th July, being excused by the prohibition and the arbitrator's finding as to reasonable time till that day, and her lay-days expired at 4 p.m. on the 10th July, leaving four days nineteen hours as the time on demurrage, being the amount found by the arbitrator, though for different reasons.

In this event the decision of the arbitrator as to the costs of his award should stand, but as this is said to be a test case, and in my view the charterers were wrong as to the effect of the cargo clause and wrong as to the inclusion of the "ca'-canny movement," while the shipowners were wrong as to the effect of the prohibition on the time for determining on a change of cargo, I think neither party should have costs before Bailhache, J. or here.

I should add that the arbitrator treated the time lost by the "ca'-canny" strike and the time lost by prohibition as coincident and therefore only allowed that time once. He apparently proceeded on the ground that but for the strike, if it acted alone, the ship would have finished loading on the 10th June instead of on the 4th June, and as there was a prohibition from the 4th June to the 10th June the two dates were coincident. This may not be right, for if the excepted cause acted, say, on the 1st June for one day, completion of loading would be delayed from the 4th June to the 5th June, and if on the 4th June there was another one day's delay, the charterers would be entitled to two days' excuse, and not one only on which two causes operated. It turns on when the first delay operated, which the arbitrator professes himself unable to say. I think he was probably wrong in his view, but as I arrive at the same figures of result by holding him wrong on two points, it is not necessary definitely to decide this.

Though I arrive at the same result as the arbitrator, I have stated the matters on which I differ from him, as it is said that this case may affect a number of other demurrage cases at this time.

Atkin, L.J.—The first question that arises in this case is the claim of the charterers for an extension of the expiration of the lay-days by reason of the provision in clause 30 as to obstructions or stoppages beyond the control of the charterers on the railways. The umpire has found that the organised action of the employees on the Central Argentine Railway was or caused an obstruction. I think that this finding should stand. The word "obstruction," in my view, may include both the physical condition which interferes with the normal flow of traffic, and abnormal industrial conditions which cause the normal flow of traffic to be impeded. In the present case I think that the arbitrator meant to find both. I cannot doubt that he meant to find that there was a glut of wagons on the line preventing the normal flow of traffic, and that there was an abnormal industrial condition which produced that diminished flow. I think that he could properly find that "obstruction" existed. The obstruction was on the Central Argentine Railway up-country from Rosario, and the question is whether such an obstruction can be said to be "on the railways," within the meaning of the clause. *Primâ facie* such

a clause only protects the shippers when it affects the actual process of loading, that is putting the goods from quay or lighter into ship, and this *primâ facie* construction is founded on the primary obligation of a charterer to have his cargo ready for shipment at the port of loading when the ship is ready to receive it, *Grant and Co.* v. *Coverdale, Todd, and Co.* (*sup.*). Nevertheless, the *primâ facie* construction can be displaced, as, for instance, when the circumstances of business in relation to the particular goods to be shipped are such that the shippers cannot have the goods ready at the port of loading but must necessarily convey them from some other place to the port or place of loading. In such circumstances the exceptions, if apt words are used, may apply to causes operating outside the port of loading. It matters little whether the right view be that the *primâ facie* obstruction is varied, or that the process of loading in such conditions is deemed to include the conveyance of the goods to the ship from the place where alone the shipper can have them ready. The kind of case where the *primâ facie* meaning is extended is to be found in *Hudson* v. *Ede* (*sup.*), the conveyance of grain from warehouse towns on the Danube to Sulina, and *Re Arbitration between Messrs. Richardson and Samuel and Co.* (8 Asp. Mar. Law Cas. 330; 77 L. T. Rep. 479; (1898) 1 Q. B. 261), conveyance of ore from Baku to Batoum. It would be found to be illustrated by and usually specially provided for in charters for the conveyance of coal or ores, which are not usually stored at the port of loading. But in every case it appears to me that the words in a charter in this connection must be construed in reference to the particular conditions of the actual transaction to which the charter is applied. We were told in argument that there are "safe loading ports or places in the river Parana not higher than San Lorenzo in which there are no warehouses and to which a grain cargo can only be brought to the ship by rail and must be loaded from trucks." To such a loading at such a port I think the word "railways" in this charter would apply, and the charterer would be protected if, having a cargo otherwise ready, the loading of the cargo was prevented or delayed by an obstruction on the railways up-country conveying the cargo to the ship. On the other hand, if the clause was sought to be applied to one of such ports or places where the cargo was customarily ready in warehouse, there would be no reason for departing from the *primâ facie* construction as to the process of loading. Applying this view to the facts of this case, it appears to me that the charterer fails to show findings of the umpire which displace the *primâ facie* rule. It is found that there is very considerable warehouse accommodation at Rosario; it is not found that the whole or part of the cargo is of necessity or even customarily loaded from rail, though that is one of the modes of loading; and there is an express finding—although in this there may lurk an ambiguity—that there was no reason why the respondents should not have had a full cargo ready for the *Castlemoor* on her arrival. Under these circumstances I think that the learned judge was right in not allowing the charterers the exemption claimed under this head.

It is unnecessary on this view to consider the umpire's finding and further finding as to the days lost by the cause in question being coincident with the days lost by the prohibition. But for the reasons given by my brothers this finding seems to be open to attack, and as at present advised I should not feel able to support it.

The second head of claim arises from the prohibition of export of wheat. It was argued on behalf of the shipowners that as the obligation was to load a full and complete cargo of wheat and (or) maize and (or) rye a prohibition confined to only one could not be said to prevent or delay the loading of the cargo. I think that in such a contract as this there is no such thing as an appropriation of cargo binding shipowner to shipper or shipper to shipowner, nor any question of final election of an option. The shipper retains control of his powers until the final ton is put on the ship, and as he retains his rights so he retains his liabilities. I think, therefore, that the prohibited export of one of the classes of grain cannot be said to prevent the ultimate loading of the cargo. Nevertheless, it may well delay it. The contract is made in relation to well-known business conditions, and it would be surprising to find that a shipper of a cargo who intended to ship wheat should find that he had no protection at all in the event of a sudden prohibition imposed while he was in the process of loading wheat, on the ground that the law presumed that he also had ready for that ship a full cargo of maize and rye, and in some cases of also linseed and rapeseed. The reasonable construction appears to me to be that in such a case, while the shipper must load a cargo in accordance with his contract, and if he cannot load wheat must complete with maize or rye, yet if he shows that it took him a reasonable time to change over, he shows that he was delayed for that reasonable time, and if he cannot so load wheat from one of the excepted causes then he is delayed in loading the cargo by that cause for that reasonable time. The umpire has here found such delay, and I see no reason for not giving effect to his finding. I think, therefore, that his award should stand and that the appeal should be allowed with costs.

Appeal allowed.

Solicitors for the appellants, *Richards and Butler*.

Solicitors for the respondents, *Botterell and Roche*, agents for *Botterell, Roche, and Temperley*, Newcastle-upon-Tyne.

Nov. 3 and 13, 1924.

(Before BANKES, ATKIN and SARGANT, L.JJ.)

UNITED STATES SHIPPING BOARD v. BUNGE Y BORN LIMITADA SOCIEDAD. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party — Fuel oil supplies — Deviation from chartered voyage for purpose of obtaining supplies—Liberty to call at any ports in any order—Claim for demurrage.

A steamship constructed to use oil fuel was chartered to carry a cargo from the River Plate to a safe port in the United Kingdom, or on the Continent between Marseilles and Hamburg inclusive. By clause 29 of the charter-party it was provided that " the steamer shall have liberty to call at any port or ports in any order for the purpose of taking bunker coal or other supplies." The vessel was loaded with a cargo part to be discharged at Malaga and part at Seville, and it was agreed that Malaga should be the first port of discharge. After discharging at Malaga the vessel had enough oil fuel left sufficient to take her to Seville, and to discharge her cargo there, but it would not have carried her to any further point. No oil fuel being obtainable either at Malaga or at Seville, she called at Gibraltar to obtain oil fuel from a tank steamer which was expected to arrive, but owing to the non-arrival of the latter, the vessel proceeded to Lisbon to bunker. Lisbon was out of the direct course from Malaga or Gibraltar to Seville.

On a claim by the charterers claiming damages for the deviation :

Held, that clause 29 of the charter-party must be read as giving a liberty to call for bunkers or supplies only at a port or ports on the way of the voyage, and that the vessel did deviate to an unauthorised extent in proceeding to Lisbon. The owners were, therefore, liable to the charterers in damages in respect of such deviation.

Decision of Bailhache, J. affirmed.

By a charter-party dated the 23rd Oct. 1920, and made between the plaintiffs as owners and the defendants as charterers, the steamer *Alamosa* was chartered to carry a cargo of maize from the River Plate to a safe port in the United Kingdom or on the Continent between Marseilles and Hamburg inclusive. Subsequently it was agreed that the charterers might load a cargo for Malaga and Seville, Malaga to be the first port of discharge, and the steamer was loaded accordingly. By clause 29 of the charter-party it was provided that " The steamer shall have liberty to call at any port or ports, in any order, for the purpose of taking bunker coal or other supplies, to sail without pilots, to tow and be towed, to assist vessels in distress, and to deviate for the purpose of saving life or property." Disputes having arisen under the charter-party, the matter went to arbitration. The shipowners claimed demurrage, and the charterers counterclaimed for freight overpaid, for short delivery, and for deviation. The material facts as found by the umpire were these. The *Alamosa* was a steamship constructed and intended to use oil fuel. On her way from the River Plate to Malaga she put into Rio de Janeiro to bunker and there took on board a further supply of oil fuel. After discharging part of her cargo at Malaga she had about 90 tons of oil fuel in her bunkers which would be sufficient to enable her to reach Seville and to discharge there, but not sufficient to enable her to get away. No supplies of oil fuel were procurable either at Malaga or Seville. On her way from Malaga to Seville the vessel had to pass Gibraltar, and arrangements were made that she should obtain supplies of oil fuel from an oil tanker expected there. The *Alamosa* went to Gibraltar and waited there for two days, but as the tanker had failed to arrive, she then left and went to Lisbon the nearest port at which oil fuel was procurable, whereby the voyage was prolonged some 300 miles. The umpire found that in going to Lisbon the master acted reasonably, and he awarded, subject to the opinion of the court, that the charterers' claim for damages for deviation failed. The questions for the court were (1) whether, upon a true construction of the charter-party and upon the facts stated, the *Alamosa* was guilty of deviation by going to Lisbon for oil fuel ; and (2) whether, if there was a deviation, the contract of affreightment was displaced or avoided so as to give the charterers a good defence to the owners' claim for demurrage.

Bailhache, J. held that clause 29 must be construed as referring to ports upon the direct line of route of the chartered voyage, and that as Lisbon was not on that direct line the deviation was unwarranted, and the shipowners were liable to pay the charterers for any damage caused thereby, and, further, that the charterers had a good defence to the shipowners' claim for demurrage.

The shipowners appealed.

R. A. Wright, K.C., *Dunlop*, K.C., and *Stenham* for the appellants.—Instead of waiting an indefinite time at Gibraltar, the master was entitled to go to Lisbon, which was the nearest port for obtaining oil supplies :

Leduc and Co. v. *Ward and others*, 6 Asp. Mar. Law Cas. 290 ; 58 L. T. Rep. 908 ; 20 Q. B. Div. 475 ;

James Morrison and Co. Limited v. *Shaw, Savill, and Albion Company Limited*, 13 Asp. Mar. Law Cas. 504 ; 115 L. T. Rep. 508 ; (1916) 2 K. B. 783 ;

Glynn v. *Margetson*, 7 Asp. Mar. Law Cas. 366 ; 66 L. T. Rep. 142 ; (1892) 1 Q. B. 337 ; affirmed. 69 L. T. Rep. 1 ; (1893) A. C. 351.

If it became necessary to obtain supplies the master was entitled to exercise a reasonable judgment as to the best place where they might be obtained, and there was really no difference between waiting at Gibraltar and proceeding to

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

Lisbon, although it was outside the voyage contracted for.

Upon the question as to when deviation was justifiable they referred to :

Kish and another v. *Taylor, Sons, and Co.*, 12 Asp. Mar. Law Cas. 217 ; 106 L. T. Rep. 900 ; (1912) A. C. 604 ;
Phelps, James, and Co. v. *Hill and Co.*, 7 Asp. Mar. Law Cas. 42 ; 64 L. T. Rep. 610 ; (1891) 1 Q. B. 605 ;
The Dunbeth, 8 Asp. Mar. Law Cas. 284 ; 76 L. T. Rep. 658 ; (1897) P. 133 ;
Carlton Steamship Company v. *Castle Mail Packets Company*, 8 Asp. Mar. Law Cas. 402 ; 78 L. T. Rep. 661 ; (1898) A. C. 486.

They also referred to : Arnould on Marine Insurance (10th edit., s. 424 (*a*), and sect. 49 of the Marine Insurance Act 1906.

Kennedy, K.C. and *van Breda* for the respondents.—The right to deviate depends upon the express terms of the contract. In the present case the charterers were not interested in the vessel beyond Seville, at which port the balance of the cargo was to be discharged. The deviation by proceeding to Lisbon was not authorised either expressly or by implication.

Dunlop, K.C. replied.

Cur. adv. vult.

Bankes, L.J.—This appeal raises a short but important point of construction of one of the clauses in the Chamber of Shipping River Plate Charter-party 1914 (Homewards). The clause in question is the exception clause, No. 29, which, so far as is material, is in the following terms : " The steamer shall have liberty to call at any port or ports in any order for the purpose of taking bunker coal or other supplies, to sail without pilots, to tow and be towed, to assist vessels in distress, and to deviate for the purpose of saving life or property." The voyage provided for by the charter-party was a voyage by the steamship *Alamosa* from the Argentine with a cargo of maize for Malaga and Seville in that order. The material facts are found by the umpire in par. 11 of the special case stated for the opinion of the court, and they may be summarised as follows. The *Alamosa* was a steamship constructed and intended to use oil fuel. On her way from the River Plate to Malaga she put into Rio de Janeiro to bunker and there took on board a further supply of fuel oil. After discharging part of her cargo at Malaga she had about 90 tons of oil fuel in her bunkers, which, taking all things into consideration, would be sufficient to enable her to reach Seville and to discharge there, but not sufficient to enable her to get away. No supplies of oil fuel were procurable either at Malaga or Seville. On her way from Malaga to Seville the vessel had to pass Gibraltar, and arrangements were made that she should obtain supplies of oil fuel from an oil tanker expected there. The *Alamosa* proceeded to Gibraltar and waited there two days, but as the tanker had failed to arrive she then left and proceeded to Lisbon, the nearest port at which fuel oil was procurable. The oil required was obtained there, and the vessel then returned and proceeded to Seville. The umpire finds that the only course open to the master in the circumstances was either to have waited an indefinite time at Gibraltar for supplies of oil fuel, or to go to Lisbon to obtain it. He also finds that the master acted reasonably in the circumstances in proceeding to Lisbon. Lisbon lies about 150 miles north of the mouth of the Guadalquiver River, so that in adopting the course he did the master, in going from Gibraltar to Lisbon, passed the mouth of the river up which his course lay to Seville, went 150 miles north to Lisbon, obtained the fuel oil he required, and then returned the way he went. As a result the voyage was prolonged some 300 miles.

The two questions for the court upon these facts are stated by the umpire as follows : (1) Whether on the true construction of the charter-party and upon the facts stated the *Alamosa* was guilty of a deviation by proceeding to Lisbon for fuel oil for which the owners are liable to the charterers in damages. (2) Whether if there was a deviation the contract of affreightment was displaced or avoided so as to give the charterers a good defence to the owners' claim for demurrage.

With regard to the point made for the appellants that the master had a right under the general law, apart from the special contract, to take the course he did, I say at once that, in my opinion, the special contract excluded a consideration of the general law in matters specially provided for in the contract. One of the matters specially provided for is the question of the supply of bunkers during the voyage. An argument therefore founded on the general right to deviate to provide bunkers as a matter of necessity for safety of ship or cargo or to enable a vessel to complete her voyage and to get to sea again after discharging is, I consider, inadmissible. So far as bunkers and supplies are concerned the parties have made a special agreement and have used terms which, having regard to the numerous decisions on similar language, must, in my opinion, be regarded as having a conventional meaning. In *Leduc and Co.* v. *Ward and others* decided in 1888 (6 Asp. Mar. Law Cas. 290 ; 58 L. T. Rep. 908 ; 20 Q. B. Div. 475), the words used were " with liberty to call at any ports in any order." In *Glynn* v. *Margetson*, decided in 1893 (7 Asp. Mar. Law Cas. 366 ; 69 L. T. Rep. 1 ; (1893) A. C. 351), the words used were " with liberty to proceed and stay at any port or ports in any rotation." In *James Morrison and Co. Limited* v. *Shaw Savill and Albion Company Limited*, decided in 1916 (13 Asp. Mar. Law Cas. 504 ; 115 L. T. Rep. 508 ; (1916) 2 K. B. 783), the words used were " with liberty on the way to London to call and stay at any intermediate port or ports." In all these cases and in others which might be cited the decision has always been that the general language of which these cases are illustrations must be read as controlled by the governing object of the contract.

namely, the prosecution of the named voyage, and that the liberty to deviate only applies to ports and places which can be said in a business sense to be on the way between the port of departure and the port of destination. Having regard to this long course of authority I am of opinion that the language used in the clause under consideration must be read as giving a liberty to call for bunkers or supplies only at a port or ports on the way of the voyage. It was suggested that this view should not be adopted because in the cases referred to the parties were dealing with matters of convenience or advantage to the shipowner such as calling for additional cargo and such like matters, whereas in the present case the parties were dealing with matters of necessity for the due prosecution of the voyage. I cannot accept this contention. It appears to me that the clause itself contains indications which, in my opinion, point to the conclusion that the parties intentionally used the language they did in its limited conventional sense. A distinction is drawn between calling at a port for bunkering or supplies and deviating generally; the right to deviate without any restriction is conferred for the purpose of saving life or property. To obtain bunkers or supplies the liberty is confined to the right "to call at any port or ports in any order." There seems to me to be reason in this. A charterer may well be content that the right to deviate for the purpose of saving life or property should not be controlled by any express provision in the charter-party and yet be anxious in the matter of bunkers and supplies which presumably would in ordinary circumstances and with ordinary forethought be procurable at a port or ports on the way to the vessel's destination, to tie the shipowner down sufficiently to prevent him wandering to out-of-the-way places in order to save money by obtaining supplies at cheap rates, or because he had not taken the trouble to secure what was wanted at a port or ports on the way. Applying this construction to the facts of the present case, it is clear that the vessel did deviate to an unauthorised extent in proceeding to Lisbon. The master was, in my opinion, within his rights in calling at Gibraltar for fuel oil, as I consider that the liberty to call for bunkers must include the right to call for sufficient fuel to enable the vessel to get away from Seville as well as to get there. In the absence of any express provision covering the unfortunate failure of the tank steamer to arrive as expected the master was, in my opinion, under the terms of the charter-party, bound to remain at Gibraltar until he could obtain the fuel oil he wanted, as the umpire finds that the only places at which fuel oil was obtainable were Gibraltar or Lisbon.

A point was made by Mr. Dunlop suggesting that if the court accepted the view that there had been an unauthorised deviation, and consequently a repudiation of the contract on the part of the shipowner, the charterers had accepted the repudiation and were consequently not entitled to make any claim under the contract. The point is not raised upon the special case and I therefore express no opinion with regard to it. The appeal fails and must be dismissed, with costs.

ATKIN, L.J.—I agree with the judgment that has just been delivered and need only express my own opinion in a few words. It appears to me important that when words in common use in commercial transactions have been authoritatively construed they should continue to receive the same construction, unless it is plain from the contract that a different meaning was intended. The clause giving liberty to call at any port or ports, whether with or without the words "in any order," has, to my mind, received such authoritative construction, and the liberty is confined to ports substantially in the course of the contemplated voyage. This seems to me to be established by the case of *Leduc and Co.* v. *Ward and others* (*sup.*), *Glynn* v. *Margetson* (*sup.*), and *White* v. *Granada Steamship Company Limited* (13 Times L. Rep. 1), and I have no doubt that the same meaning has been imputed to the words in numerous commerical cases not reported. It appears to me to make no difference in the ordinary case whether the purposes for which the liberty is given are stated or not. In *Leduc and Co.* v. *Ward and others* (*sup.*) no purposes were stated. In *Glynn* v. *Margetson* (*sup.*) the words were "for the purpose of delivering coals, cargo or passengers, or for any other purpose whatsoever." In *White* v. *Granada Steamship Company Limited* (*sup.*) the words were substantially the same as in *Glynn* v. *Margetson* (*sup.*). I do not think that the court in those cases construed the words by reference to the particular purposes for which in fact the liberty was used. If that were the criterion the words "port or ports" would have different meanings according to the use made of the liberty. I think that Bailhache, J. rightly construed the words in the present case and rightly held that the voyage to Lisbon was not covered by them. I agree with my Lord that in the present case the construction is particularly clear by reason of the general liberty to deviate for purposes of saving life and property contained in the latter words of the clause where "port or ports," &c., are omitted. I also agree that as this deviation cannot in any way be said to have been for the purpose of saving either ship or cargo it was not authorised either expressly or by implication, however desirable it may have been in the interests of the shipowner. The question of the right of the shipowner to use the bunker space for the purpose of storing enough bunkers to take the ship away from its port of destination is quite a different question and does not arise for decision here.

I understood a further point to be raised by Mr. Dunlop that, assuming the deviation to have been unauthorised, and therefore a breach of a condition, which if relied on would displace the whole of the special contract, yet here the charterers after breach treated the contract

as still subsisting by claiming under it arbitration, and therefore must be held to have waived the breach of condition. This is an interesting point which may arise for decision in some other case. It is not open here; it is not one of the points of law stated in the special case; there are no materials found in the special case upon which a decision could be made, and so far as appears it was not made before either the learned umpire or the learned judge. I agree that the appeal should be dismissed.

Sargant, L.J.—I agree and have nothing to add.

Solicitors for the appellants, *Thomas Cooper and Co.*

Solicitors for the respondents, *Richards and Butler.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Tuesday, July 22, 1924.

(Before Lord Hewart, C.J.)

JONES *v.* OCEANIC STEAMSHIP COMPANY LIMITED. (*a*)

Carriage by sea—Conflict of laws—Contract—Injury to passenger—Exception in contract—Condition limiting shipowner's liability—Injury to British subject—Application of lex loci contractus—*Condition.*

The plaintiff, a British subject, claimed to recover damages for personal injuries received on board the M., a British ship, owned by the defendants, in which the plaintiff was a passenger. The plaintiff alleged that the injuries which he suffered were due to negligence on the part of the defendants' servants, in that the porthole glass in the plaintiff's room was not properly secured, and seriously injured the plaintiff's hand. The parties had agreed that all questions should be left to the learned judge except that of negligence and the amount of damages. The question of negligence had been decided by the jury in favour of the plaintiff, and they had assessed the damages at 107l. 10s. The defendants relied on two conditions (conditions 3 and 9) of the contract made in Detroit which were as follows: Condition 3: "Neither the shipowner, agent, nor passage-broker shall be liable to any passenger carried under the contract for loss, damage, or delay to the passenger or his baggage, arising from the act of God . . . or from causes of any kind, beyond the carrier's control, even though the loss, damage, or delay may have been caused or contributed to by the neglect or default of the shipowner's servants or of other persons for whose acts he would otherwise be responsible. . . . All questions arising under this paragraph of the contract shall be decided according to English law with reference to which it is made." Condition 9: "No claim under this ticket shall be enforceable against the shipowner or his property or the agent or passage-broker, unless notice thereof in writing with full particulars of the claim be delivered to the shipowner or agent within three days after the passenger shall be landed from the transatlantic ocean steamer at the termination of the voyage, or in the case of the voyage being abandoned or broken up within seven days thereafter."

Held, (1) *that although clause 3 was void by the law of Detroit, the contract was governed by English law, that being the intention of the parties, and so was valid. But applying the* ejusdem generis *rule the defendants were not absolved from liability by the third condition of the contract;* (2) *that since no notice of claim was given within the time limited by condition 9 the plaintiff was precluded from recovering by reason of non-compliance with that condition.*

Further argument after trial before the Lord Chief Justice and a special jury.

The plaintiff claimed damages for personal injuries sustained by reason of the alleged negligence of the defendants' servants or agents. The plaintiff, a British subject, was a passenger on the steamship *Majestic*, a British ship, and he alleged that he had sustained injury to his left hand owing to the negligence of the defendants' servants in that the porthole glass in his room was not properly secured. Condition 3 of the contract stated, *inter alia*, that the shipowners would not be liable for any damage caused through the negligence of their servants; and that all questions arising under that paragraph of the contract should be decided according to English law with reference to which it was made.

The ninth condition stated that no claim would be entertained unless notice in writing, together with full particulars of the claim, was given to the shipowner, or his agent, within three days after the termination of the voyage.

The jury decided the issue of negligence in favour of the plaintiff, but the question whether the defendants were exempted from liability by the conditions on the ticket was reserved for further argument.

Comyns Carr, K.C. and *I. G. Kelly* for the plaintiff.

Boyd Merriman, K.C. and *H. L. Beazley* for the defendants.

The following cases were referred to:

Re Missouri Steamship Company, 6 Asp. Mar. Law Cas. 423; 61 L. T. Rep. 316; 42 Ch. Div. 321;

Grant v. *Norway*, 10 C. B. 665;

Pearson v. *Goschen*, 10 L. T. Rep. 758; 17 C. B. 352;

Barnett v. *South London Tramway Company*, 57 L. T. Rep. 436; 18 Q. B. Div. 815;

Gooch v. *Oregon Short Line Railway Company*, 258 U. S. 22;

Larsen v. *Sylvester*, 11 Asp. Mar. Law Cas. 78; 99 L. T. Rep. 94; (1908) A. C. 295;

The Kensington, 183 N. S. 263;

(*a*) Reported by T. W. Morgan, Esq., Barrister-at-Law.

Hamlyn v. *Talisker Distillery Company*, 71 L. T. Rep. 1 ; (1894) A. C. 202 ;
The Henry S. Grove, 292 Fed. Rep. 502 ;
Re Richardsons v. *Samuel and Co.*, 8 Asp. Mar. Law Cas. 330 ; 77 L. T. Rep. 479 ; (1898) 1 Q. B. 261 ;
Thorman v. *Dowgate Steamship Company*, 11 Asp. Mar. Law Cas. 481 ; 102 L. T. Rep. 242 ; (1910) 1 K. B. 410 ;
Ryan v. *Oceanic Steam Navigation Company*, 12 Asp. Mar. Law Cas. 466 ; 110 L. T. Rep. 641 ; (1914) 3 K. B. 371.

Cur. adv. vult.

July 22, 1924.—Lord HEWART, C.J. read the following judgment : In this action the plaintiff, a British subject, seeks to recover damages for personal injuries sustained by him while he was a passenger on the steamship *Majestic*, a British ship, owned by the defendants, a British company, those injuries being due, as he alleges, to negligence on the part of the defendants' servants. His case is that on the 16th Sept. 1922 he was received by the defendants, in pursuance of a contract made in Detroit, as a passanger to be carried by that ship on a voyage from New York to Southampton ; that the defendants, by their servants, were negligent in that the porthole glass in his room was not properly secured, but was revolving at a high speed when he attempted in the early morning of the 17th Sept. to draw the curtain aside ; and that the glass then caught his left hand and seriously injured it. The evidence and the arguments were heard on the 8th July last, when it was agreed between the parties that all questions should be left to me, except the question of negligence and the amount of the damages.

It was not seriously denied on behalf of the defendants that one at least of their servants had acted negligently in the matter, nor that the injuries of the plaintiff were caused by that negligence, and the jury, subject to certain questions of law, which were by common consent reserved, found in favour of the plaintiff upon the issue of negligence, and assessed the damages provisionally at 1073*l.* 10*s.* 0*d.*

The question remains whether the defendants are exempted from this liability by the conditions of the contract. Two conditions, the third and the ninth, are relied upon. The third condition is in the following terms : "Neither the Shipowner, Agent or Passage Broker shall be liable to any passenger carried under this contract, for loss, damage or delay to the passenger or his baggage, arising from the act of God, public enemies, arrests, or restraints of princes, rulers or people, fire, collision, stranding, perils of the seas, rivers, or of navigation of any kind, accidents to or from machinery, boilers, steam, latent defects, even though existing at the beginning of the voyage, or from causes of any kind beyond the carrier's control, even though the loss, damage or delay may have been caused or contributed to by the neglect or default of the Shipowners' servants or of other persons for whose acts he would otherwise be responsible, and whether occurring on board this or any other vessel on which the passenger may be forwarded under this contract. All questions arising under this paragraph of the contract shall be decided according to English Law with reference to which it is made."

It was at first contended on behalf of the plaintiff that by the *lex loci contractus* a carrier is prevented from stipulating that he shall not be liable for the negligence of his servants, that the condition therefore is absolutely void, and that the contract takes effect as if no condition had been inserted. *The Kensington (sup.)* was cited. I entertain no doubt that according to the law in force in Detroit, where the contract was made, and also in New York, where the voyage began, such a condition is treated as void, either as being contrary to public policy, or as lacking the ingredient of voluntary assent. But the condition is perfectly valid by English law, and it is not, I think, seriously suggested that according to the *lex loci contractus* it is illegal for subjects of another country to contract with reference to the law of that country, although that law may treat such a condition as valid. The first question which arises, therefore, is whether the contract is governed by American or by English law.

It was laid down in *Re Missouri Steamship Company (sup.)* that where a contract is made in one country to be performed wholly or partly in another country, the court will look at all the circumstances to ascertain by the law of which country the parties may be presumed to have intended the contract to be governed, and will enforce it accordingly unless it should contain stipulations contrary to morality or expressly forbidden by positive law. In that case the contract was made between an American citizen and a British company of shipowners for the carriage of cattle from Boston to England in a British ship, and it contained a stipulation that was valid according to English law, but was void by the law of Massachusetts on the same grounds as those on which the condition under consideration in the present case is void according to the *lex loci contractus*. It was unanimously held by the Court of Appeal that the contract was governed by English law, and that the stipulation was valid, one of the circumstances that were regarded as indicating an intention to contract with reference to English law being the insertion of the stipulation which was impugned. The principle that in case of a conflict of laws the presumed intention of the contracting parties is the governing factor in the question what law is to be applied was affirmed by the House of Lords in *Hamlyn* v. *Talisker Distillery* (71 L. T. Rep. 1 ; (1894) A. C. 202).

The present case is stronger in favour of the applicability of English law than *Re Missouri (sup.)*, inasmuch as here the plaintiff is a British subject permanently resident in England and the contract expressly provides that all questions arising under the third condition shall be decided according to English law, and it is

not probable that the parties would intend that some parts of the contract should be governed by the law of one country, and other parts by the law of another country. In my opinion, the whole contract is to be interpreted and enforced according to the law of England.

The next question which arises is what is the true interpretation of the condition according to English law. It was contended by counsel for the defendants that it was to be construed very widely, and exempted the defendants from liability for the negligence or default of their servants, whatever might be the nature of such negligence or default, provided that it was beyond the carrier's personal control. It was argued for the plaintiff, on the other hand, that the rule of *ejusdem generis* applied to the words "causes of any kind," and that only such negligence or default was comprised in the condition as related to the matters specified or matters *ejusdem generis* therewith, and the case of *Re Richardsons and Samuel and Co.* (*sup.*), and *Thorman* v. *Dowgate Steamship Company* (*sup.*) were cited. In *Ryan* v. *Oceanic Steam Navigation Company* (*sup.*) Vaughan Williams, L.J. and Kennedy, L.J. used language which might be taken as indicating that they thought the condition should receive the wide interpretation contended for. But in that case the negligence was in the navigation of the vessel, and navigation is one of the matters specifically mentioned in the condition. The question, therefore, of the application of the rule of *ejusdem generis* did not arise. There is not in the terms of the contract under consideration any indication of an intention to exclude that rule such as there was in *Larsen* v. *Sylvester*. Indeed, some of the other conditions (*i.e.*, conditions 4, 5 and 12) seem rather to indicate that the third condition was intended to receive a narrower interpretation than that which is contended for by the defendants. In my opinion, the principle of *ejusdem generis* applies in this case, and the defendants are not absolved by the third condition from liability for the injury of which the plaintiff complains.

The ninth condition provides as follows: "No claim under this ticket shall be enforceable against the Shipowner or his property, or the Agent or Passage Broker, unless notice thereof in writing with full particulars of the claim be delivered to the Shipowner or Agent within three days after the passenger shall be landed from the transatlantic ocean steamer at the termination of her voyage, or in case of the voyage being abandoned or broken up, within seven days thereafter."

It is common ground that no notice of claim, in the ordinary sense of the term, was given within the time limited. But it was contended on behalf of the plaintiff, first, that the contract is governed by American law, according to which such a condition is not valid unless it is reasonable, *Missouri, &c. Railway* v. *Harriman* (227 U. S. 657), and *Gooch* v. *Oregon Short Line Railway Company* (258 U. S. 22) being cited, and I am asked to say that the condition is unreasonable; secondly, that the condition had in substance been satisfied, because certain reports had been made to the defendants by the surgeon and others giving full particulars of the accident—see *The Henry S. Grove* (*sup.*); and thirdly, that the defendants had waived the performance of the condition, or were estopped from saying that it had not been performed, by reason of a representation made by the purser to the plaintiff to the effect that, in view of the reports of the accident already mentioned, no further steps were necessary upon his part in order to give notice of his claim. With regard to these contentions, (1) I have already stated that in my opinion the contract is governed by English law, and if that is so, the question of reasonableness does not arise. But even if that question did arise, I am unable to hold that the condition is unreasonable. (2) I do not think that the reports referred to can be treated as equivalent to notice of a claim for the purposes of the contract. They make no mention of a claim, and they are consistent with the possibility that no claim would follow. (3) It was not, in my opinion, within the express or implied authority of the purser to alter the terms of the contract or to waive any of its conditions—see *Grant* v. *Norway* (*sup.*) and *Pearson* v. *Goschen* (*sup.*)—or to make any such representation, and there is therefore no waiver or estoppel binding the defendants—see *Barnett* v. *South London Tramway Company Limited* (*sup.*).

It may be added that no point was made on behalf of the plaintiff with reference to the mode in which the conditions were printed upon the document handed to him as his ticket. On the contrary, it was frankly admitted that the plaintiff knew there was printing on the ticket, and knew that the printing contained perfectly legible conditions relating to the terms of the contract. He did not, however, choose to read them.

The result is that in my opinion—a conclusion to which I have come with regret—the plaintiff is precluded from recovering by reason of non-compliance with the condition requiring notice of the claim, and there must be judgment for the defendants.

Judgment for the defendants.

Solicitors for the plaintiff, *Swann, Hardman, and Co.*

Solicitors for the defendants, *Rawle, Johnstone, and Co.*, agents for *Hill, Dickinson, and Co.*, Liverpool.

July 15, 16, 30, *and* 31, 1924.
(Before BAILHACHE, J.)
FOOKS *v.* SMITH. (*a*)

Insurance (Marine)—Loss by restraint of princes —Constructive total loss of goods—No notice of abandonment—Subsequent requisition of goods by Government—Actual total loss—Whether in ordinary sequence of events—Liability of underwriter.

In June 1914 *a firm of hide merchants in Calcutta shipped goods from Calcutta to Bourgas on an Austrian ship and insured them against war and marine risks (including loss by restraint of princes). In view of the imminent outbreak of hostilities, the Austrian Government issued general instructions to Austrian shipowners to put their ships in safety. In consequence of these instructions the ship on which the goods were being conveyed put into Trieste and did not complete the voyage and the goods were landed at Trieste and sent up country. No notice of abandonment was given. About a year afterwards the goods were requisitioned by the Austrian Government and sold.*

Held, (1) *that when the ship put into Trieste and landed the goods there, instead of completing the voyage, there was a constructive total loss caused by restraint of princes, one of the perils insured against, but as no notice of abandonment was given, the underwriter was not liable;* and (2) *that the requisitioning of the goods by the Austrian Government about a year afterwards, was an actual total loss of the goods, but as this requisitioning was not an event which, in the ordinary sequence of events followed the constructive total loss by restraint of princes a year earlier, the underwriter was not liable for the actual total loss when it happened.*

ACTION tried by Bailhache, J.

The plaintiff, Mr. Daniel William Fooks, a hide merchant, claimed, under a war risk policy, to recover for the total loss of fourteen bales of hides shipped on an Austrian ship from Calcutta to Bourgas, Bulgaria, and which were insured for 790*l.*

In consequence of general instructions issued by the Austrian Government to Austrian shipowners the vessel failed to complete her voyage. About a year afterwards the goods were requisitioned by the Austrian Government.

The facts are fully stated in the judgment.

W. A. Jowitt, K.C. and *E. G. Palmer* for the plaintiff.—This case is covered by *Mellish* v. *Andrews* (1812, 15 East 13), where the head-note says that the assured of goods having received intelligence on the 8th Jan. 1811 that the ship's papers were taken away on the 7th Dec. preceding, by the Swedish Government within whose port she was, did not give notice of abandonment to the defendant underwriter till the 17th Jan., but though such notice was too late, supposing an abandonment to be necessary, yet as the goods were finally seized and unladen by orders of that Government on the 30th April following, it was held that the ineffectual notice of abandonment before given did not preclude the assured from recovering as from a total loss, without any abandonment. Thus, if a loss by restraint of princes has been suffered, which can be converted into a constructive total loss by an appropriate notice of abandonment and no such notice of abandonment has been given, the matter remains alive, and if a total loss transpires subsequently the assured can recover notwithstanding that notice of abandonment was not given. Here there has been a total loss of the goods and the assured is entitled to recover notwithstanding the absence of a notice of abandonment.

C. T. Le Quesne for the defendant.—The case of *Mellish* v. *Andrews* (*sup.*) does not apply to the present case. There was in this case a frustration of the adventure when the vessel was put into Trieste in Aug. 1914, and as from that event the policy ceased to be operative and no further loss was covered by it. The plaintiff, therefore, is now seeking to recover for a loss which occurred after the insured adventure came to an end, in other words, a loss which is not covered by the policy. There was no loss by restraint of princes in this case and even if there was, the subsequent confiscation of the goods by the Austrian Government was not the natural consequence of the loss by restraint of princes.

The following cases were also referred to:

De Mattos v. *Saunders*, 1 Asp. Mar. Law Cas. 377; 27 L. T. Rep. 120; L. Rep. 7 C. P. 570;
Roux v. *Salvador*, 3 Bing. N. C. 266;
British and Foreign Marine Insurance Company v. *Sanday and Co.*, 13 Asp. Mar. Law Cas. 289; 114 L. T. Rep. 521; (1916) 1 A. C. 650;
Cossman v. *West*, 6 Asp. Mar. Law Cas. 233; 58 L. T. Rep. 122; 13 App. Cas. 160;
Jackson v. *Union Marine Insurance Company*, 2 Asp. Mar. Law Cas. 235; 31 L. T. Rep. 789; 10 L. Rep. C. P. 125;
Stringer v. *English and Scottish Marine Insurance Company*, 3 Mar. Law Cas. (O.S.) 440; 22 L. T. Rep. 802; L. Rep. 5 Q. B. 599.

BAILHACHE, J.—This is an action by Daniel William Fooks, who is the successor in title of certain vendors of certain parcels of hides. The hides were sold under a contract dated the 22nd April 1914, to one Masoona, at Varna. The contract provided that the hides were to be shipped from Calcutta per steamer to Varna within two months. The policy sued on covered the transit from Port Said to Bourgas.

The contract, although not quite in terms a c.i.f. contract, has many of the attributes of a c.i.f. contract, and, I think, so far as this case is concerned, it may be treated as a c.i.f. contract. Although the contract was made in April, the goods were shipped considerably

(*a*) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

later. The bill of lading is dated April, but the goods did not leave for their destination until June.

The ordinary course of transit was to convey the goods by ocean steamer to Trieste and from there to re-ship them to Bourgas on a smaller steamer. The goods arrived in the ordinary course at Trieste. They were then transhipped on the *Stamboul*, a small coasting vessel which flew the Austrian flag and belonged to an Austrian subject. The buyer of the goods was a Bulgarian.

In July, the goods being still in transit, and war being imminent, the sellers took out a Lloyd's war risks policy, and the buyer's account was debited with the premium. That is the policy on which the action is founded.

The goods having been transhipped on the *Stamboul*, the latter vessel proceeded, according to her log, on the 30th July, on her way to Bourgas, and in due course arrived at Valona. While there a telegram was received from her owners ordering her back to Trieste. She arrived there on the 5th Aug. She sailed again on the 7th Aug., bound for Sebenion, and thence proceeded to the Lale of Kukulyan, whence she was again ordered to return to Trieste.

She arrived at Trieste about the middle of September, and by the end of the month the cargo (including the hides in question in this case) was discharged. The hides remained at Trieste for some time, but were afterwards sent up country, and ultimately, more than a year afterwards, they were requisitioned by the Austrian Government and sold by them for a comparatively small sum of money, which, having regard now to the fluctuations in exchange, is a perfectly negligible sum.

Nothing was heard by the seller of what happened to the cargo for some years. Indeed, he does not seem to have found it out definitely until 1921, seven years after the vessel returned ultimately to Trieste, and five years after the seizure and sale.

Having found out what had happened, the plaintiff sued the underwriter on the war risks policy as for a total loss or constructive total loss.

The action came on for trial before me some time ago, and I then came to the conclusion, as an interim opinion, that the underwriter was not liable as for a total or constructive total loss. The question was then raised whether, if it was neither a total nor a constructive total loss, it might be treated as a partial loss, and I directed that the matter should be argued from that point of view. I am glad that I did so, because although that particular point has not been pressed, I have heard a much fuller argument on the former points, and I am much obliged to counsel on both sides for their assistance on the question whether this was a total loss or a constructive total loss.

No notice of abandonment was given because the facts were not known, as far as the frustration of the adventure was concerned, for seven years, and as to the seizure and sale, for five years after the event, and it could not be suggested that a notice of abandonment given seven years after the event could by any possibility be a good notice.

As a preliminary point it was said that there was no restraint of princes. The Austrian Government gave general instructions to the owners of Austrian ships to get their vessels into a place of safety in anticipation of the declaration of war. No doubt the assured must prove that the particular peril relied upon happened, and I am bound to say that the proof of the happening of this particular peril is very slight indeed. No force was used. But behind the instructions of a Government there is always the ultimate resort to force, if force is necessary. Therefore, as in the case of the *British and Foreign Marine Insurance Company* v. *Sanday and Co.* (*sup.*) there was a restraint of princes, and that in consequence thereof the vessel put back to Trieste.

It must be borne in mind that a policy on goods insures or is intended to insure their safe arrivel at the port of destination mentioned in the policy. It is a policy of insurance on the adventure. If, therefore, the adventure is prevented by a risk named in the policy, there is a claim on the underwriters. If the risk is of such a nature that the adventure is frustrated, but that the goods remain in safety and uninjured, there is a constructive but not an actual total loss, and in order that a person may be enabled to sue for a constructive total loss, notice of abandonment is necessary as soon as there has been a reasonable opportunity for ascertaining the facts.

I have come to the conclusion that, with due diligence, sufficient facts might well have been ascertained long before they were. When a peril insured against happens and consequently a loss is incurred, the underwriters' liability on the policy comes to an end, subject, of course, to their liability to pay in respect of the peril insured against which has occurred. Therefore, in order to recover on this policy, it is necessary to show that the goods were lost in consequence of the restraint of princes. The goods were not seized by the Austrian Government for more than a year. At the end of that period the Austrian Government requisitioned and sold the goods, and no doubt that requisitioning constituted an actual and not a constructive total loss. The price realised would by reason of the doctrine of subrogation belong to the underwriters.

Authorities have been cited which show that if there is first a constructive total loss followed by an actual total loss, and no notice of abandonment having been given, the constructive total loss cannot be relied on, yet the insured may sue the underwriters in respect of the following actual total loss, and that is what the insured in this case seeks to do. It is said that the constructive total loss by the restraint of princes was turned into an actual loss when the Austrian Government seized and sold the goods. *Mellish* v. *Andrews* (*sup.*) was cited in support

of that proposition. That case was decided by Lord Ellenborough in 1812. The headnote, after dealing with the facts, says: "But though such notice [of abandonment] was too late, supposing an abandonment to be necessary; yet as the goods were finally seized and unladen by orders of that Government on the 30th April following, it was held that the ineffectual notice of abandonment before given did not preclude the assured from recovering as for a total loss, without any abandonment." To the same effect is *Stringer* v. *English and Scottish Marine Insurance Company* (*sup.*).

These two cases are authorities for the proposition that if a constructive total loss afterwards becomes an actual total loss the assured may in certain circumstances, although he has given no notice of abandonment, rely upon the actual total loss and recover, although there is a considerable interval of time between the actual total loss and the constructive total loss. To the same effect are some observations in the well-known judgment of Lord Abinger in *Roux* v. *Salvados* (*sup.*).

As I understand the law, it stands in this way: Where, by a peril insured against, there is a constructive total loss and no notice of abandonment is given, then if in the ordinary course of an unbroken sequence of events following upon the peril insured against, the constructive total loss becomes an actual total loss—as, for instance, if there is a capture followed by confiscation—the underwriter is liable in respect of the total loss. If, however, the ultimate total loss is not the result of a sequence of events following in the ordinary course upon the peril insured against, but is the result of some supervening cause, the underwriter is not liable. That is an illustration of the doctrine *Proxima causa non remota spectatur.*

Assuming that to be a correct statement of the law, I would refer to an observation of Willes, J. in *De Mattos* v. *Saunders* (1 Asp. Mar. Law Cas., at p. 379; 27 L. T. Rep. 120; L. Rep. 7 C. P., at p. 579): "The contention that the loss, partial at the time it was incurred, was converted into a total loss by the acts of the salvors and the seizure and sale under the orders of the Court of Admiralty, must fail, because those acts and proceedings were not the natural and necessary consequences of a peril insured against." To the same effect is a passage in the judgment of Kelly, C.B., in *Stringer* v. *English and Scottish Marine Insurance Company* (3 Mar. Law Cas. (O S.), at p. 444; 22 L. T. Rep. 802; L. Rep. 5 Q. B., at p. 603): "I am of opinion that the decree for the sale of the goods and the sale of the goods under that decree, which for ever took out of the possession of the owner the goods themselves, and took away from him the power of ever repossessing himself of the goods in specie, entitled the plaintiffs to treat the case as one of total loss. This loss of the goods arose, though not directly, out of the original capture (which was of itself, if it had been so treated, a total loss), through a series of consequences—viz., the institution, the different stages, and the continuance of the suit until the decree was pronounced; and the sale under the decree was—if I may use the expression—a completion of the total loss."

Again, to the same effect is the judgment of the Privy Council in *Cossman* v. *West*. The headnote says: "To constitute a total loss within the meaning of a policy of marine insurance it is not necessary that a ship should be actually annihilated or destroyed. If it is lost to the owner by any adverse valid and legal transfer of his right of property and possession to a purchaser by a sale under decree of a court of competent jurisdiction in consequence of a peril insured against, it is as much a total loss as if it had been totally annihilated." In that case it is to be observed that the same point was taken that the total loss must be in consequence of the peril insured against.

Now, was the total loss in the present case a necessary or natural or direct consequence of the peril insured against? Of course, it is true to say that the restraint of princes which brought these hides into Austria and kept them at Trieste is a *sine qua non* of the ultimate loss; if they had not been there the Government could not have seized them. But they came there at a time when this country was not at war with Austria, war being declared on the 13th Aug. 1914, and they came there because the Austrian Government did not desire Austrian ships to be in danger on the high seas. But the fact that they came there did not as a necessary, natural, or direct consequence lead to their ultimate seizure and requisitioning and sale by the Austrian Government.

It seems to me that that seizure and sale was a *nova causa superveniens*, and was not the necessary and direct result of the restraint of princes. Suppose the goods had been destroyed by fire at Trieste, it would be impossible to say that an underwriter of the war risks policy was liable, for that destruction would not be a necessary or direct consequence of the frustration of the voyage. To the extent that the voyage in this case was frustrated, the extent of the constructive total loss, I think the underwriter would have been liable; but I do not think that the constructive total loss in this case ever became a total loss or a completion of the constructive total loss. The total loss was due, not to the fact that the voyage had been frustrated but to an entirely independent act of the Austrian Government, not at all sufficiently related to the original peril, the restraint of princes.

In all the circumstances of the case, which is one of considerable difficulty, I think that these goods, so far as the actual total loss is concerned, were lost by the seizure and sale by the Austrian Government; that by the time the seizure and sale took place the policy had long since run off, and that the seizure and sale were not so nearly connected with the

restraint of princes that I can hold that the total loss was a completion of what was begun by the restraint of princes.

I have come to the conclusion that the assured cannot recover in this case, and that there must be judgment for the underwriter.

Judgment for defendant.

Solicitors for the plaintiff, *Martin* and *Barry O'Brien.*

Solicitors for the defendant, *Thomas Cooper and Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Feb. 20, 21, 22, 28, *and March* 12, 1924.

(Before Sir HENRY DUKE, P.)

THE RENSFJELL; THE ORNESFJELL; THE UPPLAND; THE FRITIOFF; THE SVEIN JARL. (*a*)

Charter-party—" Scanfin " charter-party (1899) *—" The cargo to be brought to and taken from alongside at charterer's risk and expense as customary "—Custom of ports of West Hartlepool and Sunderland—Cargo slung out from the holds of the vessel by shore cranes and stacked on the quay or in railway wagons—Cargo similarly slung out by the ship's tackle—Stevedore's charges—Cost of discharge—Practice of stevedores to render accounts for stevedores' work at a fixed sum per standard—Custom for shipowners to pay such fixed sum—Effect of added clause requiring steamer to employ charterers' stevedores and pay usual fee.*

The plaintiffs claimed from the defendants the cost of discharging cargoes of sawn goods and pit props, of which the defendants were consignees, at West Hartlepool and Sunderland. The goods were carried under the terms of the " Scanfin " charter-party 1899, by which it is provided that the cargo shall be " loaded and discharged with customary dispatch . . . according to the custom of the respective ports. . . . Cargo to be brought to and taken from alongside at the charterer's risk and expense as customary." In some cases an additional clause was added by which the shipowner was required to employ the charterer's stevedores and pay the usual fee and cost only.

At the ports of West Hartlepool and Sunderland timber is discharged either by the ships' tackle or by means of shore cranes owned by the dock company. In either case the cargo is swung out from the ship in a sling, which is met and released on shore by the stevedores' gangs. In some cases the sling containing the cargo is lowered into railway trucks standing on the railway along the quay, in other cases it is carried back by the stevedores' gangs to merchants' allotted cargo spaces in rear of the discharging berth. In either event the cargo, after release from the crane tackle, requires to be stowed in the wagon or stacked upon the quay. Rates are charged by the stevedores inclusive of the whole of these operations at a fixed sum per standard, and stevedores' accounts made up on this basis are commonly submitted to and paid by the shipowners or their agents.

The defendants contended that they were not liable, under the terms of the charter-party, to pay any part of the stevedores' charges, since, by the custom of the ports, ' alongside ' meant on the quay, and if part of the stacking space was in this sense ' alongside,' then the whole space must also be alongside; alternatively, they contended that there was a custom for the shipowners to pay the fixed sum charge per standard, inclusive of the whole operation of discharge and stacking cargo.

Held, (1) *that the words " cargo to be discharged according to the custom of the respective ports " related only to the use of dispatch in the process of discharge, and, any custom not consistent with the express terms of the charter-party, such as the custom alleged, being excluded* (*see* The Turid, 15 *Asp. Mar. Law Cas.* 538; 127 *L. T. Rep.* 42; (1922) 1 *A. C.* 397), *the defendants were bound to pay such proportion of the cost of discharge as represented the operations performed after the cargo had been put at the disposal of the receiver by loosing of the sling;* (2) *that the additional clause requiring the ship to employ charterers' stevedores and pay the usual fee and cost only did not affect the rights of the parties under the charter-party;* (3) *that a custom for the shipowners to pay a fixed sum per standard inclusive of all the operations of discharge had not been made out.*

ACTIONS remitted from County Courts, in which the plaintiffs claimed for the recovery of moneys paid representing the cost of receiving and taking cargoes of pit props and sawn goods from alongside their vessels at West Hartlepool or Sunderland.

The plaintiffs were respectively the owners of the vessels *Rensfjell, Ornesfjell, Uppland, Fritioff,* and *Svein Jarl,* which had carried cargoes of pit props to the ports of West Hartlepool and Sunderland, under " Scanfin " (1899) charter-parties by which it was provided as follows: " Cargo to be loaded and discharged with customary dispatch as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports. . ." " The cargo to be brought to and taken from alongside steamer at charterer's risk and expense as customary." In each case, except the *Fritioff,* there was added an additional clause by which it was further provided: " Steamer to employ charterer's stevedores and agents at both ends, paying the usual fee and cost only." The defendants were the receivers of the cargo under bills of lading incorporating the charter-parties. At West Hartlepool the discharge of pit prop cargoes is made either on to quay spaces, where the cargo is loosely stacked over a

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

considerable area until the merchants can remove it, or direct into railway wagons standing on the railway along the quay, where it is received by shore gangs and roughly stowed. At some quays discharge can be conveniently made with the ship's tackle, but it is more commonly made by electric and hydraulic shore cranes moving on rails alongside the quay, which cranes and rails are owned and operated by the dock owners. At Sunderland similar practices prevail, but the spaces where the cargo is stacked are separated from the face of the quay by lines of railway across which the pit props have to be conveyed by a travelling crane. The stacking spaces at both ports vary in depth from 40ft. to 50ft., and at both ports an unobstructed passage 4ft. wide must be left along the edge of the quay. Pit props are discharged from the hold of a vessel in a wire sling, which is lifted ashore by the ship's tackle or a shore crane. The sling is released in the wagon, or, where the props are to be stacked on the quay space, on the quay, whence they are removed and stacked by shore gangs.

The vessels discharged as follows: At West Hartlepool, the *Rensfjell* discharged sawn goods into railway wagons on the quay; the *Ornesfjell* discharged sawn goods by the ship's tackle on to the quay; the *Uppland* discharged pit props on to the quay by the ship's gear; at Sunderland the *Fritioff* discharged by shore crane on to the quay, and the *Svein Jarl* discharged on to the quay. Where the cargo is discharged by stevedores or by consignees acting as their own stevedores, the whole of the operations involved in removing the timber from the hold and stacking it upon the quay are carried out by gangs working under the directions of the stevedores as one entire process. Rates inclusive of the whole of these operations, including the charges made by the dock company for the shore cranes, are charged per standard of timber discharged. The plaintiffs had paid these charges and they now claimed to recover them back from the defendants.

R. A. Wright, K.C., *Le Quesne*, and *Fenwick* for the plaintiffs.—Under the terms of the charter-party the defendants were bound to take the cargo from the ship's side; this merely re-states the general law as to the liability of the receiver of cargo for the expenses of discharge: (see *Petersen* v. *Freebody*, 8 Asp. Mar. Law Cas. 55; 73 L. T. Rep. 163; (1895) 2 Q. B. 294). This is the rule apart from custom. Two questions arise: (1) a question of fact, namely, what is customary? (2) a question of law, namely, whether the custom is consistent with the charter-party. In *The Turid* (15 Asp. Mar. Law Cas. 538; 127 L. T. Rep. 42; (1922) 1 A. C. 397) a custom by which the expenses of discharge after the cargo had left the ships' rail were paid by the shipowners was held not to be consistent with the terms of a charter-party in the Scanfin (1899) form, and the plaintiffs will object to evidence of a similar character being tendered in the present case. Reference was made to:

Aktieselskabet Helios v. *Ekman*, 8 Asp. Mar. Law Cas. 244; 76 L. T. Rep. 537; (1897) 2 Q. B. 83;
Glasgow Navigation Company v. *Howard*. 11 Asp. Mar. Law Cas. 376; 102 L. T. Rep. 172;
Stephens v. *Wintringham*, 3 Com. Cas. 169;
The Nifa, 7 Asp. Mar. Law Cas. 324; 69 L. T. Rep. 56;
Aktieselskabet Dampskibselskabet "Primula" v. *Horsley Smith and Co.* (*The Rodfaxe*), 17 Ll. L. L. Rep. 33.

Jowitt, K.C. and *Clement Davies* for the defendants.—The expression "alongside" includes the whole area of quay space upon which the cargo is stacked, for the cargo must be regarded as a unit, and if one side of the stack is "alongside," then the whole stack must be regarded as "alongside," notwithstanding that a part of the stack is some distance from the ship's side. If cargo has to be deposited clear of a 4ft. passage-way on the quayside, then this 4ft. passage must be disregarded, and cargo deposited outside it must be taken to be "alongside as customary." The shipowners are, by the custom of the ports, required to place the cargo "alongside," and this is not inconsistent with the receiver's obligation under this charter-party to take from "alongside":

Aktieselskabet Helios v. *Ekman* (*sup.*).

What was done in this case does not really amount to a stacking or stowing, but is no more than was done in that case. Therefore, if the defendants' contention is accepted that the whole area occupied by the cargo must be regarded as a unit, and that that part of it which is nearest to the ship is "alongside as customary," then the receivers have performed their obligations by taking from the stacking places. The trucks are at the place which is "alongside as customary," and the deposit of cargo into them is comparable with the deposit into barges in *Helios* v. *Ekman* (*sup.*). This is a very different custom from that alleged in *The Turid* (*sup.*). *Aktieselskabet Dampskibselskabet "Primula"* v. *Horsley Smith and Co.* (*The Rodfaxe*) (*sup.*) is also distinguishable.

Further, the operation of taking the cargo from the ship and depositing it on the stacking ground is a single and indivisible operation for which the stevedores make a fixed charge per standard, and there is a custom of the ports that the shipowner, to whom the stevedores' accounts are tendered, pays the whole of this charge. In the cases where the additional clause has been inserted by which the shipowner undertakes to employ the receivers' stevedores and pay the usual fee, the shipowner has undertaken to pay the whole of the stevedores' charges.

R. A. Wright, K.C. in reply.

Cur. adv. vult.

March 12.—Sir HENRY DUKE, P.—These are five actions, brought by shipowners and defended by consignees of cargo, for the purpose of securing a judicial determination of disputes as to the incidence of expenses incidental to the delivery, receipt, and disposal of overseas cargoes of timber in the docks at West Hartlepool and Sunderland. Three of the actions arise in respect of pit props discharged at West Hartlepool docks, and two in respect of like goods discharged at Sunderland. While the sums directly involved are small, the question of liability affects the whole of a very large import trade in pit props and other round wood at West Hartlepool, and a considerable trade of the same kind at Sunderland. The consignments in question were made in all the cases upon the terms of the Chamber of Shipping Wood Charter (Scandinavia and Finland to the United Kingdom). The plaintiffs in each action claim a declaratory judgment to the effect that the defendants, as consignees of timber under the terms of this charter, are subject to the common obligations of receivers of sea-borne goods to take delivery at, or alongside the ship. The defendants in all the cases allege the existence in the respective ports of various customs which impose upon the carrier liabilities larger than those cast upon him by the general law.

The relevant clause in the charter in each of the cases provides as to loading and discharge as follows: "The cargo to be delivered and discharged with customary steamship despatch . . . The cargo to be brought to, and taken from alongside, the steamer at charterers' risk and expense as customary." In some of the cases a special clause had been added whereby the shipowners were bound "to use the brokers and stevedores of the consignees" "at current rates." The bills of lading in all the cases incorporate the terms of the charter.

Having mentioned the special provision in some of the charters with regard to use of charterers' brokers and stevedores by the shipowners, as a circumstance of some of the cases, I pause to add at once that, in my opinion, this added term does not vary the obligations of the parties under the main clause as to the place at which discharge of cargo is to take place. Its effect, if any, is limited to such bearing as it may have upon the practices or usages which are relied upon to establish the alleged custom or customs.

There are certain features common to all the cases. The charter-party is the same, the class of goods is the same, and similar rights are alleged on the part of the several consignees. The facts as to the several ships, however, differ in material particulars, and the matters in dispute arise out of local conditions in the ports in question which need to be considered in detail.

At West Hartlepool timber cargo has for a long time been ordinarily dealt with at the docks in one of two modes. Timber merchants become, by contract with the railway company which owns the docks, entitled to stack timber delivered upon the considerable areas of quay space at or near the quays at which ships bringing timber are usually berthed, and to occupy such spaces with the timber so stacked until the same can be conveniently removed to their own yards.

At some of the quays delivery over the ship's side can be conveniently made by ship's tackle; at others timber can only be conveniently landed for the purpose of stacking in the allotted spaces by the use of hydraulic or electric cranes having a radius of 30ft. to 45ft. At certain quays timber may only be discharged by means of a shore crane and into railway wagons brought into position for the purpose upon lines of rails on the landward side of a line on which the crane travels. Discharge to quay space allotted to merchants was said, no doubt accurately, to have been a practice in general use as long as an established timber trade from steamships has existed in West Hartlepool. Discharge on such space by the dock company's electric and hydraulic cranes is a later development. Discharge into railway wagons in the way described was introduced by the dock proprietors some twenty-five years ago in order to economise quay space and expedite the removal of cargoes of timber. During recent years the dock proprietors have not permitted stowage of timber on wagons alongside except when such stowage is entrusted to experienced men approved by their representatives.

At Sunderland, so far as appeared, discharge of pit props has been usually made for a long time either at one or two berths in the docks which have stacking space behind them, not separated from the face of the quay by intervening lines, or at berths separated from available stacking space by two, three, or more railway lines in use for traffic. At the first-mentioned pair of berths ships may discharge timber by means of their own tackle. At the others, that is to say at the generality of the berths available for timber in the Sunderland Docks, the situation of the stacking ground on the further side of the railway lines necessitates the use of a travelling crane on the line of rails next the ship's side, in order to deposit the timber as it is moving outboard from the ship, at a sufficient distance, to avoid blocking the adjoining lines of railway.

The areas behind the quays on which timber discharged from ships is stacked in the manner described, at West Hartlepool, and Sunderland alike, vary in depth. In some cases they have depths of forty and fifty feet. Timber such as is in question is loaded in the ship's hold into a wire sling, which is lifted ashore by ship's tackle on a shore crane.

Timber discharged into wagon is received in the wagon by two men and roughly stored there. For the purpose of such stowage they place props or other suitable timber upright at the sides of the wagon, and by means of hooks dispose of the successive shiploads which are lowered into the wagon, and pile the timber to such a height as the uprights admit of. The

uprights come usually from the cargo under discharge, but where none such are available they are provided by the consignee. The wagons, when loaded, are removed by the dock company's employees, formed into trains, and taken by rail to the consignee's premises or elsewhere as the consignee may direct.

When discharge is made to a contractor's stacking space, the sling load of timber from ship's tackle needs to be hauled upon by a numerous gang of men, in order to effect delivery free of the ship's side and beyond the four foot way at the quay front, which is kept free for purposes of passage. The sling load, raised and landed by a shore crane, is swung by the crane to the point of intended deposit. A numerous gang of men—ten or more—as was stated, await the descent of the loaded sling; release the hook by which the load is secured in the sling, and as the load of props falls asunder take charge of them, prop by prop, and carry them to the stacking space. Skill is necessary for the piling of the props so that the stack shall stand firm when it is completed. The dimensions of the stack are governed by the length of the ship's berth and the available width at the back of the quay. The height of the full stack appears usually to be not less than ten feet, and sometimes to exceed that. Where the height exceeds five feet the men engaged in forming the stack must necessarily mount upon it to build at the higher level. At the ends of the stacks, and at intervals in long stacks, the timber is methodically piled to ensure stability. Between the parts so built up the timber is roughly stowed. Where the consignee is his own stevedore, and where a firm of stevedores is employed, the whole series of operations involved in the removal of the timber from the ship's hold, its passage outboard and delivery into and stacking in wagon, or deposit on a quay and conveyance across the quay and stacking in the merchant's allotted space, is carried out by men working under the stevedore's directions as one entire process.

The cost has been charged by the stevedore, or the consignee acting as his own stevedore, at an inclusive sum per standard of timber discharged. The inclusive rate includes, as was stated, some charges in respect of use of shore cranes which are made by the dock proprietors. It is the entire sum of these expenses, in the several cases, which the defendants claim to charge against the shipowners.

The West Hartlepool cases are those of *The Rensfjell*, *The Ornesfjell*, and *The Uppland*.

The cargo of the *Rensfjell* was discharged into wagons at a quay in the central dock by means of a hydraulic crane travelling on the quay. The loading of each wagon was done by two men in the wagon. The custom as to discharge which is alleged is for the shipowner to discharge the cargo from the steamship into wagons on rails running along the quay at which the steamship lies and roughly to stow them thereon.

The *Ornesfjell* was discharged by means of ship's tackle at a quay berth in the Jackson Docks, lodged on the quay, and there piled by manual labour in a space roughly corresponding to the ship's length with an average width beyond the 4ft. way of 40ft. The custom as to discharge which is alleged is a custom for the shipowners to discharge the cargo on to the quay and then dump the same within the length of the steamship as near to the steamship as the same can be conveniently and safely dumped without obstructing any railway lines on the quay—the cargo to be taken by the charterers from the place where it is so dumped.

The discharge of the *Uppland* was made at a quay in the same dock and in the same manner as that of the *Ornesfjell*. The average width of the quay space on which the timber was piled is about 50ft. The allegation of custom is as in the case of the *Ornesfjell*.

The cases arising at Sunderland are that of the steamship *Svein Jarl* and that of the steamship *Fritiof*. Both were discharged on to quay: the *Svein Jarl* by ship's tackle, the *Fritiof* by a shore crane travelling on a line of rails along the quay. Stacking was done on quay space allotted by the dock proprietors to the consignees, being the length of the ship and some 50ft. of depth. The quay space used in the case of the *Svein Jarl* lies next to the 4ft. way. That used in the case of the *Fritiof* is separated from the line on which the crane travels by three lines of rails used for railway traffic.

The customary obligation alleged in the case of the *Svein Jarl* is for the shipowner to discharge the cargo on to the quay by which the steamer lies, and there dump the same within the length of the steamer as near to the steamer as the same can be conveniently and safely dumped without obstructing any railway lines on the said quay.

The customary obligation alleged against the shipowner in the case of the *Fritioff* is "to discharge the said cargo from the said steamer on to the quay and (or) into wagons or rails running alongside the quay by which the said steamer lay, and there dump the same on the quay within the length of the said steamer, as near to the said steamer as the same could be conveniently and safely dumped without obstructing any railway lines on the said quay, and (or) roughly stow them in the said wagons."

Alike in all the cases the defendants make alternative allegations of custom in order to bind the plaintiffs, if not by the broad allegation of custom principally relied on, then by pleading the alleged modes of discharge as facts which give a peculiar local meaning to the terms of the charter-party in respect of "discharge alongside," and alternatively as facts from which there has arisen locally a customary obligation of shipowners to pay for services following upon discharge of cargo which under the general law would fall to be paid for by the receiver of goods.

Counsel did not at the hearing embody in any one comprehensive formula the custom or

customs of either of the ports. The task would obviously be one of some nicety.

In order to arrive at a due appreciation of the issues in the several causes, it is, I think, worth while to recall a passage in a well-known judgment of Lord Esher, which defines the legal obligations of carriers by sea, and receivers of sea-borne goods respectively, in respect of discharge of cargo. In *Petersen* v. *Freebody* (8 Asp. Mar. Law Cas. 55 ; 73 L. T. Rep. 163 ; (1895) 2 Q. B. 294) Lord Esher stated the general law on this subject and delimits with enviable felicity of phrase the obligation of the respective parties : " One party is to give, and the other party is to take, delivery at one and the same time and by one and the same operation. It follows that both must be present to take their parts in that operation. . . . The shipowner acts from the deck or some part of his own ship, but always on board the ship. The consignee's place is alongside the ship where the thing is to be delivered to him . . . ; if on to the quay, on the quay. The shipowner . . . must put the goods in such a position that the consignees can take delivery of them. He must put them so far over the side as that the consignee can begin to act upon them, but the moment the goods are put within the reach of the consignee he must take his part in the operation. At one moment of time the shipowner and the consignee are both acting—the one in giving and the other in taking delivery ; at another moment the joint act is finished."

The places and modes of discharge of timber which are here in question may properly be considered before dealing with the allegations of the defendants as to a customary liability for expenses. The processes described having gone on during long periods of time in a regular manner and as matter of course a business man who took the necessary trouble to ascertain the facts would have become aware that whatever work was not being performed by the ship's crew and the ship's tackle was being done by stevedores' gangs, who were not merely loading but disposing of the cargo in the manner described. To persons engaged in the timber trade, as well as to persons acting on behalf of the shipowners, in the two ports, these business processes must have been perfectly familiar for many years. Ship-masters must also, I think, have become acquainted with them ; whether so as to understand their full meaning and effect is matter for consideration.

So far as regards the commonly recognised necessity for the deposit of all goods outside the 4ft. way at the quay front, and the practice of discharge into railway wagons alongside, both things appear to me to have been so obvious that long usage in respect of them may properly be taken into account with regard to West Hartlepool and Sunderland in determining what in these ports amounts to discharge " alongside."

Different considerations arise in respect of the discharge of goods at, and the stacking of the same upon, the consignees' allotted quay space. The quay spaces or storage yards in question lie mostly on the remote side of several lines of rails. The operation of piling timber upon them is removed by one or more definite acts from any operation incidental to the discharge of timber from the ship. Mr. Jowitt argued that if the quay space is alongside everything done upon it is done alongside, but I do not take this view. The question is not one of the relative localities of the quay and the steamer, but of contractual obligations as to the place where discharge is to be accepted. The goods-owner is to take his goods from alongside the steamer. The corresponding obligation of the shipowner is to deliver alongside the steamer. In my opinion it is impossible to say that the goods-owner performs his obligation when he casts upon the carrier the burden of conveying the goods to and stacking them upon land which is wholly apart, and in some instances is comparatively remote, from the designated place of delivery.

Reliance is placed by the defendants upon these phrases in the charter-party : " Cargo to be discharged . . . according to the custom of the respective ports," and " cargo to be . . . taken from alongside at charterer's risk and expense as customary." Reading the first of these terms with its context, it seems to me clear that the condition relates only to the use of dispatch in the process of discharge. The second set of words raises a question analagous to that which was decided in the case of *The Turid* (15 Asp. Mar. Law Cas. 538 ; 127 L. T. Rep. 42 ; (1922) 1 A. C. 397), viz., whether the alleged custom or customs at West Hartlepool and at Sunderland are consistent with the express terms of the form of charter-party which is in question. I have indicated limits as to each port within which it seems to me possible that certain of the places of discharge which are in question might be found to be places alongside. The allotted quay spaces or storage yards, and the various places of deposit of discharged goods, which can only be utilised by means of shore cranes are beyond these limits. In my opinion the goods-owner who insists upon delivery by the ship into such areas, is not performing his obligation to take the cargo from alongside the steamer as customary—for any custom which would be contradictory of the express words of the charter is of necessity excluded from its true construction.

Questions may hereafter arise with regard to the practice which is apparently increasingly prevalent at Hartlepool of effecting discharge of timber cargo by means of shore cranes, but no separate question under this head arises in the present group of cases. The use of the cranes appears to have been acquiesced in by the shipowners' representatives.

As to the final allegation by the defendants of a custom for payment by the shipowner of an entire amount in respect of the whole series of operations in question, some further statement of fact is needed. The contention of the defendants is that according to trade usage,

which has become inveterate, shipowners discharging timber in West Hartlepool and in Sunderland under the charter-party used in these cases must accept liability for the payment of this entire sum as an accident of the contract of carriage. In some of the cases the defendants support their contention by reference to clauses, added to the standard form of charter, whereby the steamer is to " employ the charterer's stevedores, paying current rates only." No doubt a contract of carriage may be so framed as to throw upon the carrier liability for the usual local charges which would not otherwise fall upon him. The language of the clauses relied on here, however, is not such as to call the shipowners' attention to any other charges than those made locally for the services ordinarily rendered by the shipowner's agent. Assuming for the purposes of the case the possible validity under the charter in question of a usage such as the defendants set up, what is to be determined is whether there was at the material times a notorious certain and reasonable local usage such as is relied upon.

Certain relevant facts have been for many years well and generally known to timber importers and stevedores in West Hartlepool and Sunderland, and extensively known among local shipowners, brokers, and agents. Before the great war there was commonly inserted in charters for the carriage of timber to these ports, and perhaps to others, a clause which imposed upon the shipowner an allowance for cost of discharge of cargo at a fixed rate per standard; this amount varied, and might be for pit props, as I understand, 2*s*. or 2*s*. 6*d*. or thereabout; the expense covered by the agreed allowance included work of varying extent beyond that imposed by the general law upon shipowners, and if the charges now sought to be thrown upon the shipowner differ in extent from the charges which were thus provided for, I think they do not differ in character in any degree which calls for observation. During the War the carriage of timber became at an early period a controlled traffic, and the ordinary relations of shipowner to merchants were suspended. When control ceased stevedoring expenses, like most others, were found to have enormously increased; in place of 2*s*. or 2*s*. 6*d*. charges of 10*s*. or 12*s*. or more came to be dealt with, and at present the stevedores' charges for the entirety of the work here in question, may be taken to be of amounts from 5*s*. 3*d*. to 7*s*. 6*d*. per Gothenburg standard varying according to the incidence of the work done. One crucial question of fact in relation to the alleged mercantile custom now under consideration is that of the duration and notoriety of the alleged uniform practice of payment of the charges in question by shipowners or their agents as matter of obligation.

The plaintiffs relied greatly upon the practice of stevedores and firms acting as stevedores in the two ports of rendering to shipowners and their agents, upon all occasions, accounts for stevedores' work, calculating the amount charged for discharge of the cargo at a fixed sum per standard. Men of great business experience representing timber importers, stevedores, shipowners, brokers, and agents in the localities in question declared this note of charge to have been in common use for long periods, and to have been generally known to be a statement of the expenses *in toto* of the operations with cargo which are here in question. The defendants called also some witnesses from London and elsewhere, who spoke of their knowledge during long periods of years of the method of charge, and of the practice of payment of the whole account by shipowners. The plaintiffs, on the other hand, called two or three local witnesses of position and character, largely concerned in the trade in question who declared that they had never heard of the alleged custom, and described it as a process of requiring shipowners to pay goods-owners' expenses. The evidence satisfied me that until 1920 no controversy arose with regard to the matters in question, and that since that time the issues involved in the present cases have been raised on numerous occasions. In various instances local merchants, threatened with proceedings by foreign shipowners, have paid the sums in question to avoid litigation.

The pecuniary amounts involved in these disputes are not inconsiderable. The difference between the charge for pit props discharged to wagons and pit props discharged to quay is a difference of one-fourth of extra cost for the additional labour involved in carrying to and stacking upon an alloted quay space. The sums repaid by merchants under threat of proceedings in respect of receivers' proportion of costs of delivery have been of considerable and substantial amount.

The question whether upon the evidence before me I ought to find a business usage of binding authority whereunder shipowners are to be held bound in respect of the expenses in question, is not in their cases, nor is it in point of principle a mere question of usage among traders in the ports in question. The matter must be considered with respect to a far larger range of interests. The certainty of the usage is matter of local ascertainment. Notoriety and reasonableness must be determined upon broader grounds.

As to certainty it is to be observed that the expenses in question have only a superficial appearance of equality. A diversity of services is involved in the various methods of discharge. The consignee determines mode and place and to some extent burden of cost. So far as there are standard rates of charge they must be fixed with due regard to the extent and situation of the largest areas of allotted storage space.

As to notoriety the test of its sufficiency would be, I think, the area of the interests affected. Foreign as well as British shipowners are concerned, for example the ships here in question are all in foreign ownership. Further the accounts rendered by stevedores in respect of the charges in question do not

show on the face of them the inclusion of other than shipowners' expenses.

The reasonableness of the alleged usage is affected by the circumstances I have mentioned in discussing their certainty and notoriety.

On the whole I come to the conclusion that the usage as to payment on which the defendants rely is not such a certain, notorious, and reasonable usage as is admitted under our law to enlarge the effect or supplement the terms of a written contract. It is therefore not necessary for me to determine whether if the usage were made out it is contradictory of the terms of the several charters.

The net result of the conclusions at which I have arrived is: that the payments in question are not payments which the several plaintiffs were obliged to make by the terms of their charter-parties; that the charter-parties exclude the requirements by consignees of discharge of cargo by shipowners otherwise than alongside the ship; that the discharge to merchants allotted space, as I have described it, is incapable of being rendered by usage a discharge alongside, and that no custom or binding usage is established whereby the respective plaintiffs are brought under any obligation for payment of the disputed amounts.

With regard to discharges into trucks and discharges with consent of the carrier by shore cranes, it appears to me that the stage of the operation at which the shipowner is properly to be held to have completed his part of the discharge of the cargo is that at which timber landed by means of the wire sling is put at the disposal of the receiver by loosing of the sling. The cost of receiving and stowing falls upon the receiver.

For the reasons I have stated, there will be judgment for the plaintiffs for such amount in each case as may be determined by the referee or referees agreed upon by the respective parties.

Solicitors: *Botterell* and *Roche*, agents for *Botterell, Roche*, and *Temperley*, West Hartlepool; *Trinder, Kekewich*, and *Co.*

Tuesday, June 17, 1924.

(Before HILL, J.)

THE PRESIDENT VAN BUREN. (*a*)

Towage contract—Owners of vessel towed undertaking to indemnify the owners of the towing vessel for all classes of damage caused by collision or otherwise to their vessel or to or by the vessel towed, whether caused by negligence of the servants of the owners of the towing vessel—Owners of the towing vessel a harbour authority with sole right to supply tugs—Collision causing damage to both vessels—Liability of owners of vessel towed—Public policy.

A towage contract by which the defendants engaged the plaintiffs' tug to assist their vessel in dock provided that the master and crew of the tug should cease to be under the control of the plaintiffs during and for all purposes connected with the towage, and should become subject in all things to the orders and control of the master or person in charge of the vessel towed, and were the servants of the owners thereof, who thereby undertook to pay for any damage caused to any part of the plaintiffs' property and to bear, satisfy, and indemnify the plaintiffs against liability for all claims for loss or damage by collision or otherwise to the vessel or to or by the vessel towed, or to or by any vessel of any other person, or to the tug or tugs supplied, whether such damage, loss, or injury arose or was occasioned by any negligence of any servants of the plaintiffs. The plaintiffs were a statutory authority in control of the docks where the defendants' vessel was being towed, and they supplied all tugs for dock work and would not allow anyone except themselves to do the work.

A collision took place whilst the towage was in progress between the plaintiffs' tug and the defendants' vessel, in which damage was caused to both vessels. The defendants counterclaimed for the damage to their vessel.

Held, that the towage contract was valid and was not void as being against public policy; and, further, that the effect of the contract was that even if the collision was solely caused by the negligent navigation of the plaintiffs' tug the defendants were liable for the whole of the damage occasioned thereby.

TRIAL of preliminary issues.

The plaintiffs were the Port of London Authority, and they claimed for damage sustained by their tug *Sirdar* in a collision between the *Sirdar* and the defendants' steamship *President Van Buren* (formerly *Old North State*), which took place on the 24th April 1922 in the Tilbury Main Dock at a time when the *Sirdar* was engaged in assisting the *President Van Buren*, which was inward bound from New York to the Thames. The defendants, by their defence, denied negligence, alleged that the collision was solely caused by the negligence of those navigating the *Sirdar*, and counterclaimed for the damage sustained in the collision by the *President Van Buren*. The plaintiffs, by their reply, joined issue on the defence and further alleged that at all material times the *President van Buren* was being transported and the services of the *Sirdar* were supplied under an agreement dated the 24th April 1922, addressed to the plaintiffs' superintendent and signed on behalf of the agents for the defendants. By the terms of the agreement it was provided, *inter alia*, that:

> The masters and crews of the tugs and transport men shall cease to be under the control of the Port Authority during and for all purposes connected with the towage or transport and shall become subject in all things to the orders and control of the master or person in charge of the vessel or craft towed or transported and are the servants of the

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

owner or owners thereof who hereby undertake to pay for any damage caused to any of the Port Authority's property or premises and to bear satisfy and indemnify the Port Authority against liability for all claims for loss of life or injury to persons or loss or damage by collision or otherwise to the vessel or to or by the vessel or craft towed . . . or to the tug or tugs supplied whether such damage loss or injury arise or be occasioned by any accident or by any omission breach of duty mismanagement negligence or default of any of such masters crew or men or any servant of the Authority or any other person or from or by any defect or imperfection in the tug or tugs supplied or the machinery or ropes or tackle or any other part of them or any delay stoppage or slackness of the speed of the same however occasioned or for what purpose or wheresoever taking place or by any other cause of any kind arising out of or directly or indirectly connected with the towage or transport.

The defendants, by their rejoinder, denied the allegations set out in the reply, but upon their admitting that the contract of the 24th April 1922 set out in the reply was made an order for a preliminary trial of the action on the following issues was made: (1) Whether the agreement is valid and not void as against public policy; (2) whether, if those on board the *Sirdar* were negligent in (i.) solely causing or (ii.) partly contributing to the said collision the defendants nevertheless are not liable to the plaintiffs for the whole of the damage occasioned by the said collision on the assumption that the answer to issue (1) is in the affirmative.

Batten, K.C. and *Stenham* for the defendants contended that (1) the terms of the towage contract did not make the defendants liable for damage which they recovered from the plaintiffs under the indemnity clause; and (2) that the indemnity clause was bad as being against public policy.

Dunlop, K.C. and *Noad* for the plaintiffs, *contra*.

HILL, J.—In this case two preliminary questions of law have to be determined. The action is by the Port of London Authority, owners of the tug *Sirdar*; the defendants being the owners of the American steamship *President Van Buren*, which was formerly known by the name *Old North State*. The action arises out of a collision between the *Sirdar* and the *President Van Buren* at a time when the *Sirdar* was acting as one of the tugs engaged in the work of towing the *President Van Buren* in the Tilbury Main Dock. For the purposes of the two issues of law, it is assumed that there was negligence on the part of those in charge of the *Sirdar*, although, of course, the plaintiffs' case is that the negligence which caused the collision was solely that of those in charge of the *President Van Buren*.

There is a counterclaim by the defendants in respect of damage to their vessel on the basis that the collision was solely caused by those in charge of the *Sirdar*. But, assuming it should ultimately be found that there was negligence on the part of those in charge of the *Sirdar*, the plaintiffs set up a contract under which the *Sirdar* and a second tug were engaged by the agents of the owners of the *President Van Buren*; and they say that by the terms of that contract they are not liable for any damage done by reason of negligence of those in charge of the *Sirdar*, but that, on the contrary, though there might have been negligence on the part of those in charge of the *Sirdar*, nevertheless they are entitled to claim against the defendants in respect of the damage to the *Sirdar*. It was in these circumstances that the defendants asked that the two preliminary questions should be tried.

The first is whether the agreement set up by the plaintiffs is valid and not void as against public policy. The second is, assuming the agreement to be valid, whether, if the collision was solely caused or partly contributed to by negligence on the part of those in charge of the *Sirdar*, the defendants are nevertheless liable for the whole of the damage occasioned by the collision. The contract which was sent in and signed by Moxon, Salt, and Co. Limited, as agents for the owners of the *President Van Buren*, on the face of it, asked for the supply of tugs on the terms and conditions endorsed, which terms and conditions they agreed to be bound by. The conditions endorsed, so far as material, were in the following terms: "The masters and crew of the tugs and transport men shall cease to be under the control of the Port Authority during and for all purposes connected with the towage or transport and shall become subject in all things to the orders and control of the master or person in charge of the vessel or craft towed or transported and are the servants of the owner or owners thereof who hereby undertake to pay for any damage caused to any of the Port Authority's property or premises and to bear, satisfy and indemnify the Port Authority against liability for all claims for loss of life or injury to person or loss or damage by collision or otherwise to the vessel or to or by the vessel or craft towed or to or by any cargo or other thing on board the same or to or by any vessel cargo or property of any other person or persons or to the tug or tugs supplied, whether such damage loss or injury arise or be occasioned by any accident or by any omission, breach of duty, mismanagement, negligence or default of any of such masters, crew or men or any servant of the Authority or any other person or from or by any defect or imperfection in the tug or tugs supplied. . . . ."

Before considering the conditions, I should mention that the Port of London Authority are in control of the docks; that they own or hire the tugs used in the docks, the *Sirdar* being one of the tugs owned by them; that they supply all tugs for dock work and will not allow any outsider to do the work; and that wherever they do supply tugs they insist upon the terms contained in this contract. The United States Shipping Board, the defendants, had an appropriated berth in the Tilbury Dock

and were in the habit of using the Port Authority's tugs in that connection; and the *Sirdar* was one of the tugs they usually employed.

On the first point as to whether the agreement is valid and not void as against public policy, I think the answer on this matter is that which I have already expressed, namely, that the English law, in my view, very fortunately regards business men as capable of knowing their own business and of making contracts for themselves and is very unwilling to limit the power of capable people to make what bargains they like. In truth, as we know, a contract in this form, or in a practically similar form, has become for a good many years past of almost universal use by tug owners; and whether a tug owner supplies a tug on these terms or on terms which reserve liability to himself (where he does it) it is only a question of price. If he is to have no liability, he can do the work very cheaply; if he is to run all the risks, then of course his reward must be sufficient not only to compensate him for the work he does, but to cover the insurance and, in fact, all the risks he runs. I can conceive no principle of public policy which should lead the courts to say: "We ought to step in and say 'This or that contract ought not to be made by competent people,'" when the people making it are competent people. It is said that the Port of London Authority is a monopoly. It is said that everybody has a right to the use of the tugs on equal terms, but here, it is said, you cannot employ any other tugs than the Port of London Authority's tugs. There it is. If you do not like these terms and if they are too onerous, nobody forces you to use the Port of London Authority's docks. I do not like to enlarge upon it because it seems to me to be so clear that, if you are talking of public policy, the highest interest of public policy is that the law should not interfere with the transactions of business men when it can help it.

Mr. Dunlop has pointed out that there is a section—195, I think—in the Port of London Authority (Consolidation) Act 1920 which—I have not considered it, but I think very likely—may give any person, who feels himself aggrieved by being asked to enter into contracts of this kind, power to appeal to the Board of Trade, who may direct an inquiry; and it may be that if there is a grievance there is a means of getting the matter considered and remedied, if there is something to remedy.

The form of contract aims, in the first place, at making the master and crew of a tug for the time being the servants of the ship which is being towed; in the second place its aim is to deal with damage caused to the Port Authority's own property; and in the third place its aim is to deal with liabilities which may be incurred by the Port Authority by reason of damage to other people's property or to life. If the first section, which begins: "The masters and crews of the tugs" and ends "are the servants of the owner or owners" of the vessel towed, is effectual to do that which it sets out to do, it does not much matter what the rest of the conditions provide, because it will be that the Port of London Authority contemplates; and if it effectually makes the masters and crews of tugs servants of the ship which is being towed—servants for the time being—then it will follow that the owner of the tow cannot claim for damage brought about by people who for the time being are his own servants; and he must also be liable for damage caused to the authority's property by persons who for the time being are his servants, the servants of the owners of the tow.

I have considered Mr. Batten's criticism. I think that clause does do what it sets out to do; and I think it sets out in terms that for all purposes connected with the towage the masters and crews of tugs are the servants of the owners of the tow. I do not think that can be limited in the way Mr. Batten suggests. I think it provides that for the purposes of the towage and for all purposes connected with the towage they are the servants of the owners of the tow. That, I think, is enough to show that for any negligence of those in charge of the *Sirdar*—the master and crew of the *Sirdar*—the owners of the *President Van Buren* are liable to the authority, that is to say, for any damage to the *Sirdar*, and cannot themselves claim in respect of any damage done to the *President Van Buren*.

I think it is also made quite clear by what follows that the owners of the tow undertake to pay for any damage caused to any of the Port of London Authority's property or premises. Thinking, as I do, that a portion of the conditions deals with the Port of London Authority's own property and is in contrast with the following part which deals with the liability of the Authority to other people, I see no reason for excluding from the general description of the Port of London Authority's property their tugs; and, in my view, therefore, the owners of the tow, the *President Van Buren*, have undertaken to pay for damage caused to the Port of London Authority's property, the tug *Sirdar*.

In the third portion of the conditions they likewise undertake to bear loss or damage by collision to the vessel towed; and that includes all damage to the *President Van Buren*.

I must therefore answer the issues by finding (1) that the agreement is valid; and (2) that, if those on board the *Sirdar* were negligent by solely causing the collision or contributing to the collision, the defendants are liable to the plaintiffs for the whole of the damage occasioned by them. I think that is the right way to answer the question as it is submitted; and, that being so, there will be judgment for the plaintiffs on the claim and counterclaim.

Solicitors for the plaintiffs, *J. D. Ritchie*.

Solicitors for the defendants, *Thomas Cooper and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

July 11 *and* 17, 1924.

(Before BANKES, SCRUTTON, and ATKIN, L.JJ.)

THE JUPITER. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Possession — Writ in rem *— Intervention by foreign sovereign State—Motion to set aside writ—Jurisdiction.*

The courts will not entertain proceedings in rem *in which possession of a vessel is claimed, when a foreign sovereign State intervenes and applies that the writ may be set aside upon the ground that the vessel is its property, since such an action is in effect a proceeding in which a foreign sovereign State is impleaded, and is thus contrary to the comity of nations.*

The plaintiffs by a writ in rem *claimed possession of the steamship J. against " all persons claiming any right or interest in the said steamship." An appearance under protest was entered by the Union of Socialist Soviet Republics, who moved to set aside the writ, alleging that the J. was their property. The Union of Socialist Soviet Republics was recognised by the British Government as an independent sovereign State.*

Held, affirming Hill, J., that the Union of Socialist Soviet Republics was impleaded by the action, since the necessary result of the proceedings in rem *was to call upon the Soviet Government to assert its title and to have the question of the ownership or right to possession litigated in this country.*

APPEAL from a decision of Hill, J. setting aside the writ and all proceedings in an action *in rem* in which the plaintiffs, the Compagnie Russe de Navigation à Vapeur, claimed possession of the steamship *Jupiter*. The writ was addressed to " the steamship *Jupiter* and all persons claiming any right or interest in the said steamship."

An appearance was entered under protest by the Union of Socialist Soviet Republics, an independent sovereign State, who moved to set aside the writ and all subsequent proceedings upon the ground that the Union were the owners of the *Jupiter* by virtue of a decree of nationalisation dated the 26th Jan. 1918. The Union was recognised by the British Government as an independent sovereign State, and as such the Union refused to sanction the proceedings.

It appeared that the plaintiffs had formerly carried on business in Russia and in the Ukraine, but their head office was now stated to be in Paris. The *Jupiter* was a vessel registered at the port of Odessa in the Ukraine. In 1924 she was lying at Dartmouth where she had been laid up by her owners with a skeleton crew, consisting of the master, chief officer, and chief engineer. In March 1924, after the recognition by the British Government of the Union of Socialist Soviet Republics as the *de jure* rulers of those parts of the old Russian Empire which acknowledge their authority, including the Ukraine, representations were made to the master of the *Jupiter* by the agents of the Union Government in London to the effect that the Union Government were the owners of the *Jupiter* by virtue of the decrees made in Russia by which all Russian vessels were nationalised and became the property of the Union Government. The master accordingly handed over the ship's papers to the agents of the Union Government in London and flew the flag of the Union on the *Jupiter* in place of the old Russian imperial flag which he had previously flown, and he refused the plaintiffs access to the ship.

Affidavits were filed on behalf of the Union Government by their Chargé d'Affaires in London, from which it appeared that Odessa was within the jurisdiction of the Union Government, that the Union Government claimed that the *Jupiter* was their property and that it declined to submit to the jurisdiction of the court.

On the motion of the Union Government, Hill, J. set aside the writ and subsequent proceedings on the 29th May 1924.

HILL, J. read the following judgment.—By a writ *in rem* dated the 26th March 1924, and amended on the 14th April 1924, the plaintiffs sue, as Cie Russe de Navigation à vapeur et de Commerce, the owners of the steamship *Jupiter*, and give their address in the words: " whose head office is at 255, Rue St. Honoré, Paris, in the Republic of France." The writ is *in rem* against " the steamship *Jupiter* and all persons claiming any right or interest in the said steamship." The *Jupiter* is described as " of the Port of Odessa." The claim endorsed is as follows: " The plaintiffs as sole owners of the steamship *Jupiter* of the Port of Odessa claim to have possession decreed to them of the said vessel." No warrant of arrest has been applied for. The writ having been served on the *Jupiter*, which was and is lying at Dartmouth, an appearance under protest was on the 2nd April 1924 entered by " The Union of Socialist Soviet Republics." On the 9th April 1924 notice of motion to set aside the writ was given by " The Union of Socialist Soviet Republics." I shall henceforth describe " The Union of Socialist Soviet Republics " as " the Union." The grounds of the application as stated in the motion are " that the steamship *Jupiter* is the property of the Union of Socialist Soviet Republics, a recognised foreign independent State, and that the said State declines to sanction the institution of these proceedings in this court."

A number of affidavits were filed, and on one of them, sworn by the master, Captain Lepine, the plaintiffs cross-examined the master. In my judgment, however, the facts upon which

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

this motion must be decided are few and simple and beyond dispute.

(1) As admitted and as shown by the letter of the Foreign Office addressed to the solicitors of the Union and the copy documents sent therewith, the Crown, the Sovereign of this court, recognises the Union as the *de jure* rulers of these territories of the old Russian Empire which acknowledge their authority. I am bound therefore to treat the Union as an independent Sovereign.

(2) As appears from the affidavit of M. Rakovsky, the Chargé d'Affaires in Great Britain for the Union, the Ukrainian Socialist Soviet Republic is one of the members of the Union. It is not disputed that Odessa is in the territory of the Ukranian Socialist Soviet Republic, nor that the Ukraine, including Odessa, formed part of the territories of the old Russian Empire. It follows that Odessa is within the territorial sovereignty of the Union, and that the *Jupiter*, which the plaintiffs say is of the port of Odessa, and as to which it is not suggested that she has ever acquired any other port of registry or any new nationality, is a ship of which the port of registry is within the territorial sovereignty of the Union. The Union is the Russian Sovereign and the *Jupiter* is a Russian ship.

(3) M. Rakovsky, as Chargé d'Affaires in Great Britain for the Union, asserts in his affidavit that the Union is "entitled to the ownership" of the *Jupiter*. It is clear from the rest of the affidavit that by the words "is entitled to the ownership" is meant "is the owner," In the affidavit of M. Rabinovitch it is stated that the *Jupiter* "is the property" of the Union. The motion to set aside the writ is based on the assertion that the *Jupiter* is the property of the Union.

(4) The writ is a writ *in rem*, that is to say, it is a writ directed primarily against the ship and, secondarily through the ship, against all persons claiming any right or interest in the ship. If the writ stands, the plaintiffs will be entitled to obtain a warrant of arrest. If the writ stands and there were no appearance and judgment went by default, the judgment, whatever else it decreed, would condemn the ship in costs. This is enough to show that a writ *in rem*, whatever the relief claimed, is a writ directed against the property in the ship. It is also a writ which compels the owner either to appear and submit to the jurisdiction or to allow judgment against his property to go by default.

In these circumstances, the ship being Russian and the Russian Sovereign asserting property in her, and being unwilling to submit to the jurisdiction of this court, this court has no jurisdiction to entertain proceedings against that property or to investigate the assertion that the ship is the property of the Russian Sovereign. I might quote *The Parlement Belge* (4 Asp. Mar. Law Cas. 234; 42 L. T. Rep. 273; (1879) 5 P. 197) and other cases, but I will content myself with quoting the language of Scrutton, L.J. in *Sagor's* case (reported 125 L. T. Rep. 705, at p. 715; (1921) 3 K. B. 532, at p. 555) which, to my mind, is exactly applicable if you substitute for the words in that case "which it exported from its own territory," the words "which is registered in a port in its own territory." Scrutton, L.J. said: "If M. Krassin had brought these goods with him into England, and declared on behalf of his Government that they were the property of the Russian Government, in my view no English court could investigate the truth of that statement." And, again: "I cannot conceive the courts investigating the truth of its allegation that the goods in question, which it exported from its own territory, are its public property" (see also *Vavasseur* v. *Krupp* (39 L. T. Rep. 437; (1878) 9 Ch. Div. 351). That I may not be misunderstood, I should add that I am here dealing with a ship of which the port is, by admission, Odessa. I am not deciding whether or not I should be bound by the assertion of the Government of the Union in respect of a ship which was not Russian, as, for instance, if the *Jupiter* had acquired a French registry, supposing such a thing to have been possible. My decision is as to a ship which is Russian, and, therefore, *primâ facie*, subject to Russian law in regard to title and transfers of ownership. Such being the grounds of my decision, I will only add that most of the argument addressed to me, and a great part of the affidavits are irrelevant to the only issue before me. I cannot go into the merits of the question whether the nationalisation decree of the 26th Jan. 1918, applied or has since been applied to the *Jupiter*. Nor, on the other hand, is it material to consider whether the master, who was a custodian for the plaintiffs, rightfully or effectively transferred possession to the Union. Mr. Jowitt contended that the plaintiffs, for the purposes of this action, were not concerned with the property in the ship—they only wanted to be put in actual possession of a ship of which they had never lost the right of possession. But they are seeking an order for possession by a proceeding *in rem*, a proceeding against the property. It is, to my mind, quite immaterial what the relief claimed may be. The material consideration is that the action is *in rem* against a ship the property in which is asserted by an independent Sovereign, recognised as such by the Crown, to be in that independent Sovereign, the ship being registered in or belonging to a port within the territory of that independent Sovereign.

For these reasons, I must grant the motion and set aside the writ.

The plaintiffs appealed.

Jowitt, K.C. and *Langton* for the appellants. —The principle upon which immunity is claimed has its basis in the comity of nations, and it cannot be applied where the claim to immunity arises from a breach of trust, such as that by which the present plaintiff was deprived of possession. In these proceedings it is not sought to deprive the Soviet Government of their alleged ownership; all that is sought is that the plaintiffs may be put back into

possession: the plaintiffs have, indeed, never lost *de jure* possession, since the wrongful act of the master was incapable of depriving the plaintiffs of their right to possession. Acts of sovereignty are not recognised in the territorial waters of another Sovereign:

The Santissima Trinidad, 1822, 20 U. S. 283, 352;

Russian Bank for Foreign Trade v. *Excess Assurance*, 14 Asp. Mar. Law Cas. 362; 119 L. T. Rep. 733; (1919) 1 K. B. 39.

The Soviet cannot become owners of the *Jupiter* except by the exercise of an act of sovereignty, and for the above reason such an act would be void; a claim to requisition the *Jupiter* would have been void. It is not conclusive that the vessel is now flying the Soviet flag: (see *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Company*, 5 Asp. Mar. Law Cas. 65; 1883, 48 L. T. Rep. 546; 10 Q. B. Div. 521). This case differs from the cases dealing with immunity which were cited in the court below, in that, in the present case, possession and not ownership is in dispute. *The Annette* (1919) P. 105) is a possible exception, but it is submitted that this case is distinguishable. Counsel referred to:

The Porto Alexandre, 15 Asp. Mar. Law Cas. 1; 122 L. T. Rep. 661; (1920) P. 30;

The Parlement Belge, 4 Asp. Mar. Law Cas. 234; 42 L. T. Rep. 273; (1880) 5 Prob. Div. 197.

The Gagara, 14 Asp. Mar. Law Cas. 547; 122 L. T. Rep. 498; (1919) P. 95;

The Tervaete, 16 Asp. Mar. Law Cas. 48; 128 L. T. Rep. 176; (1922) P. 259.

Dunlop, K.C. and *Dumas* were not called on.

BANKES, L.J.—This appeal raises the question whether or not the learned judge was right in setting aside a writ in an action *in rem*, which the plaintiffs, a French company describing themselves as the owners of the steamship *Jupiter*, issued against "the steamship *Jupiter* and all persons claiming any right or interest in the said steamship."

We know from the affidavits the circumstances under which the plaintiffs are claiming that this vessel is their property. In order to assert that claim they have elected to take proceedings *in rem*. It is a procedure in which the writ is directed to all persons claiming any right or interest in the steamship; and the only persons who have appeared are the Soviet Government who claim to be the owners of the vessel and who protest against the exercise by the courts of this country of any jurisdiction over them; and they appear under protest.

The motion to set aside the writ was served and came before Hill, J., and he has set aside the writ, in my opinion rightly, and on the ground which he expressed, I think quite accurately, in *The Gagara* (14 Asp. Mar. Law Cas. 547; 122 L. T. Rep. 498; (1919) P. 95). There the action was commenced *in rem*, and the effect of the action is described by the learned judge in these words: "In the first place the Esthonian Government is in actual possession of the ship; and that Government states that the ship is being used by it for public purposes. . . . The plaintiffs invite the court to take that possession away by arrest of the ship and ultimately by decree to transfer it to the plaintiffs." In substance that is exactly what the plaintiffs are seeking to do here. Then he goes on: "But to permit the arrest is to compel the Esthonian Government, either to submit to the jurisdiction of the court or to lose their *de facto* possession, and to compel the Esthonian Government to submit to this court the question of the ownership of *The Gagara*."

In my opinion that is contrary to all the principles upon which this court has acted where a claim is made by a duly recognised independent sovereign State. It seems to me that the necessary result of these pleadings is to call upon the Soviet Government to assert its title and to have the question of the ownership, or the right to possession of this vessel, impleaded in the courts of this country. That is not admissible. I think the judgment of Hill, J. is quite right, though I do not attach the importance which he does to the fact that this vessel was registered at Odessa.

SCRUTTON, L.J.—A writ *in rem* is issued by a company with a French name, "which at any rate it is not a company registered under the English Acts," addressed to the steamship *Jupiter* which is a steamer now lying in English waters, and "all persons claiming any right or interest in the said steamship." Whereupon an application is made to this court by the Union of Socialist Soviet Republics to set aside the writ on the ground that the *Jupiter* is the property of the Union, a recognised foreign independent State. It is agreed that the Union has been recognised *de jure* and *de facto* by the British Government.

Now, it appears to me, without going any further, without investigating whether the claim is good or bad, that the court on having that statement made to it must decline jurisdiction.

There was some obscurity as to the nature of a writ *in rem* in Admiralty, but since the judgment of Sir Francis Jeune in *The Dictator* (7 Asp. Mar. Law Cas. 251; 67 L. T. Rep. 563; (1892) P. 304), which was affirmed by this court in *The Gemma* (8 Asp. Mar. Law Cas. 585; 81 L. T. Rep. 379; (1889) P. 285) that obscurity has been cleared up. By the old practice of the Admiralty Court the appearance of a person interested in property used to be enforced either by seizing him to make him appear, or by seizing his ship, or by seizing his property other than his ship—but the object of all the processes of seizing was to make the man appear so that he might be a personal defendant to the action. If he did appear, he at once became personally liable to the judgment of the court. If he did not appear, the court, having given him the opportunity of appearing, might take away his

property. This writ being addressed to the steamship *Jupiter* and all persons claiming any right or interest in the steamship, the foreign Government which does claim a right or interest in the ship must do one of three things. First, it may appear to defend, but it cannot be compelled to appear; secondly, if it were not to appear, and let the action go on, the court might feel able to forfeit the property of a foreign Sovereign; thirdly, it can simply come to the court and say, "I am not going to discuss what my title is; I say I am a foreign Sovereign; I claim a right in this property, and you cannot compel me to come to your court to show you that I have good cause for saying that it is my property."

I think that the law is accurately stated by Mr. Dicey. He says: "The court has no jurisdiction to entertain an action against any foreign Sovereign. Any action against the property of a foreign Sovereign is an action or proceeding against such person." (Conflict of Laws, 3rd edit., p. 215). On that ground, without going into any discussion as to whether the claim is right or wrong, without basing my decision on the fact that the port of registry of the ship is Odessa, without discussing whether the result at which the plaintiffs in this case are aiming can be achieved by another method, this particular method appears to me to violate the principles of international comity and to make a foreign Sovereign appear in these courts as defendant to defend what he alleges to be his property. Consequently it should be set aside.

I desire to reserve the question whether under any circumstances the Admiralty Court would entertain an action for possession between foreigners except in a case where the foreign Sovereign consented. The matter is discussed in *The Annette and The Dora* (1919) P. 105), where the foreign Sovereign consented because he was one of the parties; but according to the old practice of the court I do not think that the Admiralty would have such an action. However, I am content to rest my decision in this case on the fact that this writ requires a foreign Sovereign to appear in these courts to defend what he alleges to be his property, and by the principles of international comity, the courts of this Kingdom do not allow such steps to be taken against foreign Sovereigns.

ATKIN, L.J.—The plaintiffs in this case are a company who appear to have been registered in Russia, and to have had property at one time in a ship called the *Jupiter*. The *Jupiter* was registered at the port of Odessa—though this appears to me to be quite an irrelevant fact to the decision which I, at any rate, am going to give.

The *Jupiter* left Odessa in the year 1919 and since then has been in waters other than Russian territorial waters in the possession of the plaintiffs through their servant the master of the ship; and for the last year or year and a half has, in fact, been lying in British territorial waters at Dartmouth. It appears that at the beginning of this year the Russian Soviet Government induced the master of the ship to repudiate the possession and ownership of the plaintiffs and to hold the ship for them, and the master procured a provisional registration from the Russian Consul which is a different registration from the registration at Odessa.

Those being the facts, the plaintiffs issued their writ *in rem* against the steamship *Jupiter* and all persons claiming any right or interest in the said steamship. It is quite plain from these facts (*a*) that the plaintiffs intended all persons claiming any right or interest in the said steamship to include the right of the Russian Soviet Government who are the only people who claim to have any rights and whose claim has given rise to these proceedings; and (*b*) it is quite certain that "all persons claiming any right or interest in the ship" did in fact include the Russian Soviet Government. Therefore it is quite plain to my mind that this writ so addressed to these persons and commanding them within eight days after the service of the writ to cause an appearance to be entered, is a writ by which the British courts purport to exercise jurisdiction over a sovereign independent State. It also is quite plain upon the authorities that the British courts have no jurisdiction to do any such thing, and that when such a writ is issued it is the right of a foreign Sovereign in these courts to apply to have that writ set aside. That is the motion which has been made here; and to my mind it must be acceded to.

It is on those simple grounds that I, and I think the rest of the court, determine this appeal. We do not determine it on the footing that this ship is in fact the property of the Russian Soviet Government. That may or may not be the fact. We do not determine it on the ground that as the Russian Soviet Government claims the ship as their property, that that is conclusive proof in these courts that it is their property. These questions do not appear to me to be necessary for the decision of this appeal and I certainly do not decide it on that ground. I decide it on the simple ground that this process by the very nature of it is an attempt to implead the Russian Soviet Government, and the court has no jurisdiction to do that. I think, therefore, that the appeal should be dismissed.

Solicitors for the appellants, *William A. Crump* and *Son*.

Solicitors for the respondents, *Wynne-Baxter* and *Keeble*.

Thursday, July 31, 1924.

(Before Sir Ernest Pollock, M.R. and Sargant, L.J.)

The Arraiz. (*a*)

On appeal from the Admiralty Division.

Collision—Procedure—Action not brought within two years—Extension of time—Maritime Conventions Act 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *s.* 8.

By sect. 8 *of the Maritime Conventions Act* 1911 *no action is maintainable by the owners of any vessel to enforce a claim in respect of damage to such vessel occasioned by the fault of another vessel unless proceedings are commenced within two years from the date of the damage; provided that the court may extend such time as it thinks fit, and shall if satisfied that there has been no reasonable opportunity of arresting the defendant's vessel within the jurisdiction during the period, extend the time so as to give such opportunity.*

Held, that the whole proviso was applicable to actions in rem *and* in personam *alike, and that the court could therefore at its discretion extend the time for bringing an action* in rem *notwithstanding that there had been an earlier opportunity of arresting the defendant's vessel.*

Appeal from a decision of Hill, J. granting the plaintiffs leave to maintain an action in respect of a collision which took place in New York Harbour on the 19th Feb. 1918 between the steamship *San Jacinto*, belonging to the plaintiffs, the United States Shipping Board, and the defendants' steamship *Arraiz*. Both vessels sustained damage.

The following statement of facts is taken from the judgment of Sir Ernest Pollock, M.R.:

"On the 1st July 1918 the owners of the *Arraiz* (appellants) took proceedings *in rem* in the New York District Court against the respondents. After that date the *Arraiz* was in various ports in American waters; and it was not until the 4th Oct. 1920 that she left those waters and traded to England. On the 2nd Feb. 1921 the Shipping Board filed a cross-claim both *in rem* and *in personam.* On the 18th Feb. of that year the Shipping Board demanded security for their cross-claim; and an order was made on the 18th March requiring security to be given. In other words the proceedings instituted by the *Arraiz* were stayed until security was given. Those proceedings came to a deadlock. The *Arraiz* did not give security; and on the 17th Aug. 1923 an order was made without opposition discontinuing the action of the *Arraiz.* Thus, up to the 17th Aug. 1923 there were proceedings pending by claim and cross-claim in the District Court.

"On the 16th April 1924 an order was made by Hill, J. giving leave to the Shipping Board to maintain an action against the *Arraiz;* and the writ was issued on the 23rd June. On the 1st July a notice of motion was given to discharge the order giving leave to the respondents to maintain the action; and on the 7th July Hill, J. dismissed that motion and confirmed the leave given."

By sect. 8 of the Maritime Conventions Act 1911 (1 & 2 Geo. 5, c. 57) it is provided as follows:

8. No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight or any property on board her or damages for loss of life or personal injuries suffered by any person on board her caused by the fault of the former vessel whether such vessel be wholly or partly in fault or in respect of any salvage services unless proceedings in respect thereof are commenced within two years from the date when the damage or loss or injury was caused or the salvage services were rendered. . . .; Provided that any court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of court, extend any such period to such extent and on such conditions as it thinks fit, and shall, if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court, or within the territorial waters of the country to which the plaintiff's ship belongs or in which the plaintiff resides or has his principal place of business, extend any such period to an extent sufficient to give such reasonable opportunity.

Dunlop, K.C. and *G. P. Langton* for the appellants.—It is submitted that there was no jurisdiction to extend the time in this case; if there was jurisdiction, then it is submitted that the judge wrongly exercised the discretion granted to him by the statute, because there is in the present case no material upon which the discretion could properly be exercised. As to jurisdiction: the permissive part of the section has application only to an action *in personam;* the obligatory part only to an action *in rem.* Therefore if there has been an opportunity within the specified period of arresting the vessel in accordance with the conditions provided in the statute, the judge has no power to extend time at his discretion under the permissive part of the section. *The Dorie Steamship Company Limited, Petitioners* (1923, S. C. 593) is an authority for this interpreation of the section. As to discretion, the rule upon which the court should act is clearly stated by Hill, J., and approved by the Court of Appeal, in *The Kashmir* (16 Asp. Mar. Law Cas. 82; 128 L. T. Rep. 681; (1923) P. 85), following *The James Westoll* (*infrà;* (1923) P. 94n), namely, that it is upon the plaintiff, who comes to have his time extended, to show that there are substantial reasons why the defendants should be deprived of the right to limitation which the law gives. It is submitted that there were no such substantial reasons in the present case. There were, for instance, many opportunities of arresting the *Arraiz* in England subsequently to Nov. 1920 when an application to extend time could have been made. The Shipping Board preferred to adopt a passive attitude, notwithstanding that after the suit of the Spanish owners had been dismissed they were in position of plaintiffs.

(a) Reported by Geoffrey Hutchinson, Esq., Barrister-at-Law.

Bateson, K.C. and *Stenham* were not called upon.

Sir ERNEST POLLOCK, M.R. (after stating the facts as above set out) said: Sect. 8 of the Maritime Conventions Act 1911, which carries out the convention entered into at the conference in Brussels in 1910, provides that no action shall be maintainable unless proceedings are commenced within two years from the date that the damage was caused; and it is pointed out by Mr. Dunlop that in the present case, as the collision took place in Feb. 1918, and proceedings were not commenced until the 23rd June 1924, the case is obviously outside that provision. It is said that it is a matter of hardship to allow proceedings to be commenced after so long a period when witnesses have disappeared and the knowledge of what took place is difficult to obtain; and sect. 8 was a most reasonable limitation to obviate the difficulties which must arise when proceedings are so long delayed.

All that is quite true: but to the section there is a proviso. It is in two parts; and the first says that the court may extend the period to such an extent and on such conditions as it thinks fit. Now it seems to me that those words give the widest possible discretion to the court.

The second part of the proviso says that the court shall if satisfied in a particular way extend the period to an extent sufficient to give a reasonable opportunity to arrest the ship.

Mr. Dunlop has argued as if that proviso ought to be read as if there were an antithesis between its two limbs; but I do not think there is any antithesis between them. I think the discretion given is intended to be wide and to extend to all the matters which have been dealt with in the first part of the section. It is added that if certain conditions are satisfied then the discretion of the judge must be exercised in a particular way. There is no contradistinction between the two parts of the proviso, but the second part is cumulative and gives an indication of how the discretion rightly falling within the earlier part of the proviso is to be exercised.

In the present case the judge has said that the second part of the proviso is not satisfied by the facts; and therefore the question he had to decide was whether he found reason to extend the period. It is said by Mr. Dunlop that there is abundant evidence that the Shipping Board were guilty of want of diligence and that inasmuch as the appellants are *primâ facie* entitled to immunity after two years it is wrong to rob them of that in a case where you find that there has been no diligence on the part of those bringing the proceedings. I think it is quite plain that in a case binding upon this court, and with which I agree, the opinion is expressed that the proviso does give a wide discretion to the judge; and unless there is some reason for interfering with it or if the discretion has not been exercised judicially, it ought not to be interfered with. In the case of *The Kashmir* (16 Asp. Mar. Law Cas. 81; 128 L. T. Rep. 681; (1923) P. 85) Lord Sterndale said: "We ought not to interfere with the judge's discretion except upon strong grounds. I think the judge has proceeded upon no incorrect principle and we ought not to interfere with his discretion." I think he meant to say that it is a matter of discretion, and unless this court can say that the judge has acted upon and applied some incorrect principle, this court ought not to interfere. And I think he meant to add that in deciding that an incorrect principle has been adopted there ought to be strong grounds for thinking so. Lord Sumner in the case of *The James Westoll* (*infrà*); (1923) P. 94n) said that the exercise of the power ought not to be interfered with unless the judge were shown to have exercised his discretion on any wrong principle.

It seems to me that those cases, which are binding on this court, show abundantly that this proviso gives a wide jurisdiction to the judge to exercise his discretion.

Hill, J., as I think, exercised his discretion upon proper principles and did not apply any principle which ought not to have been adduced for arriving at his decision. He has decided the matter upon these grounds. He finds that there were proceedings pending between the parties which were alive down to the 17th Aug. 1923; and he indicates a possible reason why the proceedings were not brought to a conclusion earlier. At any rate, it is not clear why the proceedings were so protracted; but the outstanding feature in his mind and in my own is that down to Aug. 1923 there were proceedings by both parties. The judge says that, that being so, if they had come to him in Sept. 1923 he would have thought it right to give leave, and he asks himself this question, "Is the fact that they came in April and not in Sept. a reason why I should refuse to exercise my discretion in their favour?"; and he comes to the conclusion that there is no such ground for refusing leave. It appears to me that the judge has exercised his discretion within the proper limits and upon proper principles; and it is not for us to interfere with a discretion properly exercised.

Therefore the appeal must be dismissed, with costs.

SARGANT, L.J.—I am of the same opinion as to the effect of the proviso. There is no solid foundation for the argument that the discretion extends only to actions *in personam* and not to actions *in rem*. The words of the proviso make it apply to any action to which the section relates. There was ample material in this case on which the judge might exercise his discretion in the way he did; and no case has been made that he exercised it on a wrong principle. Having heard the judgment read, I think that the judge exercised his discretion carefully and wisely.

Solicitors for the appellants, *Thomas Cooper and Co.*

Solicitors for the respondents, *Godfrey, Warr, and Co.*

COURT OF APPEAL.

Oct. 31, 1913.

THE JAMES WESTOLL.

APPEAL by Hind, Rolph, and Co., time charterers of the steamship *Bannockburn*, from the refusal of Bargrave Deane, J. to give them leave to commence proceedings against the owners of the late steamship *James Westoll* in respect of loss of freight. On the 2nd March 1911 a collision took place in the English Channel between the *Bannockburn* and the *James Westoll* in respect of which cross-actions were instituted by ship and cargo owners. These actions were settled under an agreement dated the 10th May 1911, which was duly lodged and made an order of the court. On the 27th May 1913 Messrs. Hind, Rolph, and Co. notified the owners of the *James Westoll* that they had a claim and applied to Bargrave Deane, J. in chambers for leave to institute the action. The learned judge refused to give leave under the discretionary power vested in the court under sect. 8 of the Maritime Conventions Act and the applicants appealed.

Lord PARKER (after stating that the Maritime Conventions Act was passed to give statutory effect to certain conventions which had been made between H.M. Government and certain foreign countries and that he assumed that sect. 8 was one of the sections designed to effect those agreements, continued as follows :) The applicant in the present case was time charterer of the steamship *Bannockburn* which was injured in a collision with the *James Westoll* on the 2nd March 1911—*i.e.*, before the Act which I have cited came into operation. No proceedings were commenced in respect of loss of freight which the applicant suffered by reason of the collision, and no notice of any claim in that respect was given to the owners of the *James Westoll* until the 27th May 1913, two months after the statutory period had elapsed. The proposed plaintiff now comes and asks for extension of time in which to commence an action to recover damages. He appeals to the discretionary power of the court under the first part of the proviso. It appears to me that what the court has to do is to consider the special circumstances of the case and see whether there is any real reason why the statutory limitation should not take effect. I have carefully read the affidavit which has been filed and really it only amounts to this, that it was not until a comparatively recent date, namely, April 1913, that the amount of the claim could be ascertained. I think that it is not a sufficient reason. I think long before two years had elapsed the proposed plaintiff must have known he was in a position to make some claim and there was plenty of time during which the claim ought to have been made. It appears to me therefore that he suffers no injustice by reason of the section. On the other hand it is quite possible that if we were to allow the action, which is statute barred, to proceed, the defendants might suffer serious inconvenience and injustice. Therefore it appears to me that no case has been made out for the exercise of this discretionary power. I should observe also that I do not think we ought in a case of this sort to interfere with the discretion exercised by the judge at first instance unless we are clearly of opinion that he has made a mistake or has been influenced by some wrong principle of law or misconception with regard to the facts of the case. In my opinion the appeal should be dismissed.

Lord SUMNER.—I am of the same opinion. The exercise of the power to extend the period mentioned in the first part of the proviso is a discretionary exercise, and I think the learned judge is not shown to have exercised his discretion on any wrong principle. On the contrary I think he exercised it rightly.

WARRINGTON, J.—I agree.

Friday, Dec. 5, 1924.

(Before BANKES, SCRUTTON, and ATKIN, L.JJ.)

THE PALUDINA. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Collision — Consequential damage—Second collision — Whether a consequence of the first—Onus of proof.

There is no presumption of law or fact that any damage arising to a ship subsequent to a collision must be deemed to be the result of that collision unless the defendant proves the contrary ; the observations in The Mellona (1847, 3 *W. Rob.* 7, 13) *and* The Pensher (1857, *Swa.* 211), *in which the contrary is suggested by Dr. Lushington, must be taken to be confined to cases where the damage that follows the collision is of such a kind, and follows so immediately—e.g., stranding—that unless it is proved that there is some other cause, it is to be assumed that the damage was directly caused by the negligence.*

APPEAL from a decision of the President (Sir Henry Duke, P.) in an action for damage by collision.

The plaintiffs were the owners of the steamship *Singleton Abbey*, 2324 tons gross and 1429 tons net register, 303ft. in length ; and the defendants were the owners of the steamship *Paludina*, 5818 tons and 341 tons net register, 425ft. in length.

The facts fully appear from the judgment of the President.

May 5, 1924.—Sir HENRY DUKE, P.—"On the evening of the 21st Nov. 1922 the plaintiffs' vessel, the *Singleton Abbey*, and the defendants' vessel, the *Paludina*, came to moorings at the Fish Market Quay in the Grand Harbour at Valetta. There was fine weather ; each of them was in charge of a pilot ; they took up their moorings under conditions which have been described, and there was nothing to prevent their taking up moorings at which they might remain in safety during the period in which their presence was required at that place. However, the wind changed during the night and it became a stormy morning. There was weather about which there is a great deal of discrepancy in the evidence, but what may be called—from a landsman's point of view—bad weather, disagreeable weather, and in the course of the morning of the 22nd, before midday on the 22nd, a very remarkable chapter of misadventures had developed itself. At eight o'clock the *Paludina's* starboard bow had come into contact with the *Singleton Abbey's* port

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

bow, and it remained in contact upwards of three hours. Some damage was suffered, but no cause of damage developed which was sufficient to make the matter a serious collision until after eleven o'clock. That was collision number one in this case, a collision which was attended with but small damage on either vessel. At eleven o'clock the *Paludina* with the assistance of two tugs began a series of manœuvres for the purpose of getting to windward—coming away from her anchorage and moorings at the quay, and taking up a position affording a better shelter. At about half-past eleven, or shortly after half-past eleven, the *Paludina* fell down bodily upon the *Singleton Abbey*. She was, by the use of her own steam and with the assistance of a Government tug, brought alongside of the *Singleton Abbey* under port helm, and cleared the stem of the *Singleton Abbey*, but, thereupon, by reason of the strong wind, she fell across the cables of the *Singleton Abbey*, and, by shortening the cables of the *Singleton Abbey*, in that way no doubt caused the *Singleton Abbey* to come ahead and to drag away from her moorings. The *Singleton Abbey* thereupon fell down upon another vessel, the *Sara*, which was to leeward, and broke away the *Sara* from her moorings, and the *Sara* subsequently—but after an interval of a quarter-of-an-hour or twenty minutes—in the course of manœuvring, got up her anchors to bring herself into a position of safety, came under the stern of the *Singleton Abbey*, and brought her side into contact with the propellors of the *Singleton Abbey*, and received such injuries that the *Sara* sank. The damage and loss, due to the sinking, resulting to the owners of the *Sara* are not in question ; but, by the collision which sank the *Sara*, the propeller of the *Singleton Abbey* was damaged to a substantial extent, the blades were broken away, and that is another collision in respect of which damages are claimed. There was a collision of the bows of the *Singleton Abbey* and the *Paludina*, when the *Paludina* fell down bodily upon the *Singleton Abbey* ; a collision of the *Singleton Abbey* with the *Sara* in which little damage was done, though the *Sara* was broken adrift, and a collision of the *Sara* with the propeller of the *Singleton Abbey* by which the *Sara* was sunk and the propeller of the *Singleton Abbey* was damaged. Those are the several matters which are in question in the case, and, as Mr. Stephens has said, they are proper to be dealt with with due regard to the facts affecting each of them." [The learned President dealt with the three first collisions, for which he found the *Paludina* alone to blame, and continued :]

What remains is the second collision with the *Sara*. As to that collision with the *Sara*, I have felt some difficulty, considering it as a legal problem. The master of the *Singleton Abbey* gave evidence with entire frankness on the subject. He described how, using his best judgment and in exceedingly difficult circumstances, having the risk of going ashore to leeward by one cause, or of coming into collision with the *Sara* by another cause, he used his engines until the first officer, who was keeping observation aft, gave him word to discontinue the use of his engines. He said quite frankly that a few seconds would have avoided it. He said also that the *Sara* did not appear to him to have steam, or to be using her steam, and a quarter of an hour or twenty minutes elapsed from the time he was clear of the *Sara* to the time when this second collision occurred. I have not had any evidence from the *Sara*, and I have to consider whether the machinery of mischief having been set in motion by the defaults, as I consider, of the defendants, they free themselves from liability for this collision by showing that there was an intervening negligence on the part of the *Sara* or of the *Singleton Abbey* or of both of them. That is a mixed problem of fact and law. If there is a case which is before me which shows that it was the negligence of the *Sara* which produced this collision, then obviously the owners of the *Paludina* ought not to be visited with the costs of repairing the damage to the *Singleton Abbey*. I have consulted the Elder Brethren about that matter more than once, and the Elder Brethren tell me that in the state of things which I have described they cannot say that the *Sara* was to blame for this collision—that they cannot tell me why it probably was that the *Sara* was not able to avoid the propeller blades of the *Singleton Abbey*. I have come to the conclusion that the defendants have not established that this second collision was due to the negligence of those in charge of the *Sara*. The *Sara* was put in a position of peril and difficulty, and those on board of her were exerting themselves to release their ship from that position and they failed and the ship was sunk ; but the facts as they stand, upon the advice I have had, do not satisfy me that that was the fault of those on board of the *Sara* or that it was due to any negligence of theirs.

As to the master of the *Singleton Abbey*, I came to the conclusion, on the advice of the Elder Brethren, after I had heard him, that he did his best under circumstances of great difficulty, and that his action in using his engines as he did was action which he might properly take under the circumstances—action which involved peril, but taken for the purpose of saving his ship from a greater peril. . . . I The net result of the conclusions at which I have arrived is that the *Paludina* was to blame for these successive collisions, and that the *Singleton Abbey* was not to blame."

The defendants appealed against the judgment in so far as it pronounced that the *Paludina* was to blame for the last of the collisions, namely, the second collision between the *Singleton Abbey* and the *Sara*.

Butler Aspinall, K.C., *Stephens*, K.C., and *Langton*, for the appellants, contended that the second collision with the *Sara* was not the consequence of the collisions for which the *Paludina* had been found to blame, and that the onus of proving that it was rested upon the plaintiff and had not been discharged.

Dunlop, K.C. and *Noad* for the respondents. —Reference was made to *The Linda* (1857, Swa. 306), *The George and Richard* (1 Asp. Mar. Law Cas. 50 ; 1871, 24 L. T. Rep. 717 ; L. Rep. 3 A. & E. 466), in addition to the cases cited in the judgments.

Bankes, L.J.—This appeal has reference only to what has been referred to as the last collision of several which occurred on the day in question, the collision between the *Sara* and the *Singleton Abbey*. That collision was the result of something which happened a considerable time before, and it is necessary to refer to those circumstances in order to lead up to the point which this court has to decide. [His Lordship stated the facts and continued :] The question we have to decide is whether the learned President was justified in coming to the conclusion, after taking the advice of his assessors, that the damage which is the subject of this appeal was directly caused by the original negligence of the *Paludina*.

Something has been said to us about the burden of proof. I entirely adopt what Hill, J. said in *The Waalstroom* (1923, 17 Ll. L. L. Rep. 53), to which I will refer in a moment. It seems to me that the plaintiff must always show, in a case in which he complains of damage resulting from negligence, that the negligence was the direct cause of the damage. In some cases a considerable interval may elapse between the time when the negligence is said to have occurred and the time when the damage is said to have resulted. In those cases I think the onus lies upon the plaintiff to show that the chain of causation connecting the damage with the negligence is complete. He may give evidence which, if not challenged and in reference to which no suggestion is made that it is not complete, discharges the burden, or which is such that in the absence of any such challenge there is only one inference which could be drawn. I think it is in reference to cases of that class that the authorities to which we were referred by Mr. Dunlop apply, and I think that the dicta of the learned judges, which he cited, have reference to the particular facts which were given in evidence before them. I do not think that they can be treated as in any sense rules of law varying the general rule that in cases of this kind it lies upon the plaintiff to establish his case. I will read what Hill, J. said, because I think it accurately puts in a very few words what the law is in reference to this particular point. He says : "In my view, in the circumstances of this case, the burden of proving that the consequential damage was a consequence of the negligence is upon the plaintiffs. In my view it is always upon the plaintiffs ; but the facts may speak for themselves, and in themselves shift the burden upon the defendants, as, for instance, in a case where stranding immediately follows the collision, and so follows that it speaks for itself and is *primâ facie* a consequence of the collision. But here, where there are a great many other facts to decide as to the subsequent disaster, beside the fact of the collision, in my view, the plaintiffs have a burden which, however it shifts from time to time, remains upon them ; and they have not discharged that burden."

Here the case for the plaintiffs is that the chain of causation is quite complete ; the *Singleton Abbey* and the *Sara* were both broken adrift by the negligence of those in charge of the *Paludina ;* there is no *novus actus interveniens ;* and therefore the view taken by the President was right. The argument for the defendants is that upon the plaintiffs' own evidence there are two links missing. First, it is said that although the *Sara* was broken adrift by the negligence of the *Paludina*, she was still a free agent ; that the inference to be drawn from the evidence was that her steam was up, and that she could have gone to any part of the harbour she liked and have been quite safe and out of the way of the *Singleton Abbey ;* and that it could not be said, therefore, that the chain of causation was complete when it was found that the *Sara* had this opportunity of which, through a want of proper skill and seamanship, she did not avail herself. Secondly, it is said that another link in the chain is missing owing to the action of the master of the *Singleton Abbey*. He had steam up, he saw, and had an opportunity for twenty minutes of realising, the position in which the *Sara* was. He realised that the *Sara* was coming down upon him, and he was told by the second officer that the engines ought to be stopped. I will read his own words. He was very frank about it. In re-examination he was asked : "The suggestion is made that you ought to have stopped your engines, or rung them to stop before you did, so as to avoid hitting the *Sara* with your propeller—what do you say with regard to that ? (A.) Well, I had to keep my engines going as long as I could, because I did not want the wind to take control of my ship. I wanted to have that in my own hands if I could, so I was going to hang on as long as I could. When I thought she was getting dangerously near I stopped the engines, but it apparently must have been a little bit too late." The defendants say that upon that there is a clear break in this chain. They contend that the damage complained of was not the result of the original negligence of the *Paludina*, but was due to the fault of the plaintiffs' own master. The plaintiffs' reply is that it ought not to be attributed to him as a fault ; he was in a position of danger, a position in which the defendants had placed him ; and that under those circumstances the chain is complete.

Both these points on which it is said that the chain is not complete are largely matters of seamanship—what was the right and proper thing to do under the particular circumstances —and we naturally take the advice of our assessors. I have asked them whether, assuming that the *Sara* had steam up—I assume that for the purposes of the question—were those in charge of the *Sara* guilty of a want of reasonable care and good seamanship in not keeping the

Sara clear of the *Singleton Abbey?* They give a reasoned answer, the result of which is that they say No. On that point therefore it is immaterial whether the issue is upon the plaintiffs or the defendants, the suggested break in the chain does not exist. The second question was: Under the circumstances in which he was placed, was the master of the *Singleton Abbey* guilty of a want of reasonable care and good seamanship in not stopping his engines in time to prevent the damage by the *Sara* striking the propeller? Their answer is, Yes. After having heard the arguments of Mr. Dunlop and Mr. Noad upon the point, so far as I am able to give an opinion, I entirely concur.

In those circumstances it seems to me that it is unnecessary to look very closely at the question of onus of proof, because even assuming it was on the defendants to prove a break in the chain of causation, they have proved it. In these circumstances the decision of the learned President must be reversed on this point, and the appeal will be allowed with costs.

SCRUTTON, L.J.—I do not dissent from the conclusion at which my brothers have arrived, but I think it fair to say that I have felt considerable doubt during the course of the argument, and I do not regard this as at all an easy case.

A number of ships were lying moored along a quay in Valetta Harbour with the wind blowing rather strongly into the harbour and with a considerable send of the sea. In these circumstances the *Paludina* broke loose, and, as is inevitable when a number of ships are moored in a row, she broke loose other vessels. No question comes before us in this appeal as regards her liability for breaking loose the *Singleton Abbey*. She knocked the *Singleton Abbey* into the *Sara* and the *Sara* broke adrift. There is no question here as to the liability of the *Paludina* for anything that happened in what I may call the first collision between the *Singleton Abbey* and the *Sara*. The *Paludina* went on and ran into some other ship, and ultimately collided with some moorings further up the harbour and fetched up. The *Singleton Abbey* and the *Sara* got away from the track of the *Paludina*, and after some twenty minutes they came into collision with each other and the *Sara* was sunk. When the case came before the Admiralty Court the plaintiffs pleaded case was that the *Paludina* fell bodily against the port side of the *Singleton Abbey* causing her to collide with the *Sara*, whereby the *Sara* was sunk. The defendants replied that it was not through any negligence of theirs that the *Sara* was sunk. It turns out not to be the fact, however, that the *Sara* sank owing to the original collision. What the exact facts are as to the subsequent collision is not very clear. Our assessors advise us that they doubt whether the *Sara* and the *Singleton Abbey* ever got really clear of each other; they think that they were always quite close to each other. Some twenty minutes afterwards, owing to something that was done, probably—this is my own view and not the opinion of the assessors—owing to the *Sara* hauling on her anchor and nearly getting it up in an attempt to get away, the *Sara* began drifting astern and struck the bow of the *Singleton Abbey*, drifted down along her side and got under the counter where the propeller of the *Singleton Abbey* was revolving. The *Singleton Abbey* was using her propeller to keep herself head to wind and to prevent herself from drifting further. Her second officer was aft in accordance with the usual practice of vessels in port, in order to give warning to the bridge when the use of the propeller might be dangerous. Apparently the second officer did warn the bridge that there was going to be danger if the propeller was working while the *Sara* was drifting aft, and the master acted on that warning by stopping the engines. But either the warning was given too late or the master did not act upon it in time, with the result that when the *Sara* got under the counter the propeller was still revolving; it struck the *Sara*, broke four blades, and sank the *Sara*.

The question between the *Sara* and the *Singleton Abbet* fortunately is not before us; that has been fought out in the court of Malta, which has found neither party to blame. As between the *Sara* and the *Singleton Abbey*, therefore, the damage to the *Sara* is not before this court; what is before us is the attempt of the *Singleton Abbey* to recover from the *Paludina* the damage done by the *Sara* to the propeller of the *Singleton Abbey*. It is said that there is a rule of the Admiralty Court, supported by several decisions of Dr. Lushington, that the presumption is that damage following a collision is the result of the collision unless the defendant proves the contrary. All the cases, so far as I have looked at them, in which that doctrine is supposed to be laid down, are cases where the damage happens to the ship primarily affected by the collision, and there is no suggestion of the action of third parties. A collision occurs between ships A. and B., and shortly after the collision B. goes ashore; that is the ordinary type, and Dr. Lushington has said that in a case like that one does not begin to inquire elaborately why the ship went ashore; it is to be assumed, until the defendant has shown the contrary, that she went ashore because of the collision which happened to her just before. That is quite a different class of case from the present. Here, the *Singleton Abbey's* case is that the *Paludina* came into collision with her and that in consequence she suffered damage from a third ship. It is not even the case which frequently happens of ship A. running into ship B. and knocking her into C. No one suggests that within any degree of directness the *Paludina* knocked the *Sara* into the *Singleton Abbey* or the *Singleton Abbey* into the *Sara*. She broke them both adrift, and nearly half an hour afterwards they came into collision. It appears to me that whatever may

be the case in the simple class of case of which Dr. Lushington was speaking, in the circumstances which I have suggested the plaintiff must prove his case if he alleges that a subsequent collision with a third ship, in respect of which he claims damages, is a consequence of the original collision with the defendant's ship.

There have been a number of decisions dealing with the question as to how far the intervention of a third person prevents damage being the result of the action of the defendant. Lord Sumner classified several of them in his judgment in *Weld-Blundell* v. *Stephens* (123 L. T. Rep. 593; (1920) A. C. 956): "Between the negligence of a defendant and the infliction of hurt or loss on a plaintiff, the action of human beings may intervene in a great variety of ways"—and then he deals with some of the classes of case in which the action of third parties has or has not caused the damage to be too remote. One class of case he mentions is where a person is in a state of excusable alarm owing to the wrongful act of the defendant. He cites two cases. One is the well-known case of *Scott* v. *Shepherd* (1773, 3 Wils. 403; 2 W. Bl. 892), where a squib was thrown in a crowded market place by A. on to B.'s stall. B. threw it away on to C.'s stall, and C. threw it away, and it exploded in D.'s eyes. D. claimed damages from the original thrower of the squib, and it was held that the intervention of B. and C. did not prevent D. from recovering from A. because the intermediate persons were in a state of excusable alarm produced by the act of A. The other, *Jones* v. *Boyce* (1816, 1 Stark. 493), was where a stage coach proprietor took passengers on a coach; the reins were defective and broke, and the horses went off at a gallop, and as the coach began to sway from side to side a frightened passenger on the top jumped off and broke his leg. The coach, however, went on and did not overturn. Here also it was held that the intervening act of jumping off did not prevent the passenger from recovering, as he was in a state of excusable alarm owing to the wrongful act of the defendant.

The doubt I feel in this case—and I am not sure about it now—is whether, under these circumstances, where a ship by a wrongful act has put several other ships in an awkward position—there was a strong send of the sea, a high wind, not very good holding ground, and all the ships were ranging about among each other—it can be said that the fact that one of them takes a wrong step necessarily breaks the chain of causation. But. after consideration, I do not feel able to differ from the advice which has been given us by the assessors and from the view at which my brothers have arrived. There was a considerable interval between the act of the master in not stopping his engines and the time when his ship was first set adrift by the *Paludina*. In these circumstances I do not feel able to dissent from the view that there is a sufficiently independent act on the part of the *Singleton Abbey*, which prevents the damage caused by the *Sara* being the direct consequence of the original wrong-doing of the *Paludina*. It appears to me, therefore, that the decision of the President on this point should be reversed.

ATKIN, L.J.—I agree. I am certainly not prepared to uphold the suggestion that there is a presumption of law that any damage arising to a ship subsequent to a collision must be deemed to be the result of that collision unless the defendant proves the contrary. That seems to me to be an impossible suggestion. Though the contention has been put as high as that in the arguments in this case based upon certain propositions of Dr. Lushington—if, indeed, he did lay down such a principle—I venture to say that at the present day it is wrong. In my opinion it is impossible that there can be any presumption of law; there might be in some cases a presumption of fact, though I do not think that is true. The onus must always be upon the plaintiff who claims damages to prove that the damage was caused by the negligence of the defendant, and caused in the sense that now governs these cases as laid down by the Court of Appeal—*i.e.*, was in fact the direct result of the negligence. That is the point the plaintiff always has to prove. Of course, it may often happen that in cases of collision at sea the damage that follows is of such a kind, and follows so immediately, that unless it is proved there is some other cause it is to be assumed that the damage was directly caused by the negligence. That is the case that was suggested of an immediate stranding, of which there are several reported decisions. In *The Pensher* (1857) Swa. 211), heard before Dr. Lushington, a sailing ship was in collision and drifted on to a lee shore with a precarious anchorage. She anchored for a time, and it was suggested that if there had been a longer scope of chain she would not have gone ashore. It was held that in those circumstances it was fair to assume that the collision caused the stranding damage; the Elder Brethren had, however, advised that the same result might have followed, even if the alternative scheme had been adopted. *The Mellona* (1847, 3 W. Rob. 7) was a still more simple case. The ship had been dismantled in the collision and stranded twenty-four hours afterwards. There the result of the collision was apparent, was obviously continuing throughout, and was a thing which would operate at once, and continue to operate, on the navigation of the ship. Similarly, in cases where the vessels had been deprived of their steering gear.

But now one has to consider the facts of this particular case. Here two ships were set adrift in harbour by the admitted negligence of the defendants, and twenty minutes afterwards they come into collision. The initial collision itself hardly caused any damage at all. The material question is whether the second contact was the result of the first collision. I can see no evidence that the collision caused

the *Sara* to drop down upon the *Singleton Abbey.* Indeed, I think that is the result of the learned President's finding, because he says he has consulted the Elder Brethren, and they advise him that in the state of things he has described they cannot say that the *Sara* was to blame for this collision, but they cannot tell him why it probably was that the *Sara* was not able to avoid the propeller blades of the *Singleton Abbey.* That is the first point. In the second place, it seems to me that there is no evidence to show that the collision with the *Paludina* caused the propeller blades of the *Singleton Abbey* to be moving at the time the *Sara* came in contact with her on the second occasion. More than that, we have now the advice of our assessors—with which I entirely agree—that the accident was in fact caused by the negligence of the master of the *Singleton Abbey.* I appreciate that in occasions of difficulty the court should look very benevolently upon the exercise of a mariner's ordinary care and skill. The question always is whether he has been guilty of negligence; but, in estimating the care and skill he has to employ, the court must look at the surrounding circumstances and measure the degree of care and skill by the particular circumstances of responsibility, anxiety and sudden emergency. But here, after taking that into account, we are advised that the master of the *Singleton Abbey* was negligent in not stopping his propeller when he saw the *Sara* in the position in which she was. As to that, I think there can be no doubt about the matter. The damage could have been avoided by the exercise of reasonable care and skill, and, if it could, it is impossible for the owners of the *Singleton Abbey* to say that this propeller damage was in fact occasioned by the initial negligence of the defendants. For these reasons it appears to me that the appeal should be allowed.

The exact form of the order must be settled, because there is a question of costs. The proper order would seem to be a declaration that the *Paludina* is not responsible for the second collision between the *Sara* and the *Singleton Abbey;* that finding to be treated as an issue, and the costs so far as they have been increased by that issue to be borne by the respondents; and the appeal here allowed with costs.

Appeal allowed.

Solicitors for the appellants, *Waltons* and *Co.*

Solicitors for the respondents, *Downing, Middleton*, and *Lewis*, agents for *Downing* and *Handcock*, Cardiff.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Oct. 22, 23, *and Nov.* 14, 1924.

(Before ROWLATT, J.)

MULLER (W. H.) AND CO.'S ALGEMEENE SCHEEPVAART - MAATSCHAPPIJ *v.* TRINITY HOUSE CORPORATION, DEPTFORD, STROOD.[(a)]

Pilotage — Compulsory pilotage district — Navigation without licensed pilot—Obligation to keep pilot flag flying—Liability for pilotage dues when no pilot offering—" Services "—Services rendered—Pilotage Act 1913 (2 & 3 *Geo.* 5, *c.* 31), *ss.* 11, 17, 55, 59.

By sect. 11 *of the Pilotage Act* 1913 *it is enacted:* " (1) *Every ship (other than an excepted ship) while navigating in a pilotage district in which pilotage is compulsory for the purpose of entering, leaving, or making use of any port in the district, and every ship carrying passengers (other than an excepted ship), while navigating for any such purpose as aforesaid in any pilotage district (whether pilotage is compulsory or not compulsory in that district, shall be either* (a) *under the pilotage of a licensed pilot of the district; or* (b) *under the pilotage of a master or mate possessing a pilotage certificate for the district who is* bonâ *fide acting as master or mate of the ship.* (2) *If any ship (other than an excepted ship) in circumstances in which pilotage is compulsory under this section, is not under pilotage as required by this section, after a licensed pilot of the district has offered to take charge of the ship, the master of that ship shall be liable in respect of each offence to a fine not exceeding double the amount of the pilotage dues that could be demanded for the conduct of the ship.*"

By sect. 17, *sub-sect.* (1): " *A pilotage authority may by by-laws made under this Act. . . .* (f) *fix for the district the rates of payment to be made in respect of the services of a licensed pilot (in this Act referred to as pilotage dues), and define the circumstances and conditions under which pilotage dues may be payable on different scales and provide for the collection and distribution of pilotage dues.*"

Held, that sect. 11 *did not impose an absolute prohibition against navigation in a pilotage district without a licensed pilot. It only imposed a continuing obligation to fly the pilot flag and take a pilot on board if one offered. If no pilot offered there was no liability on the shipowner to pay pilotage dues. The word " services " in sect.* 17 *meant " services rendered," and a pilotage authority could not, by its by-laws, impose pilotage dues which were not payments for services rendered.*

ACTION in the Commercial List tried by Rowlatt, J. without a jury.

(a) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

The plaintiffs, who were a Dutch company, were the owners of the Batavier line of steamships. They maintained, by that line, a frequent service for passengers and cargo between Rotterdam and London, there being five sailings per week each way.

According to the points of claim, the direct route for steamships from Rotterdam to London was to pass near the Tongue Light Vessel, and before 1919 the masters of the plaintiffs' steamships, who were Dutch subjects, held pilotage certificates authorising them to pilot their vessels between the Tongue Light Vessel and Gravesend, where the passengers disembarked. The plaintiffs alleged that during the war this route was closed, but was afterwards reopened.

Since 1919 aliens have been precluded from holding pilotage certificates for any pilotage district in the United Kingdom by sect. 4 of the Aliens' Restrictions Act 1919, and the plaintiffs' steamships became subject to the ordinary rules as to compulsory pilotage in the London area.

The defendants, as the pilotage authority for the London Pilotage District, maintained a number of licensed pilots on board a pilot cutter, which was stationed at the Sunk Light Vessel, to pilot vessels inward bound to the Thames, but refused to station pilots at the Tongue Light Vessel. The plaintiffs said that the route *viâ* the Sunk Light Vessel was longer and less favourable than that by the Tongue Light Vessel, and they instructed their masters to sail by the Tongue Light Vessel, to fly the pilot flag as soon as they entered the London pilotage district, and to accept the services of a licensed pilot if one offered. These instructions, according to the plaintiffs, were carried out, and pilots were always accepted if they offered.

The defendants sought to charge the plaintiffs with pilotage dues from the Sunk Light Vessel, whether a pilot had offered or not; the plaintiffs brought this action to recover 1351*l.* alleged to be overpaid on the grounds, (1) that they were only liable to pay the pilotage rate from the Tongue Light Vessel to Gravesend (which was lower than from the Sunk Light Vessel) when a pilot was taken on board from the Tongue; (*b*) that when no pilot offered his services, and consequently no pilot was taken, they were not liable to pay pilotage dues or rates; (3) that the by-laws hereinafter mentioned were *ultra vires* and void.

By the Pilotage Act 1913:

Sect. 11. (1) Every ship (other than ay excepted ship) while navigating in a pilotage district in which pilotage is compulsory for the purpose of entering, leaving or making use of any port in the district, and every ship carrying passengers (other than an excepted ship) while navigating for any such purpose as aforesaid in any pilotage district (whether pilotage is compulsory or not compulsory in the district) shall be either (*a*) under the pilotage of a licensed pilot of the district; or (*b*) under the pilotage of a master or mate possessing a pilotage certificate for the district who is *bonâ fide* acting as master or mate of the ship. (2) If any ship (other than an excepted ship) in circumstances in which pilotage is compulsory under this section, is not under pilotage as required by this section, after a licensed pilot of the district has offered to take charge of the ship, the master of that ship shall be liable in respect of each offence to a fine not exceeding double the amount of the pilotage dues that could be demanded for the conduct of the ship.

Sect. 17. (1) A pilotage authority may by by-laws made under this Act . . . (*d*) determine the system to be adopted with respect to the supply and employment of pilots, and provide, so far as necessary, for the approval, licensing and working of pilot boats in the district . . .; and (*f*) fix for the district the rates of payments to be made in respect of the services of a licensed pilot (in this Act referred to as pilotage dues), and define the circumstances and conditions under which pilotage dues may be payable on different scales. . . .

The following by-laws of the pilotage authority were in existence at the dates specified.

In April 1922:

A ship subject to compulsory pilotage which is bound from any port or place outside the compulsory limits of the London District shall pay the full rate of pilotage, unless it is proved to the satisfaction of the Trinity House that she was unable to obtain a pilot from the proper pilot station on account of the pilot being off station or other special causes.

The following charges are payable in respect of ships subject to compulsory pilotage bound to any port or place within the London Pilotage District, and also in respect of any other ship supplied with a pilot. [A list of charges followed.]

On the 8th June 1922 the following by-laws were respectively substituted for the above:

A ship which enters the London Pilotage District and is subject to compulsory pilotage shall take a pilot at the proper pilot station, and unless unable to obtain one for reasons acceptable to the Trinity House, shall pay the full pilotage rate and shipping charge.

Then followed the shipping charges payable in respect of any ship (sail or steam) subject to compulsory pilotage bound to any port or place within the London Pilotage District, and also in respect of any ship supplied with a pilot.

The defendants contended that by virtue of the Pilotage Act 1913 (2 & 3 Geo. 5, c. 81) and the by-laws made thereunder, it was the duty of the plaintiffs to take all reasonable steps to secure pilots and that such steps were to proceed *viâ* the Sunk Light Vessel, where the pilots were stationed.

It was admitted that as an act of grace licensed pilots had been permitted to offer themselves at the Tongue Light Vessel (which they reached in hired motor boats from Margate), but they claimed that if the plaintiffs failed to take (as they ought to do) a pilot at the Sunk Light Vessel, they were nevertheless liable to pay the full rate for pilotage from the Sunk Light Vessel. They counterclaimed for a declaration that the by-laws were *intra vires*, and that they were entitled to charge the rates therein provided for.

Dunlop, K.C. and *E. A. Digby* for the plaintiffs.

Bateson, K.C. and *G. P. Langton* (with them *S. D. Cole*) for the defendants.

Rowlatt, J.—The entrances to the Thames are two, one being at the Tongue and the other at the Sunk, and the pilots which the defendants have provided under their statutory duty are divided into three classes: the Cinque Ports pilots, who pilot ships coming up the Channel, and who get on board at Dungeness, or are distributed at different ports and board ships which are there by accident, or which are taking pilots at that point of their own free will; and the Channel pilots who pilot outwards from Gravesend, but are also trained to pilot inwards. These two classes pilot *viâ* the Tongue Light Vessel, which is in the South Channel. The third class are the North Channel pilots, who pilot from the Sunk Light Vessel by the North Channel. The Sunk pilots cannot pilot *viâ* the Tongue nor the Tongue pilots *viâ* the Sunk Channel. The Batavier line is a Dutch line, and under present law their masters and mates, not being British subjects, are not eligible as pilots, so that the ship is a ship without a pilot unless she takes one when she reaches the mouth of the Thames.

The main question here is whether when a ship enters the compulsory pilotage area and continues her passage through it to her destination without having taken a pilot, she can be charged with the pilotage dues as a debt, independently of the question whether any offence has been committed. The defendants contend that she can be so charged, and if that contention is wrong, then the whole defence fails, and there is no longer any question as to what rate is chargeable. The question depends on the Pilotage Act 1913, and the most material section here is sect. 11 (see above). The plaintiffs say that this section covers the whole of the ground and that the liability being created by the statute and a penalty for breach being provided there can be no debt. The defendants on the other hand say that sub-sect. (2) only deals with the case where the pilot has offered, and that whether a pilot offers his services or not, a debt is incurred for pilotage dues in every case, as soon as an inward ship passes the limits with the intention of navigating to London, but that if in fact a pilot has offered then a penalty is incurred in addition under sect. 11, sub-sect. (2). The question is therefore whether sect. 11, sub-sect. (1), creates a debt for pilotage dues. As to this I think the true construction is not that a vessel shall navigate unless she has a licensed pilot on board, but that she is under a continuing obligation to fly the pilot flag, and must take a pilot on board if he offers.

To construe the sub-section otherwise would be unreasonable, and would place a great responsibility upon the pilotage authority, beside being in conflict with sect. 30 which provides for the supersession of a pilot who is not authorised. Even if the position is that she must stop, it does not follow that if she does not stop she must pay the fees for pilotage, and I cannot see any connection between the two propositions. But, the defendants say that even if she is not bound to stop she must take all reasonable steps to find a pilot, that is to say she must go to the place where she knows the pilots will be assembled, even though that point is at the Sunk and not at the Tongue, which is the nearest route from the nautical point of view. Even if this is true I am in the same difficulty as before, that if she fails to carry out this obligation, it does not seem to follow that she must pay the pilotage dues.

It was further argued that sect. 17, sub-sect. (1), enabled the pilotage authority to make by-laws upon various matters, for example (clause (*d*)) to "determine the system to be adopted with respect to the supply and employment of pilots, and provide, so far as necessary, for the approval, licensing, and working of pilot boats in the district. . . ." That means that they may determine by means of by-laws the system which is to govern the supply and employment of pilots as a matter of internal administration. There were, as has been pointed out, at the time of the passing of the Act of 1913, various pilotage systems in force all over the country, and the pilotage authority had to decide which was the best system, but in my judgment that does not give them power to affect the liability of ships. By clause (*f*) they were empowered to "fix for the district the rates of payment to be made in respect of the services of a licensed pilot," and it was argued for the defendants that "services" there means not "services rendered" but "services available." I think that this only empowers them to fix the rate and not to add to the liabilities of the ship a liability to pay for a pilot when none is taken. It is to be observed that in sects. 49 and 55, which made provision for the recovery and collection of pilotage dues, the words used show that payments are only to be made for services actually rendered. In sect. 49 the pilotage dues are "for any ship for which the services of a licensed pilot are obtained," and in sect. 55 the dues for foreign ships are, as to ships inward, "for the distance piloted."

An interesting argument was founded on sect. 59 from the historical point of view. That section preserves any "custom . . . with reference to pilotage affecting any pilotage district in particular, and in force at the time of the passing of this Act" until provision is made by pilotage order or by-law under the Act superseding such custom. If one turns back to the Pilotage Act 1812 (52 Geo 3, c. 39), s. 63, and to the Pilotage Act 1825 (6 Geo. 4, c. 125), s. 46, one finds, and it was expressly provided in the cases of foreign ships entering the Port of London, that a liability for dues should be incurred even if no pilot were taken; but that legislation disappeared with the Merchant Shipping Repeal Act 1854 (17 & 18

Vict. c. 120) and was replaced by the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 381, and there has been no similar legislation since. The defendants rely upon the fact that they have taken these dues all the time and that within sects. 368 and 376 of the Merchant Shipping Act 1854, the power of the Trinity House to alter regulations is preserved. This cannot mean that the Trinity House can continue to charge fees for which the liability could only accrue under a section which has long been repealed. The provision in the Pilotage Act 1913, s. 59, as to the Trinity House by-laws is not enough to make the charge here in dispute lawful merely because there is this provision in the old Acts and some evidence of acquiescence in those charges on the part of shipowners. There is no enactment in force authorising the defendants to make this charge, nor is there any proof of custom. I think that sect. 59 has application to matters which can be dealt with by pilotage order and by-laws, and it is not applicable to a fundamental question affecting the liability of a ship to pay pilotage dues when she has had no pilotage. In my judgment the defendants, although they have in one sense been following an old custom, have been proceeding on a basis which was not warranted and therefore they cannot retain this money. If they cannot retain the pilotage dues, neither can they retain the shipping moneys, which for this purpose are on the same footing.

As regards the rate of payment, even if the plaintiff's ships ought to have gone to the Sunk, with which I do not agree, they have in fact taken a pilot at Margate, and the only thing he could do was to pilot them through the Tongue. The plaintiffs are therefore entitled to succeed both on the claim and counterclaim, and the sum claimed must be refunded. As regards the validity of the by-laws I shall make no general declaration, but only a declaration as regards the plaintiffs: (1) that they are not liable to pay any pilotage dues or shipping moneys to the defendants in respect of any ship inward bound *viâ* the Tongue to Gravesend, which has not been piloted by a pilot; (2) that when any of their ships is piloted from the Tongue to Gravesend, the pilotage rate payable is the rate from the Tongue Light Vessel to Gravesend, and not from the Sunk Light Vessel to Gravesend.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Behrend* and *Co.*

Solicitors for the defendants, *Sandilands* and Co.

Tuesday, Dec. 5, 1924.

(Before Roche, J.)

Bassa (Owners of) v. Royal Commission on Wheat Supplies. (a)

Charter-party — Exceptions — Strikes — Obstructions or stoppages "on the railways or in the docks or other loading-places"—Demurrage.

By the terms of a charter-party it was provided that: "If the cargo cannot be loaded by reason of riots, civil commotions, or of a strike or lock-out of any class of workmen essential to the loading of the cargo or by reason of obstructions or stoppages beyond the control of the charterers on the railways, or in the docks or other loading-places . . . the time for loading . . . shall not count during the continuance of such causes. . . . In case of any delay by reason of the before-mentioned causes no claim for damages or demurrage shall be made by the charterers, receivers of the cargo, or owners of the steamer."

Held, that the charterers were not thereby excused for delay in loading caused by obstructions on the railways leading to the port or loading-place, but not occurring actually at the port or loading-place.

Held, further, that the charterers were not protected by the exceptions' clause quoted above, from liability for delay in loading caused by congestion in the port due to a strike which had come to an end before the lay-days began to run.

Brightman v. Bunge y Born (ante, *p.* 423; 132 L. T. Rep. 188; (1924) 2 *K. B.* 219) *followed.*

Special case stated by an umpire for the opinion of the court. The following facts were stated in the case.

By a charter-party dated the 13th March 1920 the owners chartered their steamship *Bassa* to the charterers, the Royal Commission on Wheat Supplies.

The matter in dispute in the arbitration was the owners' claim for 5135*l.* 6*s.* 6*d.* demurrage of the *Bassa* at her port of loading, all of which was disputed by the charterers.

The material clauses of the charter-party were:

(2) That the steamer . . . shall proceed as ordered by the charterers or their agents to the undermentioned ports or places and there receive from them a full and complete cargo of wheat and (or) maize and (or) rye in bags and (or) bulk which cargo the charterers bind themselves to ship. (5) . . . charterers have the option of loading the entire cargo at . . . Bahia Blanca.

(12) The steamer shall be loaded at the rate of 500 tons per running day (Sundays and holidays excepted) otherwise demurrage shall be paid at the rate of one shilling sterling per gross registered ton per running day. Time for loading shall commence to count twelve hours after written notice has been given by the master or agents on any day (Sundays and holidays excepted) between 9 a.m. and 6 p.m. to the charterers or their agents that the steamer is ready to receive cargo.

(28) If the cargo cannot be loaded by reason of riots, civil commotions or of a strike or lock-out of

(a) Reported by J. S. Scrimgeour, Esq., Barrister-at-Law.

any class of workmen essential to the loading of the cargo or by reason of obstructions or stoppages beyond the control of the charterers on the railways, or in the docks or other loading places . . . the time for loading . . . shall not count during the continuance of such causes provided that a strike or lock-out of the shippers . . . men shall not prevent demurrage accruing if by the use of reasonable diligence they could have obtained other suitable labour at rates current before the strike or lock-out. In case of any delay by reason of the before-mentioned causes no claim for damages or demurrage shall be made by the charterers receivers of the cargo or owners of the steamer.

The charterers exercised their option of loading the entire cargo at Bahia Blanca. The *Bassa* arrived at Bahia Blanca on the 20th March with a cargo of coal for the Buenos Aires and Pacific Railway Company. When she arrived there was a strike of the labourers at the port, which began on the 9th March and finished on the 5th April. She completed discharge of the coal cargo on the afternoon of the 14th April. On the morning of the 16th April the *Bassa* was ready to load her cargo of wheat for the charterers and notice of readiness was given at noon on the 16th April and the time for loading commenced to count at midnight on that day. The cargo loaded was 6921 tons, giving at the charter-party rate of 500 tons a day, thirteen days twenty-one hours for loading. Excluding Sundays, 18th April, 25th April, and 2nd May, and the holiday on the 1st May (Labour Day), the time expired, subject to anything within the exceptions, at 9 p.m. on the 4th May. The loading was finished at 9 a.m. on the 24th May, and the owners claimed nineteen days twelve hours demurrage. At the charter-party rate of 1*s.* per gross registered ton on 5267 tons or 263*l.* 7*s.* per day, the amount claimed was 5135*l.* 6*s.* 6*d.*

The charterers denied that any demurrage was due, alleging that the delay was wholly caused by matters within the exceptions in the charter-party, viz., by strikes or delays consequent on strikes or by reason of obstructions or stoppages beyond the control of the charterers on the railways or in the docks or other loading places.

The charterers in 1920 purchased large quantities of wheat for shipment from Bahia Blanca and other Argentine ports. As a rule the purchases were on f.o.b. terms, the charterers supplying the ships to load the wheat, and the merchants who had sold to them being under contractual obligations to the charterers to load at a fixed rate, usually 400 tons per day, subject to exceptions corresponding to those in the charter-party. The charterers' purchases (at Bahia Blanca) were mainly from eight firms or companies all of whom did a large exporting business. Among the eight firms or companies were the Compania Mercantil Argentina and E. Hardy and Co. Each vessel that arrived to load for the charterers was allocated by their agents to some merchant or merchants who were under contract to deliver grain f.o.b. at the particular Argentine port.

The port of Bahia Blanca consists of Puerto Galvan served by the Buenos Aires and Pacific Railway, of Puerto Ingeniero White served by the Buenos Aires and Great Southern Railway, and of a small port called Puerto Belgrano served by the Rosario Puerto Belgrano Railway. Provision is made for interchange of traffic between the railways if required. Each railway owns warehouses and elevators at the port served by them and the exclusive use and control of warehouses and loading berths at the ports is given to various merchants under arrangements between them and the railway companies. By arrangement with the railway company the Compania Mercantil Argentina had the right to use a berth at one of the elevators in turn with Messrs. Bunge and Born, and they had also the exclusive right to a berth on the mole. Messrs. E. Hardy and Co., by arrangement with the railway, had the right to use two berths, and they had also the right to deposit grain at one of the elevators, but had only the right to use the berth for loading at the elevator if it was not required by another firm. The right to use most if not all the other berths had been similarly given by the railways to other firms.

As stated above there was a strike of port labourers at the port which began on the 9th March and ended on the 5th April. Work was not entirely stopped during the strike, as the merchants endeavoured to defeat the strikers by employing free labour, but the work of loading was proceeding slowly and with great difficulty during the strike. The carriage of wheat on the railways to the port was stopped owing to the railways being single tracks with double tracks only at the stations and other passing places, which made it impossible for the railways to carry more wheat to the port, which was blocked during the strike by the accumulation of loaded wagons at the port. Vessels were loaded slowly, and as more vessels arrived there was during the strike an increase in the number of vessels waiting to load. The shipping season for wheat begins in the month of January and usually is at its height in March, gradually decreasing till by the end of May the great bulk of the wheat has been shipped. In 1920 the quantities of wheat shipped from Bahia Blanca for the first six months were as follows: January, 95,186 tons; February, 205,396 tons; March, 144,647 tons; April, 242,498 tons; May, 245,423 tons; June, 232,896 tons; total, 1,166,046 tons. The total quantity shipped from Bahia Blanca in 1920 was 1,328,701 tons, which was a record.

Although the strike of the port labourers ended on the 5th April, the after-effects of the strike continued to affect the work of the port for a time. This appeared from a contemporaneous certificate of the Chamber of Commerce of Bahia Blanca in the following terms:

Syndical Chamber.—Certificate of "Force Majeure."—The Chamber of Commerce of Bahia

Blanca issues this official document in favour of the Compania Mercantil Argentina to certify the existence of a strike in the ports of Ingeniero White and Galvan as and from noon of the 9th March last until the 6th April of the current year; on this date the labourers returned to work, but notwithstanding this and in consequence of the agglomeration of steamers (due to the strike) this Syndical Chamber declares also the existence of a state of "force majeure" applicable in the loading and discharging of steamers until midnight the 20th April inclusive, therefore considering as non-working days these days (as above mentioned) and times for the reasons above stated.—Bahia Blanca, the 29th April 1920.—(Signed) L. Pedemonte, secretary. L. Costa, vice-president.

On the 15th April the Buenos Aires agents of the charterers notified the Buenos Aires house of the Compania Mercantil Argentina to load about 4000 tons of wheat at Bahia Blanca on the *Bassa*, expected ready to load on the 17th April, and the agents on the same day notified in similar terms the Buenos Aires house of E. Hardy and Co. to load about 2000 tons on the *Bassa*. These notices were supplemented on the 16th April by notices from the Bahia Blanca agent of the charterers to the Bahia Blanca offices of the merchants that the *Bassa* was ready to load. When these notices were given the Compania Mercantil Argentina had already loading or waiting to load for the charterers seven other steamers previously notified to them as ready to load; and E. Hardy and Co. had already three other steamers loading or waiting to load for the charterers previously notified to them as ready to load.

The wheat position of the Compania Mercantil Argentina at Bahia Blanca on the 16th April, the date when the *Bassa* was ready to load, was as follows: There was a balance still to be delivered at Bahia Blanca on their contracts with the charterers of 63,927 tons and on their contracts of sale to other persons of 30,134 tons. They had in warehouses at Bahia Blanca ready for shipment 3474 tons, in store at up-country stations waiting for transport by the railways 51,560 tons, in transit on the railways 10,427 tons, and a further 30,827 tons not yet delivered up-country by the sellers to them.

The wheat position of E. Hardy and Co. on the same date, the 16th April, was as follows: There was a balance still to be delivered at Bahia Blanca on their contracts with the charterers of 34,120 tons, excluding 10,000 tons transferred to Rosario, and on their contracts of sale to other persons of 10,000 tons, they had in warehouses and lighters at Bahia Blanca ready for shipment 1102 tons, in transit on the railways 5134 tons, and a further 53,611 tons not yet delivered by the sellers up-country to them.

The wheat position of the Campania Mercantil Argentina at Bahia Blanca on the 4th May, the date when the owners contended that the lay days of the *Bassa* expired, was as follows: There was a balance still to be delivered at Bahia Blanca on their contracts with the charterers of 40,763 tons and on their contracts of sale to other persons of 33,846 tons. They had in warehouses at Bahia Blanca ready for shipment 3330 tons, in store at up-country stations waiting for transport by the railways 47,899 tons, in transit on the railways 8027 tons, and a further 23,409 tons not yet delivered up-country by the sellers to them. They had shipped between the 16th April and the 4th May for the charterers 28,725 tons and for other buyers 2288 tons.

The wheat position of E. Hardy and Co. at Bahia Blanca on the same date, the 4th May, was as follows: There was a balance still to be delivered at Bahia Blanca on their contracts with the charterers of 23,405 tons, and on their contracts of sale to other persons of 9670 tons. They had in warehouses and lighters at Bahia Blanca ready for shipment 2478 tons, in transit on the railways 4344 tons, and a further 37,746 tons not yet delivered up-country by the sellers to them. They had shipped between the 16th April and the 4th May for the charterers 10,715 tons and for other buyers 330 tons.

When the *Bassa* was ready to load on the 16th April all the berths that the Compania Mercantil Argentina and E. Hardy and Co. had the right to use were occupied. There was no "turn" at the port, but the berths continued to be occupied by other vessels, and it was not till the 7th May that the Campania Mercantil Argentina obtained a berth for the *Bassa*. The berth then obtained was not one of the regular berths of either the Compania Mercantil Argentina or E. Hardy and Co. The Compania Mercantil Argentina commenced to load the *Bassa* on the 8th May and finished loading 4616 tons, their parcel, on the 19th May. E. Hardy and Co. began to load on the 18th May and loaded 2305 tons by the 24th May at 9 a.m., which completed the cargo of the *Bassa*. For some reason not explained the *Bassa* changed her berth on the 16th May. This second berth also was not a regular berth of either the Compania Mercantil Argentina or E. Hardy and Co. During the period from the 4th to the 19th May, including the quantity loaded on the *Bassa*, the Compania Mercantil Argentina shipped 19,167 tons for the charterers and 3549 tons for other buyers. During the period from the 4th May to the 24th May E. Hardy and Co. shipped the quantity loaded on the *Bassa*, 2303 tons for the charterers, and 5670 tons for other buyers.

Of the 34,120 tons of wheat deliverable on the 16th April by E. Hardy and Co. to the charterers, 10,000 tons had been purchased from E. Hardy and Co. in March and 15,000 tons in April. The position from the 16th April, when the *Bassa* was ready to load, until the 24th May, when she finished loading, of the charterers and of the other firms from whom they had purchased wheat was not proved. From documents submitted by the charterers it appeared that between the 5th March, a few days before the strike began, and the 24th May 148,724 tons of wheat had been shipped by

various merchants on behalf of the charterers at Bahia Blanca in eighteen steamers (including the *Bassa*) all of which arrived on or after the 5th March. Of these, six sailed in April and the remaining twelve in May on or before the 24th May. There was no information as to which of the other seventeen steamers had (like the *Bassa*) cargo to discharge or as to the dates when they were ready to load. None of the seventeen steamers was in port as long as the *Bassa*, but with four exceptions they may have been ready to load before the *Bassa* was ready.

During what is called the rush season for the export of grain the railways supplying Bahia Blanca are always working at very high pressure, and the demand for railway wagons is always very great. In 1920 this pressure was increased by the delay in transit during the strike of the port labourers at Bahia Blanca, and by the demands for wagons for traffic other than grain, particularly for the transport of wood fuel then urgently required by the railway companies themselves and by consumers such as public utility companies. The result was that after the strike of port labourers at Bahia Blanca ended the railway companies were unable to cope with the demands made upon them for railway wagons for the carriage of wheat and there was considerable delay in the supply of the wagons and special trains asked for by the merchants. The railways worked to the full extent of their capacities and there were no obstructions or stoppages on the railways at any material dates.

It was contended for the charterers that there were some strikes at up-country stations of men employed by the merchants to load wheat on the railway wagons. Such strikes when they took place were of very short duration. It was not proved that any such strike had in fact delayed the loading of the *Bassa*.

Although the certificate of the Bahia Blanca Chamber of Commerce set out above certified that a state of *force majeure* existed after the end of the strike on the 5th April, up to and including the 20th April, merchants were busy loading steamers from the end of the strike, and it was not proved that by reason of the strike and the after effects thereof, the charterers were prevented from loading the *Bassa* at the charter-party rates of 500 tons per day from the time that she was ready to load.

Subject to the opinion of the court the umpire awarded that the charterers were liable to the owners for nineteen days twelve hours demurrage, or 5135*l.* 6*s.* 6*d.*, and he awarded accordingly that the charterers should pay that sum to the owners. The question for the opinion of the court was whether on the true construction of the charter-party and on the facts stated, the award was right or wrong.

R. A Wright, K.C. and *Van Breda* for the charterers.

Stuart Bevan, K.C. and *Pritt* for the owners.

ROCHE, J.—This is a case stated by an umpire. The umpire by his award awarded the shipowners a sum of 5135*l.* 6*s.* 6*d.*, being nineteen and a half days' demurrage, to which he held the owners of the *Bassa* were entitled in respect of a certain detention or delay of the *Bassa* in loading a cargo of grain at Bahia Blanca in the Argentine Republic in the year 1920. The award of that sum of demurrage to the shipowners involved the rejection by the umpire of a contention of the charterers that they were protected from liability to pay demurrage by reason of the terms and operation of the exceptions clause appearing as clause 28 of the charter-party dated the 13th March 1920 which regulated the relations of the parties the one to the other in connecton with this loading. The clause has been read several times and it is sufficient to say that it provided that if the cargo could not be loaded by reason of certain specified causes, which included obstructions or stoppages beyond the control of the charterers on the railways or in the dock or other loading places, the time for loading should not count during the continuance of such causes, and by a final sentence the clause provided that "in case of any delay by reason of the before-mentioned causes no claim for damages or demurrage shall be made by the charterers' receivers of the cargo or owners of the steamer."

Now what happened, as found by the case, is shortly as follows. The notice of readiness of this ship the *Bassa* was not given until the 16th April and the loading time began, if the exceptions clause was not in operation, at midnight on the 16th April and expired on the 4th May. The loading was not begun until after the period of loading had expired, and it was not finished until the 24th May, and in respect of the time between the 4th and the 24th May occurred the period in respect of which demurrage was claimed and allowed. Earlier than the 16th April there had been a strike of persons material to loading in the port of Bahia Blanca, and it appears from other findings that there was in consequence of that and perhaps other causes a certain congestion of steamers in the port, whereby the *Bassa* did not even get into berth until after the period of loading which I have described had expired; but at the same time not only was the strike over by the 16th April, but there is a finding in the case, at the end of par. 17 thereof, that "the railways worked to the full extent of their capacities and there were no obstructions or stoppages on the railways at any material dates." I think Mr. Van Breda was right in saying, in the course of his argument on behalf of the charterers, that by "material dates" the umpire means the dates on and after the 16th April, and that in a sense that is a finding not merely of fact but also of inference, or a decision on a matter of construction, namely what dates are material to consider in deciding as to the scope and duration of clause 28 of the contract.

Those being the facts, two contentions, or one contention supported on two grounds, have been raised on the part of the charterers. It is said on their behalf that this clause 28 is of such a scope as to cover not merely the loading at the dock or loading place, but the operation which is indispensable to loading in a case such as this, namely the bringing of the cargo to the loading place; in other words, it is a contention that the operation of the clause has a scope or action in point of space wider than such clauses as a rule have. Now that contention was raised in a case which dealt with this charter-party which I am considering, namely *Brightman* v. *Bunge y Born* (*ante*, p. 423; 132 L. T. Rep. 188; (1924) 2 K. B. 619). The decision of the Court of Appeal, differing from a decision of the late Mr. Justice Bailhache was adverse to the charterers. The grounds on which that adverse judgment was founded are, as to part of the grounds, very material. The ground on which Bankes, L.J. based his decision is not material and does not arise in the present case, but the grounds on which Scrutton and Atkin, L.JJ. rested their judgments are, in my opinion, very relevant to the present case, and although it is possible to make refined distinctions of fact between the case that was then under consideration and the case which is here under consideration, yet I am unable to make any sensible or substantial distinction between the two cases. I think that the Lords Justices intended to hold, and did hold, that this clause was, in the circumstances, which as I say I am unable really to distinguish from the present circumstances, a clause which operated and was confined in space to the port of loading, and therefore, whether I agree with that decision or not is quite immaterial; it is a decision which I ought to follow and which I propose to follow. I am told that the case of *Brightman* v. *Bunge y Born* (*ubi sup.*) will probably be considered by a tribunal even higher than the Court of Appeal. If so, then this decision of mine, which follows the decision of *Brightman* v. *Bunge y Born*, can be reconsidered at the same time, and there I propose to leave the matter.

But there is another point to which I directed the attention of counsel: a point which is not covered by the decision in *Brightman* v. *Bunge y Born* (*ubi sup.*), but a point which I think is really fatal to their contention here. In the case of *Brightman* v. *Bunge y Born* the cause complained of, or relied upon by the charterers as excusing them was certainly in operation during the lay-days. The only question was whether it was a cause covered by or within the exceptions clause. Here, the cause relied upon, namely, the obstruction on the railway, was not in operation during any part of the lay period, that is to say after the 16th April, and it can only be said to be in operation at the material time if you give to clause 28 an extension not in point of space but in point of time, and extend the material period to the period before the lay-days ever began at all, and enable the charterers by reason of such extension to say: Because the strike was in operation before the 16th April and in consequence work was delayed, or the obstruction on the railway was in existence before the 16th April, as the case may be, therefore there is delay now; other ships which would have been loaded if things had gone right and there had been no strike and no obstruction are still here, and, accordingly, by reason of the operation of these causes at the earlier period, we, the charterers, are protected during the period of the loading after the 16th April.

In my judgment that extension in point of time is not warranted by the language of clause 28. The provision is that in the case of certain specified events occurring, the time for loading (meaning, I think, the time after the notice of readiness and the other matters necessary as precedents to the beginning of the lay-days have operated) shall not count during the continuance of such causes; not, as the charterers of necessity must have it for their own purposes, during the continuance of the results of such causes, or the results of such causes as have been enumerated above. In those circumstances, that seems to me to be another and not less fatal objection to the argument and contention of the charterers than that afforded by the decision of the Court of Appeal in *Brightman* v. *Bunge y Born* (*sup.*). On those grounds, therefore, I decide, in answer to the question submitted to me by the umpire, that in the opinion of the court, on the true construction of the charter-party and on the facts stated in the special case, the award of the umpire is right.

I would only add one other word. Although it appears to have been mentioned in the course of the arbitration it is not a matter which finds any part in the award or the special case or in the argument before me, to consider whether, if the necessary facts had been proved, the congestion of ships which is alluded to, though not found, in the case, was due to the strike which had existed before the 16th April, and whether, if that fact were proved, that was an obstruction in the docks or loading places within the meaning of clause 28, and whether by reason of those facts the charterers were protected. That point did not arise either in the special case or in this judgment, and consequently is not decided.

Award in favour of the owners upheld.

Solicitors for the charterers, *Richards* and *Butler*.

Solicitors for the owners, *Lawrence, Jones, and Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

March 26, *May* 16, 19, 20, *and July* 25, 1924.
(Before Sir HENRY DUKE, P.)

THE CEDERIC. (*a*)

Collision—Narrow waterway—Overtaken ship—Increase of speed due to engines developing capacity — "Keep course and speed"—Regulations for Preventing Collisions at Sea, art. 21.

A vessel passing down a narrow waterway held not to have failed to keep her speed as required by art. 21 *of the Regulations for Preventing Collisions at Sea, by reason merely of her speed increasing owing to the development of the capacity of her engines after being put full speed ahead, and held not to be bound in these circumstances, upon becoming aware that a speedier vessel is gaining upon her, to diminish her speed or to keep it at a reduced rate in order that the speedier vessel might pass her.*

ACTION for damage by collision.

The plaintiffs' vessel *Mar de Irlanda* was in collision with the defendants' vessel *Cederic* on the 11th Feb. 1923 in the River Odiel, Spain, at a point some four or five miles below La Cascajera. The Odiel is a tidal river approached from the sea over a sand bar. There are extensive sand banks over the lower part of its course. From about half way between La Cascajera and the place of collision and from the latter point seaward, the navigable channel is narrowed by sand banks the extent of which varies from time to time. At about one and a half miles above the place of collision the deep water channel becomes greatly reduced in width.

The facts and arguments of counsel fully appear from the judgment of the President.

Art. 21 of the Regulations for Preventing Collisions provides :

Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed.

Art. 24 provides :

Notwithstanding anything contained in these rules, any vessel overtaking any other, shall keep out of the way of the overtaken vessel. . . .

Stephens, K.C. and *E. Aylmer Digby* for the plaintiffs.

Bateson, K.C. and *Alfred Bucknill* for the defendants.

Reference was made to :

The Roanake, 11 Asp. Mar. Law Cas. 253 ; 99 L. T. Rep. 78 ; (1908) P. 231 ;
The Echo, 14 Asp. Mar. Law Cas. 142 ; 117 L. T. Rep. 345 ; (1917) P. 132.

Cur. adv. vult.

Sir HENRY DUKE, P. (read by Hill, J.).—This action arises out of a collision which occurred on the morning of the 11th Feb. 1923 in the River Odiel between the plaintiffs' steamship *Mar de Irlanda* and the defendants' steamship *Cederic* while those vessels were proceeding laden, the *Mar de Irlanda* from Huelva to Bordeaux and the *Cederic* from Huelva to Ghent. The *Mar de Irlanda* is of 3080 tons net register and 339ft. long ; the *Cederic* is 4101 tons gross register and 323ft. long. The *Mar de Irlanda* is capable of a maximum speed of about 8 knots and the *Cederic* of a maximum speed of about 9½ knots. At the time of the collision the draught of each vessel was about 24ft.

On the morning of the 11th Feb. 1923 the *Mar de Irlanda*, proceeding down-river from Huelva, passed the *Cederic* while that vessel was still at her anchorage off La Cascajera, some four or five miles above the place where the collision occurred. The *Mar de Irlanda* proceeded at half speed in the usual down-river channel until she was passed at about a mile below La Cascajera by a small steamship, the *Vicente Ferrer*. The *Mar de Irlanda*, after passing the *Vicente Ferrer*, put her engines at full speed ahead and gradually increased her speed from about six knots to seven and a half, or perhaps eight. The *Cederic*, as soon as her master and pilot became aware of the *Mar de Irlanda's* slower speed, shaped to pass her. They proposed to pass on her port side and proceeded safely with that intent until the *Cederic* had drawn ahead of the *Mar de Irlanda* to the extent that the stem of the *Mar de Irlanda* was about abreast of the after mast of the *Cederic*. Then the vessels collided. The distance between the vessels at that time is in dispute between the parties and the facts which produced the collision are the subject of the present action.

[The learned President then considered allegations of negligence which are not material to the point reported, and continued :]

I find in point of fact that the *Cederic*, at a speed of nine knots at a part of the river where the waterway was less than 250ft. wide and when she was as near the east bank as she could venture to go, proceeded to pass the *Mar de Irlanda* at no more than 100ft. distance ; that the *Mar de Irlanda* after she passed Buoy No. 7 kept a direct heading for Buoy No. 5 with that buoy slightly on her starboard bow ; that she did not starboard her helm ; that her engines were during all this time kept at full speed ahead ; and that very shortly before the collision she had about reached her maximum effective speed. While the *Cederic* under these circumstances was passing the *Mar de Irlanda*, the collision occurred. The *Cederic* was at the material times an overtaking ship and the *Mar de Irlanda* an overtaken ship. The *Cederic* had upon her an obligation under rule 24 to keep out of the way of the *Mar de Irlanda*. The latter vessel was required by reg. 21 to keep her course and speed.

Apart from legal considerations it appears to me that the conduct of those in charge of

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

the *Cederic* in pressing forward to pass the *Mar de Irlanda* in the reach of the river where the collision occurred was imprudent and, indeed, reprehensible. For some reason which did not appear, the pilot of the *Cederic* was not called or examined, but upon the facts as they stand he, knowing the character and narrow width of the channel, pressed on with the *Cederic* to pass another large steamship when according to the *Cederic's* account he could only do so by coming close to the bank on the east side and when those on board the *Cederic* were well aware of the intention of the pilot and master of the *Mar de Irlanda* not to depart from the course on which they were proceeding so as to give way to the *Cederic.* The master of the *Cederic* suggested in his evidence that before and at the collision the *Mar de Irlanda* was the overtaking ship and ought therefore to keep out of his way. The suggestion does not call for serious consideration. The defendants had indeed pleaded to the contrary effect.

Primâ facie, the *Cederic* was to blame for the collision. It is not necessary to determine whether her falling off to starboard was due to helm action. Having regard to the position in which she was, in close proximity to the shoal on the eastern side of the channel, the Elder Brethren advised me that being near the bank and "smelling the bottom" she may have sheered. If her falling off was not due to this cause, it appears to me an inevitable conclusion that her helm was put to port because of her close approach to the bank. But I accept the view of the Elder Brethren.

In the view I took of the facts at the hearing, I should have felt no difficulty in giving judgment then for the plaintiffs, had it not been that a powerful argument of Mr. Bateson on the defendants' behalf was directed to establish that upon the true view of the case the *Mar de Irlanda,* being an overtaken ship, failed to keep her course and speed and thereby brought about the collision. Mr. Bateson claimed to establish that the *Mar de Irlanda,* after becoming an overtaken ship, substantially increased her speed and that she caused or contributed to the collision by helm action taken just before the collision. He argued that, if the *Mar de Irlanda* had proceeded at the speed she had when the *Cederic* began to overhaul her, the *Cederic* could have passed in safety and that she would have done so in the events that happened but for later helm action of the *Mar de Irlanda.* He relied also upon passages in the evidence to show that the place of collision was well over on the east side. As to the place of collision I have had no hesitation in accepting the evidence of the pilot and helmsman of the *Mar de Irlanda.* As to the charge of improper helm action I accept the evidence of the same pilot. The only particular in which the *Mar de Irlanda* could be said not to have kept her speed was that for twenty minutes or thereabouts before the collision her speed was increasing as her engines developed their capacity after being put at full speed ahead. It would seem to me unreasonable to treat this development of speed as a failure to keep the ship's speed and therefore a breach of reg. 21. Neither upon the wording of the regulation, nor upon the authority of any decision of which I am aware, am I prepared to hold that a vessel going down-river in a stream like the Odiel is bound, upon becoming aware that a speedier vessel is gaining upon her, to diminish her speed or to keep it at a reduced rate in order that the speedier vessel may pass her. Moreover, the *Mar de Irlanda* was proceeding at full speed ahead, though she had not developed her full rate of speed, when the *Cederic* was two miles behind her, and those on board the *Cederic* were aware that the speed of the *Mar de Irlanda* was increasing and that she would not give way to the *Cederic* some minutes before they decided to pass her in the narrow reach near Buoy No. 5. The collision resulted from their decision to take this improper course at a time when the *Cederic* was well astern of the *Mar de Irlanda* and a slight reduction of her own speed for about a quarter of an hour would have brought her safely to the crossing of the bar.

I have not attempted to define the point of time at which with relation to each other the *Cederic* became an overtaking ship and the *Mar de Irlanda* an overtaken ship within the meaning of the regulations. A time when these relationships clearly existed was when the *Cederic* being still astern of the *Mar de Irlanda* was proceeding at her superior speed in order to pass. No doubt the *Cederic* could at some earlier point of time and perhaps substantially earlier have been correctly described as overtaking the *Mar de Irlanda.* I have difficulty, however, in seeing how the latter vessel could at any substantially earlier time be described as "overtaken." Upon the facts as I find them this question of a precise point of time seems to me to be in this case of no considerable importance.

For the reasons I have stated I hold the *Cederic* to have been alone to blame for the collision ; and there will be judgment accordingly.

Solicitors for the plaintiffs, *Thomas Cooper and Co.*

Solicitors for the defendants, *Ince, Colt, Ince,* and *Roscoe.*

July 23, 24, *and* 30, 1924.

(Before HILL, J.)

THE GRIT. (*a*)

Damage at berth—Invitation—No charge for the use of the wharf—Cargo carried for shipment over the wharf-owner's railway for freight received by the wharf-owner—Wharf-owner not the owner of the bed of the river—Liability for damage caused by lying aground on unfit berth—Berth not reasonably fit—Duty

(*a*) Reported by GEOFFREY HUTCHINSON, ESQ., Barrister-at-Law.

of the wharf-owner to warn the owners of vessels through their agents of the unfit condition of the berth—Knowledge of the agent that the berth was unfit.

The plaintiffs' vessel was damaged by taking the ground at the berth at the defendants' wharf. The defendants, who were a railway company, were not the owners of the berth, but were the owners of the wharf. They made no charge for the use of the wharf, but cargoes shipped from it were carried to the wharf along their railway, and they received the freights for such carriage. Arrangements for shipment were made between the defendants' stationmaster, at their station adjoining the wharf to which the cargoes for shipment were consigned, and an agent who acted for both the plaintiffs and shippers, and who had an office on the wharf. It appeared that this agent was at one time aware of the conditions on the berth which subsequently caused the damage, and had warned the defendants of their existence. Since such warning had been given, soundings had been taken by the defendants, but they had failed to reveal the obstruction in the berth by which the plaintiffs' vessel was afterwards damaged.

Held, (1) *that the defendants' servants agreed to the ship loading at the wharf, and that the shipowner was therefore not a mere licensee, but was using the wharf, both for his own benefit and for that of the defendants, because the defendants earned the freight for the land carriage of the cargo; and that the defendants were therefore liable if they had failed to take reasonable care to see that the berth was safe, or to give warning of their failure so to do. The liability of the defendants to the plaintiffs was not affected by the fact that dues were not charged and that the wharf was not a profitable part of the defendants' undertaking:* (2) *that although the knowledge of the plaintiffs' agent of the state of the berth might have relieved the defendants of their duty to warn the plaintiffs of its unsafe state, in the circumstances the agent was entitled to assume that the defendants were satisfied by their soundings that the berth was reasonably safe, and that the plaintiffs were therefore entitled to be warned through their agent that this was not the case.*

THE plaintiffs were the owners of the motor barge *Grit*, and the defendants were the London and North-Eastern Railway Company, who were the owners of a wharf at Keadby, on the River Trent. It was alleged that the plaintiffs' vessel was damaged by taking the ground at the wharf at Keadby on the night and early morning of the 21st and 22nd Aug. 1923, owing to the presence of large stones on the berth. The defendants charged no dues for the use of the wharf, but cargo shipped from it, including the cargo shipped in the plaintiffs' vessel, was brought over the defendants' railway, for which the defendants received freight. The defendants had no officials on the wharf, but their railway station at Keadby adjoined the wharf. A Mr. Wharton, who was collector of dues for the Humber Conservancy at Keadby, and who had an office on the wharf, acted as agent for the plaintiffs and for their shippers, and made the necessary arrangements for the *Grit* with the defendants' station officials.

The facts and arguments fully appear from the judgment.

Raeburn, K.C. and *Dumas* for the plaintiffs.

Bateson, K.C. and *John B. Aspinall* for the defendants.

Reference was made to the following cases:

The Moorcock, 6 Asp. Mar. Law Cas. 373; 60 L. T. Rep. 654; 14 Prob. Div. 64;

The Bearn, 10 Asp. Mar. Law Cas. 208; 94 L. T. Rep. 265; (1906) P. 48;

Mersey Docks Trustees v. *Gibbs*, 1866, 14 L. T. Rep. 677; L. Rep. 1 H. L. 93;

Smith v. *Bauer and Sons*, 65 L. T. Rep. 467; (1891) A. C. 325;

Bauer v. *James, Bros., and Sons*, 125 L. T. Rep. 414; (1921) 2 K. B. 674.

Cur. adv. vult.

July 30, 1924.—HILL, J.—The plaintiffs are the owners of the motor barge *Grit;* the defendants own a wharf at Keadby on the River Trent. The plaintiffs complain that by reason of inequalities in the berth alongside the wharf on which the *Grit* took the ground after her loading was completed on the evening of the 21st Aug. 1923, the *Grit* received damage; and they contend that the defendants failed in their duty to the plaintiffs as regards the safety of the berth. Defendants deny that the *Grit* sustained damage in the berth and deny that the berth was unfit, and say that they owed no duty to the plaintiffs, or, if they did, it was fulfilled. The case raises questions of fact and questions of law.

First, as to the facts. The *Grit* is a motor barge of 193 gross tonnage, 105ft. long, 23ft. 6in. beam, flatbottomed, with machinery aft, with two hatches and loaded draught 9ft. 6in. aft and about 9ft. forward. Her frames and side plankings were of oak, chimes and keel of elm. She was strongly built, and so constructed as to be able with safety to take the ground laden. She was completed in 1923. She carried a cargo of wine from London to Norwich, and thence came to Keadby to load basic slag in bags. The wharf at Keadby, belonging to the defendants, adjoins the goodsyard at Keadby station. It is a pile wharf, 210ft. long; and the northern or down-river half of it is sometimes spoken of as the jetty. When I use the word "jetty" I refer to the northern half. A short distance to the south of the jetty is a coal tippler, up which trucks of coal are brought, so that the coal can be tipped into vessels which lie at the wharf. I refer to it as the tippler to distinguish it from the moveable shoots hereafter to be mentioned. This tippler was in evidence sometimes spoken of as the shoot. The shipments at Keadby are chiefly of coal. In addition, a certain quantity of basic slag is shipped. Whether coal or slag, it is brought to Keadby by defendants along their railway.

When coal is shipped, defendants' men bring the coal to the tippler and tip it into the vessel. When basic slag is shipped, defendants' men bring the truck to the tippler, and defendants provide moveable shoots whereby men employed by the shipper or ship move the bags from truck to quay and from quay to ship.

In the present case the shoot to the quay landed the bags some 10ft. to the south of the tippler. The *Grit* arrived on the 20th Aug. and went alongside the wharf and lay head to northward, that is, down-river. She loaded first into the fore hatch. She took in 84 tons and then shifted further to the northward so as to bring her main hatch abreast of the temporary shoot. In this position her master said the main hatch was 20ft. to the southward of the tippler. Unfortunately, plaintiffs had no builders' plans and did not give me any precise measurements of the hatches and so forth. In this second position, the loading was completed by 8 p.m. on the 21st. She took in all 280 tons. Between 2 and 3 a.m. on the 22nd she shifted further to the northward to make room for another vessel which was about to load coal. In this third position her stem was some 20ft. to the northward of the northern end of the jetty. She lay there until 4.20 p.m. on the 22nd and then proceeded on her voyage As the tide fell on each ebb she took the ground —on the 20th forward only—but when loaded she took the ground on the evening of the 22nd and again on the morning of the 23rd. The plaintiff's case is that she received damage on the evening of the 21st and early morning of the 22nd in the second position.

[The learned judge then dealt with the evidence that the *Grit* was damaged at the berth on the night and morning of the 21st–22nd Aug., and the defendants' contention that she grounded at other places, and continued :]

Then as to the berth. It was surveyed for plaintiffs early in September. At two places stones projecting above the bed were found ; and in addition there were several stones or hard substances embedded in the berth. Mr. Kirk, who surveyed for the Humber Conservancy Board, found hard material, slag or stones, and a small part also of coal tipped. A consultation followed between the defendants and the Humber Conservancy Board which resulted in defendants in January dredging the berth and removing a very large number of stones as well as sand.

There can be no doubt that there were a great many stones in the berth and that some were projecting. The positions of these projecting stones found by the surveyors are shown on the plan put in. One was 17ft. forward and the other group 45ft. forward of the place where the master said the stern of the *Grit* in the second position had been. It is impossible to fix the position absolutely to a foot or two. I am advised that the damage found may well have been caused by the berth as found ; and I find that it was. I find also that it happened on the night of the 21st–22nd Aug. after the loading had been completed.

There is no doubt how the stones got into the berth. Below, or to the northward of the north end of the jetty, the river bank had been made up by tipping slag down it. It was in controversy whether this work below the north end of the jetty was done by the railway company or by the Board of Agriculture. I am, upon the evidence, unable to find that it was by the defendants and not by the Board of Agriculture. I cannot therefore find that the defendants created a nuisance upon the highway of the river. But that the stone came from the bank is clear. In the Trent there is a very strong flood tide. In course of time much of the stone slipped down into the bed of the river and disappeared. Mr. Wharton who, among other things was collector of dues for the Humber Conservancy Board at Keadby, with an office on the wharf, said that when the stone was first placed to protect the bank he pointed out that it might cause obstruction. By 1922 he said the greater part of the stone had disappeared into the river bed. On the 13th July 1922, he wrote to the railway company as follows : " Referring to conversation *re* depth of water at the Keadby Trent Jetty, I find that there is only 4ft. to 5ft. of water at the north end of this jetty at low tide. This is chiefly owing to the large stones rolling into the river when repairing the Trent bank. Consequently, those stones are very dangerous to those vessels, which are now loading, grounding on those stones. Will you be good enough to give this prompt attention, otherwise we may have a serious accident, as those stones are liable to hole a vessel's bottom when loaded." It is admitted that nothing in the way of dredging was done until 1924. I have no doubt that Mr. Wharton is right in thinking that the stones which by Aug. 1923 were in the berth alongside the wharf came from the bank below the north end of the jetty. I find in fact that on the 21st Aug. 1923 the berth was unfit for the *Grit*.

To determine liability I have to state one other fact. Mr. Wharton acted as agent for both shipowners and shippers to see that the ship received the cargo at the wharf. He told the stationmaster, who controlled the wharf on defendants' behalf, that the *Grit* was coming for the cargo, and asked him to see that the cargo was brought down to the wharf for the ship. No one else on behalf of the owners of the *Grit* had any communication with the defendants.

The position then is this : defendants own a wharf and a railway line. They carry goods to the wharf and are paid for the carriage. They make no charge for the use of the wharf or the loading appliances at the wharf and take no part in the work of loading. Mr. Wharton, who is agent both of ship and shippers to see that the ship receives the cargo at the wharf, tells the railway company's servant who has control of the wharf that the ship is coming to the wharf and asks him to see that the cargo is sent forward by the railway. The railway company's servant assents to the ship coming and sees that the cargo arrives, *i.e.*, he agrees that

the ship shall load the cargo at the wharf. In such circumstances the shipowner is not a mere licensee any more than the cargo-owner. Both are using the railway company's wharf not only for their own purposes and benefit but also for the purposes and benefit of the railway company, that is, so that the railway company may earn the freight for the land carriage of the cargo. What difference can it make *quâ* the shipowner if the wharf-owner charges shipping dues upon the goods? And, apart from the fact that the railway company did not charge the goods for any wharf service, the facts are as in *The Bearn* (10 Asp. Mar. Law Cas. 208; 94 L. T. Rep. 265; (1906) P. 48). Further, it is nothing to the point that the wharf is not a profitable part of the railway company's undertaking.

In my judgment, defendants did invite the *Grit* to load at the wharf and came under the liabilities of those who own a wharf but not the bed of the river alongside the wharf, and invite ships to load at the wharf. Further, the defendants knew that ships which loaded at the wharf often did take the ground and, by their servant, the stationmaster, knew that the *Grit* was of a size to take a cargo of 280 tons, and they knew, or ought to have known, that the *Grit* was likely in the ordinary course to take the ground. Their duty therefore extended to the safety of the ship as a ship which might take the ground when alongside the wharf.

The duty is defined by *The Moorcock* (6 Asp. Mar. Law Cas. 373; 60 L. T. Rep. 654; (1889) 14 Prob. Div. 64). In that case Bowen, L.J. (at p. 375 (Asp.); p. 656 (L. T. Rep.); p. 70 (14 Prob. Div.) said: "They at all events imply that they have taken reasonable care to see whether the berth, which is the essential part of the use of the jetty, is safe, and, if it is not safe, and if they have not taken such reasonable care, it is their duty to warn persons with whom they have dealings that they have not done so." Compare *The Bearn* (*sup.*) at p. 217 (Asp.); p. 274 (L. T. Rep.); p. 76 (1906) P.).

In fact, the railway company had taken no steps to make the berth safe. They had taken no adequate steps to see whether the berth was safe. I say no adequate steps because they had from time to time made some inspection of the berth; the defendants' evidence was once a year or twice in two years. Mr. Wharton said that time after time he pointed out to the defendants' servants that the stone was coming into the river and washing alongside the jetty. He said that after his letter of July 1922 some railway men examined the wharf. A plan was put in by defendants showing soundings taken on the 17th Aug. 1922. There are only six lines of soundings in the whole 210ft. of wharf and jetty. In the berth occupied by the *Grit* the soundings along the centre line showed 11ft. forward, then 9ft. 9in. about amidships, then 10ft. aft. The draughtsman who took the soundings never discovered the stones. The defendants gave no warning that they had made no proper examination.

This brings me to a matter which has given me some trouble. The duty was to warn. But when the negligence alleged is a failure to give information, the knowledge or absence of knowledge on the part of the shipowners must be a material circumstance. The judgments in *The Moorcock* (*sup.*) and *The Bearn* (*sup.*) emphasise the point that the shipowner had no knowledge as to what steps had been taken by the wharf-owner and knew nothing about the berth. In the present case, however, Mr Wharton did the ship's business at Keadby, such as it was. Plaintiffs rely, and have to rely, upon invitation. The person to whom the invitation on behalf of the plaintiffs was given was Mr. Wharton—the invitation was implied in the arrangements made between him and the stationmaster. Being the person who sought and obtained the invitation, Mr. Wharton was the person to whom, on behalf of the plaintiffs, the warning should have been given. I therefore think that I must consider the knowledge or absence of knowledge of Mr. Wharton.

At one time I was inclined to think that Mr. Wharton knew so much and had himself given to the railway company such warnings of the risks to the berth that it could not be negligence on the part of the railway company to fail to re-echo to Mr. Wharton warnings which he had himself given. But, on consideration, I think that would not be sound. Mr. Wharton did give warnings, but he knew that the railway company thereafter took soundings. He was not to know that they had taken them in a very inadequate manner. He was, in the absence of any further communication by the railway company, entitled to assume that they were satisfied by their soundings that the berth was reasonably safe, and that the risk of stones reaching the berth which he apprehended had not yet passed from risk to fact. Plaintiffs, through Mr. Wharton, were still entitled to a warning that the defendants had not taken reasonable care to see that the berth was safe and at least to be told the extent and results of the examination on the 17th Aug. 1922. I therefore come to the conclusion that such knowledge and apprehension as Mr. Wharton had does not, in this case, affect the plaintiffs' rights.

There will be judgment for the plaintiffs, with costs.

Solicitors: *Holman, Fenwick, and Willan*; *Thomas Chew.*

Nov. 3, 4, 5, and 12, 1924.

(Before ROCHE, J.)

THE MOLIERE. (*a*)

Collision—Action in *rem—Both vessels to blame—Division of loss—Damages—Payment of compensation under foreign statute—Jurisdiction—Maritime Conventions Act 1911 (1 & 2 Geo. 5, c. 57)—Surveyors' fees—Surveyors employed and paid by underwriters.*

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

In an action in rem *the plaintiffs' and the defendants' vessels were found to blame for a collision with one another in which a seaman on the plaintiffs' vessel lost his life. The plaintiffs paid compensation to the relatives of the seaman under a Swedish statute comparable in effect to the English Workmen's Compensation Act* 1906. *At the reference the registrar allowed the sum paid for compensation in the claim of the plaintiffs.*

Held, on appeal, that the amount ought not to be allowed, since there is no jurisdiction under the Maritime Conventions Act 1911, *or otherwise, to entertain an action* in rem *in respect of claims for personal injury or loss of life under a statute, such as the Workmen's Compensation Act* 1906, *or the equivalent of that Act in foreign law, which provides merely for payment of compensation and not damages; consequently the Admiralty rules of division of loss have no application to a claim to recover compensation.*

The plaintiffs also claimed fees paid by the underwriters to surveyors who supervised the repair of the collision damage; the registrar allowed the claim.

Held, that the amount was rightly allowed, since the survivors were employed in surveying and superintending the owners' work. The employment of surveyors was indispensable. It was, therefore, immaterial in the circumstances that the surveyors were in fact employed and paid by the underwriters.

APPEAL from a decision of the Admiralty Registrar.

The plaintiffs' (respondents') steamship *Adolf* and the defendants' (appellants') steamship, *Molière* had been held equally to blame for a collision which took place in the Bristol Channel in March 1920. In assessing the amounts due on the claim and counterclaim the registrar and merchants allowed the following items (amongst others) in the claim lodged by the plaintiffs, the owners of the *Adolf*:

Item 99: Survey fees. Claimed 695*l*. 10*s*.; 500*l*. allowed by the registrar.

Item 101: Compensation paid to the relatives of William Samuelsson who lost his life in the collision, 165*l*. 18*s*. 7*d*.

The defendants appealed.

The Maritime Convention Act 1911 (1 & 2 Geo. 5, c. 57) provides as follows:

Sect. 1 (1). Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault: . . .

Sect. 3 (1). Where loss of life or personal injuries are suffered by any person on board a vessel owing to the fault of that vessel and any other vessel or vessels, and a proportion of the damages is recovered against the owners of one of the vessels which exceeds the proportion in which she was in fault they may recover by way of contribution the amount of the excess from the owners of the other vessel or vessels to the extent to which those vessels were respectively in fault: Provided that no amount shall be so recovered which could not, by reason of any statutory or contractual limitation of, or exemption from, liability, or which could not for any other reason, have been recovered in the first instance as damages by the persons entitled to sue therefore. (2) In addition to any other remedy provided by law, the persons entitled to any such contribution as aforesaid shall, for the purpose of recovering the same, have, subject to the provisions of this Act, the same rights and powers as the persons entitled to sue for damages in the first instance.

Sect. 5. Any enactment which confers on any court Admiralty jurisdiction in respect of damage shall have effect as though references to such damage included references to damages for loss of life or personal injury, and accordingly proceedings in respect of such damages may be brought *in rem* or *in personam*.

Noad and *MacIver* for the appellants.—The registrar should not have allowed the surveyors' fees. The fees were paid to the surveyors superintending the work on behalf, and in the interests, of the Swedish underwriters, and the owners of the *Molière* ought not to be liable for payment of fees which were unnecessary and incurred solely in the interests of the underwriters. As to the sum paid to the relatives of Samuelsson, that payment was not a payment of damages, but was compensation paid under the terms of a Swedish statute comparable in effect to the Workmen's Compensation Act 1906. Payment of compensation under such a statute is irrespective of negligence. Before the passing of the Maritime Conventions Act 1911 it is clear that such a payment was not recoverable as damages in proceedings *in rem* where both vessels were held to blame: (*The Circe*, 100 Asp. Mar. Law Cas. 149; 93 L. T. Rep. 640; (1906) P. 1). The question is whether the law has been altered by the Maritime Conventions Act 1911. It is submitted that the expression "damages" in sect. 3 does not include compensation; no doubt the draftsman of sect 3 had the decision in *The Circe* (*sup.*) present in his mind. An indemnity for compensation paid cannot be recovered where the party seeking to be indemnified is guilty of contributory negligence: (*Cory and Son* v. *France Fenwick and Co.* (11 Asp. Mar. Law Cas. 499; 103 L. T. Rep. 649; (1911) 1 K. B. 114). The sum paid to Samuelsson's relatives cannot be recovered as damages, for the relatives could not have sued for damages.

Reference was made to: *The Annie* (11 Asp. Mar. Law Cas. 213; 100 L. T. Rep. 415; (1909) P. 176); *The General Havelock* (1906) P. 3 (*n*); *The Rigel* (12 Asp. Mar. Law Cas. 192; 106 L. T. Rep. 648; (1912) P. 99).

Stranger for the respondents.—The registrar was right in allowing both items. The employment of the surveyors was necessary, and their work was performed on behalf of the owners and not solely in the interests of the underwriters. As to the sum paid to Samuelsson's relatives, the respondents were bound to pay compensation under Swedish law, which in this matter must be taken to be the same as English law unless the contrary is proved. Such compensation is part of the respondents' general

damages. The decision in *The Circe* (*sup.*) was given before the Workmen's Compensation Act 1906, which extended the right to compensation to seamen, and also the Maritime Conventions Act 1911. The law has been changed by these statutes. Reference was made to *The Cedric* (15 Asp. Mar. Law Cas. 285; 125 L. T. Rep. 120; (1920) P. 193).

Noad replied. *Cur. adv. vult.*

Nov. 12, 1924.—ROCHE, J. read the following judgment: In an action of damage arising out of a collision which occurred in the month of March 1920 between the Swedish steamship *Adolf* and the British steamship *Molière*, both vessels were held equally in fault. Claims were brought to a reference by the owners of these vessels, and the registrar, assisted by merchants, reported on these claims.

The owners of the *Molière* objected to the allowance of two items in the report upon the claim of the owners of the *Adolf*, and further objected, in respect of their own claim, that the report allowed too little in respect of demurrage or loss of time.

The first objection arose in respect of item 99 of the claim of the *Adolf*, being survey fees; 695*l.* 10*s.* was claimed and 500*l.* was allowed. The objection is to the allowance of any part of that sum. The matter is thus dealt with by the registrar at p. 78 of the record. Objection was taken to the charges of the only surveyor who was employed, and it was contended that the surveyor having been paid by the underwriters, the owners of the *Adolf* could not recover this amount. There is evidence, however, that the surveyor was also instructed by the master and further, no other surveyor having been employed, the work in question must be regarded as work and labour for the costs of which the defendants are liable, since the services of a surveyor were indispensable. Therefore 500*l.* of this item has been allowed. The finding that the surveyors were requested to act or employed on behalf of the owners is supported by the evidence, and the real ground of objection put forward was that the underwriters, and not the owners, had paid the surveyors' fees. It was not, and could not be disputed, that in respect of a heavy repair costing some 11,000*l.* done to a Swedish vessel in England the services of surveyors were necessary, and it was not contended that the amount allowed was excessive. The report and reasons of the registrar are, in my opinion, clearly correct. The measure of damage recoverable in respect of a ship is the amount of damage done whether repairs are executed or not. But where repairs are done the cost is the usual and convenient standard whereby to measure the damage. The expenses of survey and superintendence are, in most cases—of which the present is one—a necessary part of the cost of repairs, and are properly and generally allowed. It was stated by counsel that the practice in the registry still accords with the practice that I personally recollect, and that two sets of surveyors, one for owners, and one for underwriters, are not allowed. That practice is correct, in my view, inasmuch as the necessity for two sets of surveyors arises not out of the necessities of the collision damage but out of the infirmities of human nature. This practice may have misled the objectors in the present case. Here the surveyors were employed, not in watching the owners' operations, but in surveying and superintending the owners' work, and it is, in my view, nothing in point that they happened to be generally employed by the underwriters, or that the underwriters paid their accounts. It is to be observed that the account is not allowed in full, and it is to be assumed—and indeed the registrar's reasons imply—that any part of the surveyors' work which was mere surveillance for underwriters has not been allowed. What has been allowed is payment for their services which were rendered to the owners, and were indispensable to repair. As to the fact that the underwriters have paid the account such a state of circumstances must exist in respect of a very large number, probably the majority, of the repair accounts which are brought into the registry and the doctrine of subrogation exists because of this fact, and for the very purpose of dealing with this and similar situations. I therefore decide against this objection.

I now pass to the second matter of objection: the allowance of item 101, "compensation paid to relatives of William Samuelsson who was drowned in collision, 165*l.* 18*s.* 7*d.*" The registrar deals with the matter in his reasons on p. 78 of the record. "The only other item which requires to be referred to is item 101 which was in respect of compensation paid for a life claim. This claim was objected to by the defendants. I am of opinion that it should be allowed. The collision appears to have been the cause of the death of the sailor in question and the claim is one which is covered by the Maritime Conventions Act 1911, and there are no judicial decisions to the contrary." The point is one of considerable difficulty, but having heard full arguments, and having taken time to consider my judgment, I have arrived at the conclusion that the law remains as it was before the Maritime Conventions Act 1911 and that the decision of the learned registrar on this point cannot be supported. Before the passing of the Maritime Conventions Act the position as to claims for loss of life or personal injury in relation to courts with Admiralty jurisdiction was as follows: where such claims had to be enforced by action, they were not within the jurisdiction of the court of Admiralty as such, accordingly an action *in rem* will not lie to enforce them, and the Admiralty rules as to division or loss had no application in respect of them. *The Vera Cruz* (*No.* 2) (5 Asp. Mar. Law Cas. 270; 51 L. T. Rep. 104; 9 Prob. Div. 96); *The Bernina* (6 Asp. Mar. Law Cas. 257; 58 L. T. Rep. 423; (1888) 13 App. Cas. 1). An action *in personam* could of course be brought in the Admiralty Division to enforce such claims subject to the same rules of law as

would apply to them in a court of common law. Where such claims gave no right of action but a right to compensation subsisted or arose under some statute, British or foreign, it could not be contended that it was within the jurisdiction of the Court of Admiralty to award compensation to a claimant. But in the year 1905 an attempt was made in proceedings *in rem* to include a moiety of the compensation paid to a seaman under a foreign statute in the shipowners' claim for damages against the owner of another vessel held to be partly to blame in proceedings *in rem:* (see *The Circe,* 10 Asp. Mar. Law Cas. 149; 93 L. T. Rep. 640; (1906) P. 1). Sir Gorell Barnes (President) decided that the claim was not one within the Admiralty rules of jurisdiction. The learned President also stated that such a claim for compensation was not recognised by the law of England. At the date of his decision (1905) British seamen were not covered by any Workmen's Compensation Act. Their inclusion was brought about by the Act of 1906 (6 Edw. 7, c. 58). Thereafter shipowners who paid compensation under that Act successfully enforce the right of indemnity conferred by the Act itself, sect. 6 (2), in the Admiralty Division: (see *The Annie,* 11 Asp. Mar. Law Cas. 213; 100 L. T. Rep. 415; (1909) P. 176). But such enforcement was achieved by an action *in personam* and it clearly follows from the decision of the Court of Appeal in *Cory and Son Limited* v. *France Fenwick and Co. Limited* (11 Asp. Mar. Law Cas. 499; 103 L. T. Rep. 649; (1911) 1 K. B. 114) that the Admiralty rules as to division of loss were inapplicable in such an action. It was there held that contributory negligence was an answer to a plaintiff's claim for indemnity. It remains to consider what, if any, change, has resulted from the passing of the Maritime Conventions Act. The sections having a bearing on this matter are sects. 1, 2, 3, and 5. Their effect may be, I think, sufficiently summarised as follows: sect. 1 alters the Admiralty rule as to division of loss by substituting for equality of division a division into proportions based on degree of fault, but preserves the earlier limitation of the rule itself to cases of damage to ship, cargo, freight, and property on board.

Sect. 5 confers on courts with Admiralty jurisdiction jurisdiction *in rem* or *in personam* in respect of damages for loss of life and personal injury. Sect. 2 provides that where two vessels are to blame, and loss of life and personal injury claims arise, liability shall be joint or several. It follows that the plaintiff in an action to recover damages for these matters is not subject to any rule as to division of loss. Sect. 3 provides for contribution as between owners where more than one vessel is to blame and one owner has paid more than his due proportion (estimated in accordance with sect. 1) of damages recovered in respect of matters dealt with under sects. 5 and 3, that is to say, in respect of claims for loss of life or personal injuries. It is to be observed that sects. 2, 3, and 5 of the Act are concerned with damages and with actions therefor. No mention is made of compensation, or of claims for compensation arising independently of fault in a shipowner and no right of contribution or indemnity is conferred in respect of payments made by way of compensation. On any other view the silence of the contribution section (sect. 3) with regard to the case of an owner who may have to pay compensation though his vessel is not in fault at all would be quite inexplicable. The Maritime Conventions Act, therefore, in my opinion, leaves the matter where it was before, and does not cover, or support, the claim now under consideration. It may be, and was suggested during the argument, that since the date of the decision in *The Circe* (*sup.*) circumstances had changed, and that by the laws of England and foreign countries a like compensation to seamen for accident and loss of life was so generally payable independently of any considerations of fault in the owner, that it had become a head of damages so natural and probable as to be recoverable in an action such as the present action. Apart altogether from any difficulties as to jurisdiction in Admiralty *in rem* or as to division of loss, I am of opinion that this contention is not open to the appellants. The matter is concluded in all the courts of this country by a line of decisions from *Baker* v. *Bolton* (1808, 1 Campbell, 493) to *The Amerika* (13 Asp. Mar. Law Cas. 558; 116 L. T. Rep. 34; (1917) A. C. 38). The principle that (apart of course from some statute) the death of a human being *per se* is not actionable, and cannot found a claim for damage was laid down by Lord Ellenborough in the case first mentioned and was held by the House of Lords in the last-mentioned case to have become established as part of the common law and to be incapable of disturbance save by legislation. For these reasons I allow the second objection to the report of the registrar, and disallow this item of the *Adolf's* claim.

Solicitors for the appellants, Messrs. *Godfrey, Warr,* and *Co.,* agents for Messrs. *Cameron, MacIver,* and *Davis,* Liverpool.

Solicitors for the respondents, Messrs. *Stokes* and *Stokes,* agents for Messrs. *Bramwell, Clayton,* and *Clayton,* Newcastle-on-Tyne.

Friday, Dec. 5, 1924.

(Before Sir HENRY DUKE, P. and HORRIDGE, J.)

THE HOPPER NO. 13. (a)

Practice—Discovery—Report by master of vessel to solicitor for underwriters—Report made as a matter of routine—Document obtained for solicitor as material upon which professional advice to be given—Privilege.

The defendants, the Port of London Authority, arranged with their underwriters that, in all cases of claims for collision in which their vessels were concerned, the management of the

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister at-Law.

claim should be put in the hands of certain solicitors. The defendants directed that a report on a printed form headed " Confidential report for the information of the Authority's solicitor . . . " should be made by the master of the vessel. The report was subsequently passed through various departments in the defendants' offices until it reached the solicitors' hands. It was then dealt with by the solicitor in the course of his professional conduct.

A report was made in these circumstances by the master of a vessel belonging to the defendants in respect of a collision with the plaintiffs' vessel. The plaintiffs claimed to have this report produced to them.

Held, reversing the judge of the Mayor's and City of London Court, that the report having been obtained for the solicitor, in the sense of being procured as materials upon which professional advice should be taken in proceedings pending or threatened or anticipated, it was privileged from production. The test laid down by Buckley, L.J. in Birmingham and Midland Motor Omnibus Company Limited *v.* London and North-Western Railway Company (109 *L. T. Rep.* 64, 67 ; (1913) 3 *K.B.* 860, 856) *applied.*

APPEAL from an order of the judge of the Mayor's and City of London Court reversing a decision of the registrar refusing to order the defendants the Port of London Authority to make a further affidavit of documents.

The defendants, who owned a number of craft, had an arrangement with their underwriters whereby in the case of a claim in respect of collision, the management of the claim was put in the hands of certain solicitors. The defendants gave instructions to their masters that, immediately after a collision in which one of their vessels was concerned, the master should prepare a report in triplicate on a printed form supplied by the defendants and entitled " Confidential report furnished for the information of the Authority's solicitor in view of anticipated litigation in respect of a casualty occurring between the Authority's . . . and the . . . " This report was submitted, in the first instance, in the case of the Authority's dredgers, to the superintendent of the dredging department, and subsequently through the Authority's claims department, to the solicitors.

A report was made in these circumstances by the master of the defendants' hopper dredger *Hopper No.* 13, in respect of a collision between the hopper and the plaintiffs' barge *Promptitude.* Litigation ensued, and in the course of correspondence reference was made by the defendants to the existence of the report. The plaintiffs thereupon asked for the report to be produced : the registrar of the Mayor's and City of London Court refused to order a further and better affidavit of documents, but the judge ordered the report to be produced, taking the view that it was not privileged.

The defendants appealed.

Dunlop, K.C. and *Alfred Bucknill* for the appellants. — The report conforms with the test of a privileged document laid down by Buckley, L.J. in *Birmingham and Midland Motor Omnibus Company Limited* v. *London and North-Western Railway Company* (109 L. T. Rep. 64, 67 ; (1913) 3 K. B. 860, 856). It was clearly a document *boná fide* brought into existence for the purpose of litigation. Reference was made to : *Southwark and Vauxhall Water Company* v. *Quick* (38 L. T. Rep. 28 ; 3 Q. B. Div.315) ; *Adam Steamship Company* v. *London Association Corporation* (12 Asp. Mar. Law Cas. 559 ; 111 L. T. Rep. 1031 ; (1914) 3 K. B. 1256) ; *Collins* v. *London General Omnibus Company* (68 L. T. Rep. 831).

Claughton Scott, K.C. and *Trapnell* for the respondents.—The decision of the learned judge was right. The document came into existence in the ordinary routine of the defendant's business and not for the purpose of litigation. The fact that the document is stated to be for the information of solicitors does not of itself invest it with privilege though no doubt intended to do so.

Reference was made to : *Cook* v. *North Metropolitan Tramway* (1889, 6 Times L. Rep. 22) ; *Jones* v. *Great Central Railway* (100 L. T. Rep. 710 ; (1910) A. C. 4) ; *Polurrian Steamship Company* v. *Young* (12 Asp. Mar. Law Cas. 449 ; 109 L. T. Rep. 901).

The appellants were not called upon to reply.

Sir HENRY DUKE, P.—This is an appeal from an order of the learned judge of the City of London Court in a matter of discovery. The action in which the order was made was an action between the owners of the barge *Promptitude* and her cargo, and the Port of London Authority in respect of an alleged delinquency by the servants of the authority on board the authority's *Hopper No.* 13. In the course of the litigation a question arose as to discovery of documents, and by reference to a disclosed document it was learnt that there had been a report of the master of the dredger upon the collision which was the subject of the litigation. Thereupon application was made that there should be a further affidavit of documents disclosing that report. No question arises here as to the exact form of the proceedings before the registrar in the City of London Court, or of the appeal to the learned judge, and there is no question as to whether there should not have been an additional application for a further affidavit, or an application for inspection. The sole question is whether upon the facts, as the court knows them, this document ought to have been produced for inspection by the defendants to the plaintiffs.

The facts are as follows : The authority own large numbers of craft, including dredgers, and employ their own servants in charge of their craft. In view of the almost inevitable certainty of litigation where there is a collision between craft of the authority and the craft of any other owner, the authority have adopted a particular form of procedure with respect to reports by the masters of their craft in cases of collision. They treat a collision as a case in

which—in default of settlement—litigation must almost inevitably follow. Taking that view of the matter, the defendants have given directions to their various officers. We have learnt with particularity how it is done, that wherever there is a collision, the master of the authority's craft which is in collision shall prepare a report to be considered by the solicitors. There are also arrangements by which the defendants have their own claims department and deal with claims in respect of collisions. They underwrite the risk in respect of collision, and have an arrangement with the underwriters whereby in all cases of claims in respect of collision they put the management of the claim in the hands of certain solicitors—solicitors to whose employment the underwriters assent, or it may be whose employment is proposed by the underwriters, and acquiesced in by the authority. The authority direct that a report upon such a casualty as is here in question shall be made by their servants for the purpose of being submitted to the solicitors who for that occasion are their solicitors, to be dealt with by them in the course of their professional duties for the protection of the authority in respect of the claim arising out of the particular collision. I take those to be the facts; and it seems to me that when the facts are ascertained the case comes quite clearly within the principle which is enunciated by Buckley, L.J. in *Birmingham and Midland Motor Omnibus Company Limited* v. *London and North-Western Railway Company* (109 L. T. Rep. 64, 67; (1913) 3 K. B. 850, 856). The test is, the Lord Justice said, was the document obtained from the solicitors "in the sense of being procured as materials upon which professional advice should be given in any proceedings pending or threatened or anticipated"? Was this report obtained for the solicitors? Yes; the master was directed by his employers, in such an event as a collision, to make a report for the information of the solicitors; the solicitors were identified in advance. Was it procured as material upon which professional advice should be taken? Yes; the authority had determined that, when there were claims in respect of collisions, time, trouble, and expense could be saved by their being dealt with by the solicitors. Was it obtained as materials for professional advice in proceedings pending, threatened, or anticipated? Yes; the defendants intelligently anticipated that where there was a collision between one of their craft and some craft of another owner, if they could not settle the claim, it would be litigated. It seems to me that this report satisfies the tests which are laid down in the concise statement of the learned Lord Justice. So far as my own mind on the matter is concerned, the court has exercised—as the learned judge did, and I think it is the court's duty—the right of examining the particular report, and looking at its terms I cannot have the least doubt that it was prepared in anticipation of litigation. I do not propose to state all its contents—it would be improper to do so—but it is prepared in such a way that it is useful in case of a claim, and it gives the very information which an experienced person would look for if a claim were to be made. That being so, I think that this document is protected from production, and the parties having agreed that that should be decisive of this case, the appeal must be allowed.

HORRIDGE, J.—I agree. In this case the authority having a number of craft, give instructions to their servants to make a report in triplicate by means of carbon paper immediately after every claim. The form of report is set out in a book which is supplied to the servant in charge of the craft. We can look to some extent at what that document contains because the printed forms have been put in. I do not say the actual report made in this case, but the printed forms on which the report has been made have been put in, and those forms constitute something very like a preliminary act. They inquire the names of the witnesses on the authority's vessel and the names of other witnesses, what lights, if any, were exhibited on the authority's vessel, what lights were visible on the other vessel, what sound signals were given by the authority's vessel, and what sound signals were heard from the other vessel, and when. That is the sort of information which a solicitor who is advising on a collision case wants at once, and those are some of the particulars which are required to be set out in the printed form. What happens to the printed form? When a casualty takes place the report is sent to the dredging superintendent, who sends it to the chief harbour master, who in turn hands it to the witness who was called before us to-day. He told us that in every case in which there is a claim in which a third party is involved, that report is sent to the solicitors for the underwriters. It is suggested that he does this in order that they may advise as to whether the underwriters are liable to the authority. It seems to me there is no suggestion in the evidence of anything of the kind. The report is sent to them because, being solicitors for the underwriters for the authority, they advise the authority in a defended case that their case will be defended at the risk of the underwriters. If that be so, is that a document privileged from production? It seems to me to come exactly within the language of Buckley, L.J., to which the President has referred in *Brimingham and Midland Motor Omnibus Company* v. *London and North-Western Railway Company* (*sup.*), where the Lord Justice says: "If it was obtained for the solicitor, in the sense of being procured as materials upon which professional advice should be taken in proceedings pending, or threatened, or anticipated." The learned judge in the court below laid stress upon some language which is to be found in the judgment of Hamilton, L.J. Now, I do not think, however, that the Lord Justice was laying down any general proposition there. What he was dealing with was the form of the claim contained in the affidavit as

drawn, and he pointed out that that claim would extend to matters which clearly would not be privileged; but when he goes on to deal with particular documents before he decides it, not on the form of the claim, but upon the documents and concludes his judgment by saying, speaking of the learned judge below: "He has drawn his distinguishing line by the date at which the defendants first received a letter of claim from the plaintiffs, a test which, though often unexceptional, and particularly so in mercantile disputes, is inappropriate in such a case as the present, where, as in *Collins* v. *London General Omnibus Company* (68 L. T. Rep. 831), at the very moment when the accident occurs, an ordinary employee can anticipate that litigation in respect of it will probably ensue."

In this case it seems to me clear that where there is a collision between vessels it is almost certain there will be a claim by one or other of them, or by both of them, and under such circumstances the authority have provided that they shall have an immediate report to be laid before their solicitors. That was what happened in this case, and the document comes within the decision of the Court of Appeal, to which I have referred, as being a privileged document, and one not liable to inspection.

Appeal allowed.

Solicitors for the appellants, *Pritchard* and *Sons.*

Solicitors for the respondents, *J. A.* and *H. E. Farnfield.*

Dec. 9 *and* 17, 1924.

(Before Sir HENRY DUKE, P.)

THE MEANDROS. (*a*)

Salvage—Services to vessel requisitioned by, and in possession and control of, sovereign State—Master and crew conscripted during period of requisition into forces of the State—Claim against owners of the vessel—Maritime lien—Benefit to the owners.

Where salvage services have been rendered to a vessel under requisition of a sovereign State, the owners of the vessel, if they have benefited by the services, are liable in an action in rem *to pay salvage remuneration, notwithstanding that by the terms of the requisition their vessel had, at the time of the services, passed into the possession and control of the State, and her master and crew had become conscripted into the forces of the State.*

SALVAGE ACTION.

The plaintiffs were the Neptune Company, owners of the salvage steamer *Belos*, her master and crew and the Scandinavian Salvage Union. The *Belos* rendered salvage services to the defendants' steamship *Meandros*, a vessel registered in Greece, of 2468 gross tons, the property of a Greek firm. At the time of the services the value of the *Meandros* was 30,000*l.*

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

The services were rendered to the *Meandros* when she stranded in the harbour of Moudania, Asia Minor, in Sept. 1922, at a time when she was engaged, under requisition of the Greek Government, in transporting Greek troops and refugees in the course of the war between Greece and Turkey. By the terms of the requisition the possession and control of the *Meandros* passed to the Greek Government, and her master and crew ceased to be the servants of the owners, and became conscripted in the Greek forces.

Bateson, K.C. and *Balloch* for the plaintiffs.—The owners have had the benefit of the services. A maritime lien has attached, for the services were not the consequence of the acts of the master and crew, and no question of the rights of the Greek Government arises. It was not sought to enforce the maritime lien until after the termination of the requisition.

Dunlop, K.C and *Stranger*.—The sole question is whether a maritime lien attached. It is submitted that it could not do so, because the master and crew were not the servants of the owners when the services were rendered. *The Sylvan Arrow* (16 Asp. Mar. Law Cas. 244; 130 L. T. Rep. 157; (1923) P. 220) is relied upon. [Sir HENRY DUKE, P.—There was a tort in that case, giving rise to a cause of action, the tort being that of the servant.] No lien can attach to anything which is in the possession of a sovereign State (*The Tervaete*, 16 Asp. Mar. Law Cas. 48; 128 L. T. Rep. 176; (1922) P. 259). *The Broadmayne* (13 Asp. Mar. Law Cas. 356; 114 L. T. Rep. 891; (1916) P. 64) is distinguished because in that case there was no evidence that the owners had parted with possession and control. Neither was there any benefit to the owners.

Balloch, in reply, referred to *The Sarpen* (13 Asp Mar. Law Cas. 370; 114 L. T. Rep. 1011; (1916) P. 306). Reference was also made to *The Porto Alexandre* (15 Asp. Mar. Law Cas. 1; 122 L. T. Rep. 661; (1920) P. 30) and *The Lomonosoft* (1921) P. 97).

Dec. 17, 1924.—Sir HENRY DUKE, P.—In the course of the war between Greece and Turkey, and in the month of Sept. 1922, the *Meandros* had been requisitioned by the Greek Government to assist in bringing away troops, part of a defeated army, and refugees, part of a population flying before the Turkish advance. After the requisition she was sent to Moudania, a port on the Sea of Marmora, on the north coast of Asia Minor. While there she stranded on a sandy shore, and although efforts were made by such assistance as was available locally—and there were craft of all kinds in the neighbourhood attracted by the necessity which had caused the *Meandros* to be there—she had remained stranded, and had become sanded up to a very considerable extent; she was sinking, and getting into a worse condition. The state of the sand which forms the shore there was described by the master of the *Meandros*, and though it had something of the character that one associates with a quicksand it was not a

quicksand in the sense in which the phrase is commonly used, but sand shifting with the weather. The shore there is exposed, with no shelter from the north, south, or east. The *Belos* was sent from Constantinople. She is the property of a firm who are part of a salvage association ; she is well equipped for salvage—a vessel of a class which it has always been the object of the court to encourage. She was lying ready with steam up, and she came on to the scene and laboured there from the afternoon of the 9th Sept. until the morning of the 11th Sept, at first with no success. She towed and jerked and produced no result in that way, but ultimately it appeared to her master that the proper course was to deal with the sand, and by using his engines he, as he says, dredged the sand—he really scoured and shifted the sand and increased the depth of water available for the *Meandros*, and after conducting that operation for a considerable period during the night of the 10th, on the morning of the 11th he was able to bring the vessel off.

She thereupon rendered very material service. She was forthwith crowded with refugees of various classes to the number of something like, I think, 1100, and got away with them. They were rescued in time to avoid the arrival of the Turkish troops but the closing operations in the scene were conducted to the accompaniment of artillery fire which was going on in the neighbourhood of the heights, and the Turks arrived and took possession of the town, it is said, within forty-eight hours.

Looked at in that way, and on broad grounds, it is perfectly obvious that the *Belos* rendered a highly important and valuable service in the way of salvage to somebody, but although her service was rendered in September 1922, her owners have laboured in vain until this time to secure remuneration, and they are met now with defences which render it necessary to look with some care at the documents and the facts in order to see whether the principles of law upon which salvage is based gives the *Belos* a claim which could be, and ought to be, enforced in this court Various defences were raised. It was said the vessel was a requisitioned ship and in effect that she and her crew thereupon passed to the Greek Government. It is not pleaded that the property in her passed, and I think the learned pleader very naturally shrank from any such allegation as that, but it is pleaded that the management of her, the possession, the benefit and the control of her and of her crew passed. Then it is pleaded that at the time of the service the vessel was solely at the risk of the Greek Government, and that the Greek Government were under an obligation to return her in the condition in which she had been delivered to them. It is also pleaded that no benefit was derived by the defendants ; that these services were rendered under a contract with the Greek Government, and that the proper proceeding is by way of a claim upon the Greek Government—a claim to their consideration as a sovereign State—and to their sense of justice in respect of the claim.

First, as to the contract. The master of the *Belos*—who is experienced in salvage matters—took with him Lloyd's form, and presented it to the master of the *Meandros*, who thereupon took him to a Greek officer in command of a Greek department. He signed the salvage form in blank. It provides for an award of salvage to be paid by the Greek Government after arbitration. What may be said about that agreement is, I think, that if it had been put in order by the Greek Government—if they had, as the Scotch say, " implemented " it—and if they had performed all its terms, in my judgment it would have afforded an answer to the present claim. But what took place was that before the salvage service had really commenced the Greek officer on the spot repudiated the agreement, and so it has never been completed ; and the Greek Government say that when appeals were made to them, their agents in London expressed reasons why, in the existing state of political affairs, nothing could be done in the matter. I think, therefore, the action stands as if there had never been an attempt to make an agreement—it is a repudiated agreement of the third parties.

The next question is as to requisition. The effect of requisition may be of the most various kinds. It is not an operation of stereotyped form. Requisition is not a term of art. It is barely more than a colloquial expression which has come into use during recent years. It has some connection with a term with which the English people became familiar twenty-five years ago—the term " commandeering." A requisition is a process by which the State takes the use or the possession of, or the property in, chattels and sometimes in land. But it is infinitely various. If, for instance, a stack of hay is requisitioned, it is requisitioned to be consumed ; if premises are requisitioned they are requisitioned to be occupied ; and if a ship is requisitioned it may be requisitioned for the purpose of being sent to sea, or sunk at the mouth of a harbour, or for a purpose which is satisfied the next day. I have looked at the document and listened to arguments on the Greek law. Regarding the Greek law as a matter of fact, I do not think the defendants have made out their allegation. That is upon the question of fact, as to what the Greek law is. But there is something more than that, because I am able to see by the document what actually was the effect of requisition in this case. The first step in the requisition was a demand by the Greek Government for a delivery of this ship, and I am satisfied that for every practical business purpose the ship was taken possession of by the Greek Government, that is, that they required that the ship and her master and crew should be at their service for the purpose for which they required them. Later, after the services for which the vessel was required had been completed, namely, in Jan. 1923, the sub-manager of the Greek Direction of Transport delivered her to the owners' agent. That having taken

place in Jan. 1923, in the following month there were proceedings before what I may call a statutory tribunal—not one of the civil courts—but a statutory tribunal appointed to examine and assess accounts upon requisition. On the 2nd Feb. 1923 that tribunal awarded a payment to the owners of the *Meandros* in respect of the requisition for a period from Aug. 1922 to Jan. 1923, a period of 135 days at 4671 drachmas per day. They treated the transaction, on the face of that account, as a hiring transaction. The Ministry was debited, in respect of the requisition and use of the vessel, with 635,585 drachmas. That seems to me to be a safer guide with regard to the effect of the requisition than I can find in the conflict of the arguments of the Greek advocates who have made affidavits. The possession of the vessel and the control of her passed for the time being, for her crew, by the act of requisition, became conscripts in the Greek forces, and came under the lawful authority of Greek commanders. The property in her did not pass. It is obvious, upon the facts being examined, that the owners of the *Meandros* never were disseised, in the technical sense, of property in her. All they were deprived of for the time being was the use and possession of her.

Now it is said that the salvage services produced no benefit to the defendants. Now the contrast between the position at the time when the service was about to be performed, and the period when it had been completed, is that at the time when it was about to be performed the *Meandros* stood a strong probability, as I have been advised by the Elder Brethren, of becoming a total loss by reason of the prevailing conditions, by reason partly of the paralysing influences which affected the rescue owing to the Turkish approach. The Elder Brethren advise me that as things went on, but for the service of the *Belos*, there was a strong probability that the *Meandros* would have been a total loss, that she would have been embedded in the sand, and, upon a change of weather, deeply embedded, and she would have been rendered useless as a vessel. That was the possibility, and if that had been realised, according to the defendants' contention, the owners would have had a claim against the Greek Government. I am not at all sure that the Greek Government regarded that claim as a claim by which it was bound. According to the statement of an agent of the Greek Government in London, the risk was a matter for the owners, and not for the Government; but, taking it at its highest, the owners would have had a claim which they could have presented to the arbitral tribunal which I have mentioned, a claim which could have been assessed, and in respect of which they would then have had a claim in moneys numbered. That might have been their position. As the result of the salvage they have their ship and not a claim, and to say that they derive no benefit from the salvage services seems to me to be illusory. In my judgment benefit was derived by the salvage.

What is the result? Who is to pay? If the Greek Government had been a corporation subject to national law there would have been a claim against them. They were in the possession of and had an interest in the ship. They had temporary control of her, and the right to possession of her, and upon the principles which are administered in courts possessing Admiralty jurisdiction, salvage creates a legal liability arising out of the fact that a property has been saved whereby the owner, who has had the benefit of the service, has to make remuneration to those who have conferred the benefit. It has been said, more widely than it is necessary to express an opinion upon this case, that any person whose interest in the property is real—though it fall short of ownership—may be liable in respect of salvage, and it has been said, further, in comprehensive terms, that "owner" includes all persons who are collectively or singly owners. The defendants in this case were the owners in the true sense, and at all material times, although I accept the contention of the defendants that for a period they were out of possession and out of control. On that question of control I take account of the argument founded upon the decision of the Court of Appeal in *The Tervaete* (16 Asp. Mar. Law Cas. 48; 128 L. T. Rep. 176; (1922) P. 259) and other well-known decisions, that if the act in respect of which reward is being claimed was the act of the crew while they were servants of, or under the control of the Greek Government, it would not result in a claim capable of being enforced in salvage proceedings, because neither the Greek Government, nor the vessel in their hands, nor the Greek Government in respect of acts of the crew under their control, nor subsequent owners in respect of these transactions, could be made liable in subsequent proceedings. But this is not that case. Nothing is claimed here in respect of any act of the crew of the *Meandros*. What is claimed is salvage in respect of the services of the *Belos* and her master and crew. The judgment of Sir James Hannen in *Five Steel Barges* (6 Asp. Mar. Law Cas. 580; 63 L. T. Rep. 499; 15 Prob. Div. 142) and the judgment of the Court of Appeal in *The Port Victor* (9 Asp. Mar. Law Cas. 182; 84 L. T. Rep. 677; (1902) P. 243) will be found to be ample authority for the principle on which I am proceeding. The service in this case was beneficial to the owners, and the question is what ought to be the reward. The service was of the high value which I have endeavoured to describe. I am anxious not to exaggerate the claim by reason of military danger so as to reward the claimants for intervening in a military transaction. I think that would not be proper in the circumstances of this case; but the claimants intervened in difficult circumstances, and, in my judgment, the lowest amount I can reasonably award them is the sum of 2500*l*.

Solicitors: *William A. Crump and Son*; *Downing, Middleton, and Lewis*.

House of Lords.

Nov. 10, 11, 13, *and Dec.* 19, 1924.

(Before Lords Cave, L.C., Finlay, Shaw, Phillimore, and Blanesburgh.)

Owners of Steamship Melanie *v.* Owners of Steamship San Onofre. (a)

On appeal from the Court of Appeal in England.

Collision—Statutory duty to assist—Damage caused to ship during assistance—Salvage claim—Principle applicable—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *s.* 422, *sub-s.* 1.

On the 27th *Dec.* 1916 *the steamer* M. *came into collision with the steamer* S. *in the Bristol Channel. The* M. *was struck on her starboard side by the stem of the* S. *and was seriously damaged. The* M. *was held alone to blame for the collision. After the collision the* M. *not being in a sinking condition, the master of the* S. *formed the idea of taking her in tow with the assistance of a third vessel, and getting her up to Barry Roads for the purpose of beaching her. Subsequently, owing to the set of the tide or to some other cause, and without negligence on the part of the* S., *the three vessels grounded on a ledge of rocks. Both the* M. *and the* S. *afterwards floated off and were safely towed by two tugs to Barry. The bottom of the* M. *as well as that of the* S. *was badly damaged by the rocks. A salvage action was then commenced by the owners, master and crew of the* S. *against the* M. *In that action Bailhache, J. held with the assistance of Trinity Masters that the* S. *had not contributed to the rescue of the* M. *so as to be entitled to salvage, but the Court of Appeal (Bankes, Scrutton, and Atkin, L.JJ.) assisted by Nautical Assessors came to a different conclusion and referred the assessment of the damages to the Admiralty Division. The owners of the* M. *appealed to the House of Lords.*

Held, that the action of the S. *in standing by the* M. *was not a salvage service. The towage was no doubt a meritorious attempt, but unfortunately it failed in its effect owing to the accident of grounding. The* M. *was in no better position when she was grounded on the rocks than she would have been if the* S. *had not taken her in tow. There was therefore ample material upon which the trial judge could come to the conclusion which he reached and there was no sufficient reason for setting it aside.*

Per Lord Finlay: "It seems to be very undesirable that the amount of the salvage award should be fixed by a court other than that which tried the case."

Per Lord Phillimore: Although sect. 422, *sub-sect.* 1 *of the Merchant Shipping Act* 1894 *which provides that "In every case of collision between two vessels, it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without danger to his own vessel, crew and passengers (if any),* (a) *to render to the other vessel her master crew and passengers (if any) such assistance as may be practicable," does not deprive the assisting vessel of the right to salvage, success being necessary for a salvage reward, services, however meritorious, which do not contribute to the ultimate success, do not give a title to salvage reward.*

Decision of the Court of Appeal reversed.

Appeal from a decision of the Court of Appeal (Bankes, Scrutton, and Atkin, L.JJ.) sitting with Nautical Assessors reversing a decision of Bailhache, J. sitting with Trinity Masters.

The facts which are sufficiently summarised in the headnote appear fully from the judgments.

Sir *John Simon*, K.C., *Dunlop*, K.C., and *H. Stranger* for the appellants.

Bateson, K.C. and *H. C. S. Dumas* for the respondents.

The House took time for consideration.

Lord Cave, L.C.—The question which your Lordships have to determine on this appeal is whether, having regard to the action taken by the steamship *San Onofre* after her collision with the steamship *Melanie* on the 27th Dec. 1916, the former vessel is entitled, as the Court of Appeal have held, to a salvage award or, as Bailhache, J. had held, to none. No question as to the measure or amount of the award (if any) arises on this appeal.

The legal principles to be applied in a case of this character are not in dispute. In order to earn a reward for salvage a vessel must not only have endeavoured to rescue another from loss at sea but must have done so to some purpose; that is to say, the latter vessel must have been actually salved and the former must have contributed to that result. An attempt at rescue, however meritorious and however costly to the would-be rescuer, if not attended by success, gives no right to any salvage reward. Sir John Coleridge, in delivering the judgment of the Privy Council in *The Atlas* (1 Lush. 518, on p. 527), said that if the ship or cargo were not saved there could be no salvage; but he added that "where a salvage is finally effected, those who meritoriously contribute to that result are entitled to a share of the reward, although the part they took standing by itself would not in fact have produced it." It was on this principle that salvage was awarded in *The Killeena* (4 Asp. Mar. Law Cas. 472; 45 L. T. Rep. 621; 6 Prob. Div. 193) and *The Camellia* (5 Asp. Mar. Law Cas. 197; 50 L. T. Rep. 126; 9 Prob. Div. 27) and refused in *The Cheerful* (5 Asp. Mar. Law Cas. 525; 54 L. T. Rep. 56; 11 Prob. Div. 3) and *The Tarbert* (15 Asp. Mar. Law Cas. 423; 125 L. T. Rep. 800; (1921) P. 372). Cases like *The Benlarig* (6 Asp. Mar. Law Cas. 360; 60 L. T. Rep. 238; 14 Prob. Div. 3) and *The Lepanto* (7 Asp. Mar. Law. Cas. 192; 66 L. T. Rep.

(a) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

623; (1892) P. 122), where the claim was not for salvage but for payment for work done on request, stand of course on a different footing.

In the present case the *Melanie* undoubtedly reached port, though in a damaged condition; and the question is whether the efforts of the *San Onofre* contributed materially to that result. The main facts of the case may be very shortly stated. After the collision, which has been held to have been due to bad seamanship on the part of the *Melanie*, the two vessels separated; but the *San Onofre* afterwards came up to the *Melanie* and put on board her some of her officers and crew who at the time of the collision had taken refuge on the *San Onofre*. It was then ascertained that the *Melanie*, although one of her holds (Hold No. 2) was flooded, was not sinking; and thereupon she was made fast to the *San Onofre* on the starboard side and to the *Urania* (who was escorting the *San Onofre*) on the port side, and these two vessels attempted to tow her into Barry Roads. Unfortunately, owing to the set of the tide or to some other cause, and (as it has been held) without negligence on the part of the *San Onofre*, the three vessels grounded on a ledge of rocks near the Stout Point. Some few hours afterwards, the tide having risen, the *San Onofre* floated and left the *Melanie* on the rocks; and next morning the *Melanie* also floated and was safely towed by two tugs to Barry. The bottom of the *Melanie*, as well as that of the *San Onofre*, was badly damaged by the rocks. The tugs obtained a salvage award of 1650*l*., and the question is whether the *San Onofre* is also entitled to an award.

Bailhache, J., who heard the action, held that the *San Onofre* had not contributed to the rescue of the *Melanie* so as to be entitled to salvage; but the Court of Appeal took the opposite view. The question is one of fact; and I can only say that, having carefully listened to the evidence and the arguments of counsel, I do not think that there was sufficient ground for disturbing the judgment given at the trial. The action of the *San Onofre* in standing by and putting some of the *Melanie's* crew on board her was not, I think, a salvage service. The *Melanie* was not an abandoned ship; and the weather being what it was, the *San Onofre* could hardly have sailed away with the *Melanie's* crew without endeavouring to ascertain the condition of the *Melanie* and giving her crew a chance of returning to her. The towage was no doubt a meritorious attempt, but unfortunately it failed in its effect owing to the accident of grounding; and the only result was that the *Melanie*, instead of being brought into harbour, was piled up on the rocks with a damaged hull and little (if at all) nearer to port than when the towage began. It is true that the *Melanie*, being (as Mr. Dumas put it) "safely on the rocks," could not and did not sink; and it is also true that, owing to her being on the rocks, her master was able, when the tide fell and the water ran out of her No. 2 hold, to close the watertight doors and so prevent the water from again entering the hold when the tide rose; but it is not proved that these facts saved the *Melanie* from loss. The weather, though foggy, was fine, and there was no wind and no sea; and it is a probable conjecture that, if the *Melanie* had been left to lower her anchors and use her bell, she would have remained afloat until the fog lifted and could then have been towed safely into port. If the weather had changed, she might no doubt have been in danger; but in that event her position upon the rocks would have been not less serious. The trial judge was advised by the Trinity Masters that, having regard to the weather as it was and to all the circumstances of the case, and to what might have been done to the *Melanie* had she been left in the position in which she was, she was in no better position when she was grounded on the rocks at Stout Point than she would have been if the *San Onofre* had not taken her in tow; and with this opinion the learned judge entirely agreed. The assessors who advised the Court of Appeal were of a different opinion; but the appeal was not from assessor to assessor but from court to court. It appears to me that there was ample material upon which the trial judge could come to the conclusion which he reached, and that there was no sufficient reason for setting it aside.

For the above reasons I am of opinion that this appeal should be allowed and that the order of the Court of Appeal should be set aside and the judgment of Bailhache, J. restored, with costs here and below.

Lord Finlay.—This is an action by the owners of the *San Onofre* steamship to recover for salvage services to the *Melanie* steamship. Balihache, J., before whom with the Trinity Masters the case was tried, dismissed the claim, but the Court of Appeal (Bankes, Scrutton, and Atkin, L.JJ.), sitting with assessors, reversed this finding. They did not, however, themselves settle the amount of the salvage remuneration, but sent the case to the Admiralty Division for that purpose, and the President, after a hearing, awarded to the owners of the *San Onofre* 21,500*l*., and to her captain and crew 1500*l*., of which 500*l*. was to go to the captain.

The *Melanie* and the *San Onofre* came into collision about 9.45 a.m. on the 27th Dec. 1916 in the Bristol Channel, a few miles to the south and east of Nash Point, in a dense fog. The *Melanie* was struck on her starboard side by the stem of the *San Onofre*, with the result that a large V-shaped hole was made in the *Melanie*. The captain and most of the crew clambered up into the *San Onofre*, and the remainder went in a lifeboat to an armed steam trawler, the *Urania*, which was in attendance upon the *San Onofre*. The *Melanie* did not sink, as had been feared, and she was taken in hand by the master of the *San Onofre*, with the intention of taking her to Barry, the *San Onofre* being made fast on the starboard side of the *Melanie* and the *Urania* on

her port side. The towage began at 10.30 a.m. and at 11.45 a.m., the fog still continuing, all three vessels ran on the rocks at Stout Corner, a few miles to the east of the spot of the collision. The *San Onofre* and the *Urania* were speedily got off and taken up channel. The *Melanie* floated as the tide rose, but having been anchored remained over the spot where where she had been aground, swinging to the tide, and next day she was taken to Barry by two tugs.

Both the *Melanie* and *San Onofre* sustained a good deal of damage to the bottom by this grounding, the former to the amount of 8000*l.* and the latter to the amount of 19,000*l.*

In another action in the Admiralty Division it was decided by Hill, J. that the stranding was not caused by any negligence on the part of those in charge of the *San Onofre*, and the present case must be dealt with on this footing.

Bailhache, J., by whom the present action for salvage reward was tried, explained the legal position in the course of his judgment as follows :—" Now, in these circumstances, as I have said, the *San Onofre* claims salvage ; and there is no doubt that if I ought to find as a matter of fact that the *Melanie*, when she unfortunately by accident got aground on the Stout Point, was by reason of the services rendered by the *San Onofre* in a materially better position than she would have been if the *San Onofre* had left her where she was when she was first of all picked up and taken in tow, somewhere about three miles to the southward of Nash Point —if those services really were beneficial to the *Melanie*, then undoubtedly the *San Onofre* ought to receive a salvage reward ; and in considering that salvage reward account of course would have to be taken of the damages —19,000*l.* for the bottom damage—which the *San Onofre* sustained. It is, therefore, fundamental to make up one's mind whether the *Melanie* was in a materially better position when she found herself on the rocks at Stout Point. That is a point on which I, of course, have been advised, and taken the advice of the Trinity Masters who are sitting with me in this case and advising me. They have advised me that, having regard to the weather as it was, and there being no sea, no wind, fine weather ; and having regard to all the circumstances of the case, and to what might have been done with the *Melanie* had she been left in the position in which she was, in fact she was in no better position when she was aground on the rocks at Stout Point than she would have been had the *San Onofre* not taken her in tow. I need not go into the reasons which have led me to that result. We have discussed the matter, and that is the result at which they have arrived and the result which I have accepted, and, if I may say so, which is a result with which I personally entirely agree."

This finding was reversed in the Court of Appeal, sitting with nautical assessors.

Two questions were put by the Court of Appeal to the assessors. The first was : Having regard to the weather conditions, was the water in No. 2 hold and the tunnel of the *Melanie* after collision a source of danger to the vessel ? "

To this the assessors answered, " Yes."

The second question was : " Do you consider that the towage of the *San Onofre*, though it resulted in the *Melanie* going aground, did place the *Melanie* in a safer position than she probably would have been in had the *San Onofre* left her immediately after the collision ? "

To this the assessors replied, " Yes."

Of these two answers the second is the more important. The water in No. 2 hold and in the tunnel of the vessel may have been a source of some danger to the *Melanie*, but there is no reason to think that it was material. The second question is, for the purposes of the salvage claim, all-important. The Court of Appeal, in conformity with the advice they received, held that the *Melanie* was after the stranding in a safer position than she was before the *San Onofre* took her in hand after the collision. It was strenuously maintained in argument before your Lordships that the Court of Appeal were right in reversing the decision of Bailhache, J. on this point. The main ground urged was that but for the *San Onofre* the *Melanie* would have been abandoned after the collision, so becoming derelict. I think that it is impossible to treat the fact that the captain and crew immediately after the collision took refuge on the *San Onofre* and the *Urania* as an abandonment of the *Melanie.* It was natural and proper that they should at that time leave her. The damage done by the collision was very serious, and it was apprehended that she might sink. But she did not sink, and there is no sufficient evidence that the master and crew would have abandoned the *Melanie* even if the *San Onofre* had left her. It is highly improbable that the *San Onofre* would have so sailed away, and still more improbable that she would have carried all the crew of the *Melanie* with her. The *Melanie* was a very valuable vessel, and I think that we ought not to assume, as we were asked to assume, that the captain and crew of the *Melanie* would have left her to drift about as a derelict. What would probably have happened is that a part of the crew would have taken her in charge and anchored her. It is immaterial that the *Melanie* was not in a position to use her foghorns, being unable to get up steam, as when the vessel was at anchor the foghorn would not be wanted, the use of her bell being the proper mode of giving warning of her presence to passing vessels.

In these circumstances it appears to me that there are not sufficient materials to justify a reversal of the finding of fact by the judge of first instance.

The services rendered by the *San Onofre* were undoubtedly meritorious, as Bailhache, J. says, but in the result the plight of the *Melanie* on the rocks was not materially better than it would have been at anchor on the spot whe the collision took place.

This conclusion, at which the court of first instance, with the assistance of the Trinity Masters, arrived, should not, in my opinion, be set aside. The question which Bailhache, J. put as that on which the decision of the case should turn, was beyond all doubt the right one—I have already cited the passage in which it is stated.

If the *San Onofre* had materially improved the position of the *Melanie*, the *San Onofre* would be entitled to a substantial salvage award, though it was by others that the vessel was brought into port, inasmuch as the *San Onofre* would have materially contributed to the salvage. But Bailhache, J. found, and in my opinion rightly, that there had been no such contribution by the *San Onofre* to the ultimate safety of the *Melanie*.

I wish to add that it seems to be very undesirable that the amount of the salvage award should be fixed by a court other than that which tried the case. In order to estimate the amount to be given, the nature of the services must be appreciated, and this duty can best be discharged by the court before which the trial was conducted. We have been informed that this is the first case in which the assessment of damages has been sent to another court, and except in cases of absolute necessity it appears to me that the court which tries the case should also assess the remuneration.

In the present case, for the reasons which I have given, I think that the judgment appealed from should be reversed, and the judgment of Bailhache, J. restored.

Lord Shaw.—I have had the opportunity of reading the judgment about to be delivered by Lord Phillimore, and I concur in it.

Lord Phillimore.—On the morning of the 27th Dec. 1916 the steamships *Melanie* and *San Onofre* were coming up the Bristol Channel in ballast and were off or a little further above Swansea—the *Melanie* being the leading ship. A fog came on, or they ran into a fog, and the *Melanie* determined to anchor, which may have been a wise action on the part of the master. He carried it out, however, unwisely, for he ported his helm, perhaps to stand out from the land but with the actual effect of throwing his vessel across the course of any following ship, and he further unwisely gave the signal R with his whistle indicating that the way was off his ship and that other ships could safely pass ahead of him, whereas in fact he had way upon him, and the ship was not turning on her heel but was describing a wider circle and forging ahead. The result was that the *San Onofre* ran into the starboard side of the *Melanie* almost at right angles and made a V-shaped cut into the engine room, reaching down into the bilge.

While the two vessels were still in contact the master and some of the officers and crew clambered over the bows of the *San Onofre* which was the larger and higher vessel, while the remainder of the crew got into the remaining lifeboat (the other having been smashed) and proceeded on board the armed trawler *Urania* which had been escorting the *San Onofre*.

The master of the *Melanie* is said to have conceived and spoken of his ship as a lost vessel. It so happened that he had at one time served as an officer under the master of the *San Onofre*. Both were British ships. The *San Onofre* then backed out of the *Melanie*, but came up to her again, and the master of the *San Onofre* then observed that she was apparently not sinking, and he formed the idea of taking her in tow with the assistance of the *Urania* and getting her up to Barry Roads.

The facts were that the water was coming into the engine room and into the screw tunnel and also into No. 2 hold, because the doors between that hold and the engine room had not been closed. But No. 1 hold was intact, and so was No. 3, unless there was some weeping from the screw tunnel; and the vessel had still a considerable reserve of buoyancy. The master says that her loaded draught was 21ft., and he should say that before the collision she was drawing about 8ft. 6in. forward and 10ft. 6in. aft. He estimated her draught at the moment when the *San Onofre* came up to her again as being a mean draught of about 14ft., the ship being rather by the head. But as he also said that when she was ultimately towed to Barry at which time her No. 2 hold was dry, her draught was 14ft., it is probable that at the moment we are discussing, she was drawing more.

At any rate, the master of the *San Onofre* thought that he might be able to tow her with the assistance of the *Urania* to Barry Roads; and the two vessels seem to have been brought sufficiently close to each other to enable two of the officers of the *Melanie* and some of the crew to scramble on board her. The master of the *Melanie* gave as an excuse for not going on board himself that he was getting elderly and not so nimble. It might not have been an easy job. The officers and crew who got on board the *Melanie*, got out her ropes, and with them the *San Onofre* was made fast—" breasted " as it is called—on the starboard side and the *Urania* on the port side; and they proceeded to tow.

The direction intended was Barry Roads, but the master of the *San Onofre*, thinking as he said, that there was just a possibility of her sinking, proposed to get near the Welsh shore and tow along in somewhat shallow water. It appears that the tide was about half-ebb and set somewhat strongly towards the Welsh shore, and whether the three vessels during the three-quarters of an hour which elapsed between the collision and the start to tow, had drifted considerably towards the Welsh shore, or whether the master of the *San Onofre* did not sufficiently allow for the drift when he was towing, or whether all along in the thick fog the vessels had been out of their reckoning, it so happened that after three-quarters of an hour's towage all three vessels apparently simultaneously took the ground on a ledge of

rocks about half a mile east of Stout Corner and about two or three miles east of Nash Point. The *San Onofre* endeavoured to back off, but the main injection became choked, and she had to give it up. The ropes were cast off, a ladder was put out between the two ships, and the master of the *Melanie* went on board her. As the tide ebbed, the water drained out of No. 2 hold, and the master of the *Melanie* closed the doors between that hold and the engine room.

The collision had been about 9.45 a.m. The towage began about 10.30, and the grounding was about 11.15. While the towage was proceeding, and before they grounded, the master of the *San Onofre* had used his wireless to report that he had had a collision with the *Melanie*, that she had been holed, and that he was towing her to Barry. After she got ashore, he sent a second wireless message to say that they were ashore six miles west of Barry, that both vessels were damaged, and tugs must be sent immediately. The *San Onofre* floated between 5.30 and 6 p.m. and having tug assistance, got away to Barry. The *Melanie* floated later and was towed away next morning by two tugs to Barry. A salvage award has been made in their favour to the amount of 1650*l*. The *San Onofre* received trifling damage in the collision, but in consequence of her stranding she received damage to her bottom which it cost 19,696*l*. to repair. The *Melanie* had damage to her bottom which cost 8080*l*. to repair.

These incidents gave rise to a large crop of litigation. There was first the collision action. This was tried before Hill, J., who on the 16th March 1917 found both vessels to blame. There was no doubt about the negligence of the *Melanie*, but Hill, J. thought that the *San Onofre* was going too fast in the fog and ought to have done more to take off her way when she heard the R signal. The Court of Appeal on the 5th March 1918 varied this judgment by holding the *Melanie* alone to blame, and this decision was confirmed by your Lordships' House on the 15th May 1919.

Meanwhile, almost immediately after the decision of the Court of Appeal—namely, on the 16th March 1918—the owners of the *Melanie* brought an action against the *San Onofre* claiming damages for the stranding as being due to her negligence. This action was heard on the 13th June 1919 by Hill, J., when it was decided that the stranding was an accident and had not been brought about by negligence. There was, as far as I gather, no appeal from this decision.

Then the owners of the *San Onofre* turned the tables on the *Melanie* and claimed to reckon as part of the damage which they had sustained in the collision, the damage which was due to her stranding, as being consequential upon the collision. The registrar and merchants accepted this view in their report dated the 19th July 1921, but the President reversed their decision on the 14th March 1922, and the Court of Appeal affirmed the President's decision on the 31st May. I shall find it necessary to revert in some detail to this portion of the litigation.

The present action was begun on the 16th March 1918, claiming salvage on behalf of the owners and master and crew of the *San Onofre*. But proceedings in it seem to have been suspended during the other litigation, as I see that the statement of claim was not delivered till the 6th March 1923.

By this statement, the plaintiffs asserted that they had rescued the *Melanie* from a position of the utmost danger and, in fact, from certain total loss and had placed her in a position of safety. They further said that the services were rendered by the *San Onofre* at a very high degree of risk due to the dense fog which had led to the grounding of the three vessels, and they set out the items comprising their own damage due to the stranding, making a total of 19,696*l*., as an ingredient to be considered in the salvage award.

The defence was in substance that the plaintiffs left the *Melanie* in a position of greater comparative danger than she was in before the *San Onofre* began to tow, and that therefore no salvage was due. The case was heard by the late Bailhache, J. sitting as an additional judge of the Admiralty Division with the assistance of Trinity Masters, and on the 29th June 1923 the learned judge delivered judgment accepting the view of the defendants and holding that no salvage was due.

The plaintiffs appealed to the Court of Appeal, and on the 3rd Dec. 1923 that court, consisting of Bankes, Scrutton, and Atkin, L.JJ., assisted by nautical assessors, came to the contrary conclusion. Instead, however, of fixing the sum which should be paid for the salvage, the court referred this assessment to the Admiralty Division—an unusual step.

This appeal was then preferred to your Lordships' House. But meanwhile the assessment has proceeded notwithstanding the appeal, and was taken before the President with the assistance of Trinity Masters. He on the 16th Jan. last—hearing the case upon the same materials as were before Bailhache, J. and the Court of Appeal—assessed the figure at 23,000*l*., 1500*l*. of which was to go to the master and crew. The 21,500*l*. which was to go to the owners was arrived at, as the judgment shows, by placing the whole burden of the 19,686*l*. upon the *Melanie* and giving to the owners of the *San Onofre* in addition the sum of 1904*l*.

The procedure which I have last recounted, puts your Lordships in a position of some difficulty. If the Court of Appeal, after coming to the conclusion that it was a salvage case, had proceeded to fix the sum due, and it should have happened that your Lordships agreed that it was a case of salvage but thought that in fixing the quantum of award the Court of Appeal had proceeded on a wrong principle, it would have been open to this House to vary the order of the Court of Appeal in respect of amount. But since the assessment was

remitted to the court below, it would be awkward for your Lordships to deal with it, unless and until an appeal from the President had travelled the usual course through the Court of Appeal to your Lordships' House. The result is that the only question which your Lordships will think fit to deal with on the present occasion, is salvage or no salvage.

I do not disguise from myself that this is a difficult and delicate matter, and that my mind has fluctuated possibly more than once during the course of the hearing.

One matter may be cleared away. The counsel for the appellants rightly insisted upon the importance of sect. 422, sub-sect. 1, of the Merchant Shipping Act 1894, which runs as follows: "In every case of collision between two vessels, it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without danger to his own vessel crew and passengers (if any) (*a*) to render to the other vessel her master crew and passengers (if any) such assistance as may be practicable." He did not, however, as I understand, desire to contend that the duty to assist in certain cases deprived the assisting vessel of the right to salvage.

This is, I believe, the first opportunity which this House has had of pronouncing upon a question which has, I imagine, long been treated as settled in the courts below. Ever since the judgment of Sir Robert Phillimore in *The Hannibal* and *The Queen* (L. Rep. 2 A. & E. 53)—accepted, I think, in the Privy Council, though there was another ground on which the decision was confirmed—it has been taken as law that the duty cast by the Merchant Shipping Acts upon one of the two colliding vessels to stand by and render asistance, does not prevent that vessel if she renders assistance from claiming salvage. That particular judgment was given upon the construction of the Merchant Shipping Act of 1862; but there is no material difference in the section which must govern this case. I am glad that your Lordships have the opportunity of giving your adhesion to this doctrine.

On the general question several authorities have been cited at your Lordships' Bar. All those which were earlier in date than the second edition of Lord Justice Kennedy's work on salvage are to be found cited under the head "Success" in the second chapter of that work. The principles may be summed up in these words: Success is necessary for a salvage reward. Contributions to that success, or as it is sometimes expressed meritorious contributions to that success, give a title to salvage reward. Services, however meritorious, which do not contribute to the ultimate success, do not give a title to salvage reward. Services which rescue a vessel from one danger but end by leaving her in a position of as great or nearly as great danger though of another kind, are held not to contribute to the ultimate success and do not entitle to salvage reward.

In considering these questions wherever the service has been meritorious, the court has leant towards supporting a claim for salvage, as is shown by the cases of *The Jonge Bastiaan* (5 C. Rob. 322), *The E. U.* (1 Spinks, E. & A. 63), and *The Santipore* (in the same volume, p. 231), among other authorities.

That partial or initial service, if it can be shown to have been a factor of or contributory to ultimate success, is a subject of salvage reward, is shown by a line of cases of which the decision of the Privy Council in *The Atlas* (Lush. 518) and of Sir James Hannen in *The Camellia* (*sup.*) are good examples.

That meritorious action which does not contribute to ultimate success must go without reward is shown by such instances as *The India* (1 W. Rob. 406), *The Edward Hawkins* (a decision of the Privy Council in Lush. 15), *The Killeena* (*sup.*), and my own decision, if I may quote it, in *The Dart* (8 Asp. Mar. Law Cas. 481; 80 L. T. Rep. 23) and a recent decision of Hill, J. in *The Tarbert* (*sup.*). This case was not, I think, cited by counsel, but has some features of marked resemblance to the case which your Lordships are now discussing.

Such cases as *The Cheerful* (*sup.*), *The Benlarig* (*sup.*), and *The Lepanto* (*sup.*), are cases *a fortiori*. In them the court found that the effect of the services was to put the vessel in a worse position than she was before.

To the propositions which I have stated, I would add a corollary. The mere fact that the claimant has brought the ship to a position or spot where the ultimate salvor has found her does not of itself show that the bringing to that spot was a contribution to the ultimate success. This last proposition is supported by the cases of *The India* (*sup.*) and *The Killeena* (*sup.*). If it were otherwise, in every case where there was ultimate salvage every person who rendered any service would be a salvor. In cases like *The Camellia* the view taken was that the ship had been brought into or nearer to the track of vessels, and, to use the language of Kennedy, L.J. into a position of greater comparative safety. On this ground, also, Bruce, J. decided the case of *The Hestia* (7 Asp. Mar. Law Cas. 599; 72 L. T. Rep. 364; (1895) P. 193).

I have now to apply these propositions to the facts of the present case. There is no doubt that the *Melanie*, whose value then was a little under 64,000*l.*, was immediately after the collision in a position of considerable danger, and that between 55,000*l.* and 56,000*l.* worth of her was—at the cost of 1650*l.* paid to the tugs—ultimately brought to a place of safety.

During the argument I found myself considering whether one could evaluate the risk to the *Melanie* untowed, and compare it with the loss which she sustained by reason of the stranding, and if the former were the greater, treat the excess as giving the measure of the benefit which the salvors had incurred. But this mode of reasoning has not seemed to commend itself to your Lordships or to the respondents' counsel; and after reflection I have concluded that one ought to measure risk against risk—that is to say, the risk of loss, total or partial if the *Melanie* had been left

untowed, with the risk of loss, total or partial, when the *Melanie* was landed on the rocks.

Now it may be that on perusing the judgment of Bailhache, J. one sees small insistence on the danger to the *Melanie* if she had been left untowed; but on the other hand, in the judgments of the learned Lord Justices, I can hardly trace any reference to the dangers of her second situation. I proceed to sum them up for myself as best I can.

Here I have further to consider the operation of sect. 422 of the Merchant Shipping Act, which I have already quoted.

The words "till there is no need for further assistance" mean primarily, as I apprehend, till it is seen that the other vessel, though injured, can manage for herself. Counsel for the respondents contended that they meant till it was seen that the vessel was bound to be lost—a meaning which is certainly not the primary one. I should quite agree, however, that there was no duty after the crew had been saved to stand by a vessel of which it could certainly be predicted that she must go to the bottom in a short time. That, however, is not this case.

It is said that the master of the *San Onofre* might, as soon as the two vessels parted, on being assured that no living soul remained on board the *Melanie*, have taken it for granted that she would sink and have steamed away at once. I think he would have put himself in peril if he had steamed away without some examination; and, to do him justice, he did not. When he came up to her again it was clear that she could not be treated as a vessel which was bound to sink in a few hours. She was not perceptibly getting lower in the water and had a considerable reserve of buoyancy. So far, then, the period for which the statute applies had not come to an end.

Now as to the other condition of the statutory requirement that it must be without danger to the vessel standing by and to her crew and her cargo, if any. When the claim for consequential damage was argued before the President and before the Court of Appeal, the parts taken by counsel for the *San Onofre* and the *Melanie* were the opposite of those which they have taken in the present case. The *San Onofre* connected the collision and her claim for damage by stranding in this ingenious way. She said to the *Melanie*: "The collision was your fault; the statute made it necessary for me to stand by and assist. If the proper mode of assistance was by towage, in the course of towing, I—through no fault of mine—got aground and got serious damage. That is the consequence of the collision." The *Melanie* raised two defences. First she said: "You had no duty to assist as you did. It was too dangerous for you." And secondly, she said: "The stranding was not in the legal sense a reasonable and natural result of the collision." The case is reported in 16 Asp. Mar. Law Cas. 1; 127 L. T. Rep. 540; (1922) P. 243, and the President thought that this second defence succeeded. He also held that the towage, which took the form of the *San Onofre* lashing herself alongside what he called a waterlogged vessel, was assistance which could not be rendered without danger and therefore was assistance which the statute did not require.

In the Court of Appeal, Bankes, L.J. said that he did not disagree with this last conclusion, and Scrutton, L.J. laid stress on the danger involved in taking the *Melanie* in a fog towards the shore. But the governing ground in the decision of the Court of Appeal was that the stranding was not a natural and reasonable consequence of the collision.

I should, however, not be disposed to allow the appellants' counsel in the present case—particularly after the way in which the previous case was conducted—to contend that there was a statutory duty on the *San Onofre* to tow the *Melanie*, still less that there was a statutory duty to tow her by breasting alongside.

But that by no means exhausts the matter. Before the duty to assist comes the duty to stand by, and that matter did not arise for decision in the litigation to which I have just been referring. The counsel for the appellants have contended before your Lordships with force that the *San Onofre* had a wireless installation and had signalled, and that tugs could have been got at Barry, apparently only about eight miles off, as soon as she stood by and thereby have given heart to the crew of the *Melanie*, several of whom got on board her. Counsel has argued that they could easily, as they got out the ropes for towage, have let go an anchor, which it is said they were preparing to do before the collision; that though there was fog, she had her proper fog protection in her bell, and did not require a steam whistle; that if need were, the *San Onofre* could have anchored, or she could have—as she did—taken the *Melanie* in tow.

I see objections to these contentions, but not such as to wholly neutralise them. There would be some danger in anchoring in fog if it were—as probably by this time it was not—in the track of vessels. I say by this time, because I can only understand the stranding by supposing that the vessels were all along drifting with some rapidity towards the Welsh shore.

But in truth the policy of merely standing by was not a very practical policy. If the ship was compelled by law to stand by till the other vessel was sunk or safe, the natural thing was to redeem the duty of standing by, by towing.

This is, I think, the idea which was underlying the mind of the late Butt, J. in the case of *The Beta* (5 Asp. Mar. Law Cas. 277), a case which at first blush it is difficult to understand. There a small schooner by her own fault came into collision with a steamship, and the steamship having towed her some little distance towards a safe port, claimed salvage. I gather that the collision action and the claim for salvage were tried together. I think that Butt, J., in refusing salvage, was influenced by the consideration that the steamship had by statute to stand by, which of itself would

give no title to salvage, and that it was cheaper for her to get the schooner to a safe place than to stand by till something else could be done. His words are: "In my view of the Act of Parliament, if the steamer had not chosen to tow the schooner she would have had to stay by her a very long time, because she would not have dared to have left her."

All this being so, I cannot bring myself to think that the master of the *San Onofre* could have left the *Melanie* derelict. There is also another consideration. If the *Melanie* had been left derelict, she would, unless previously collided with, have drifted ashore. There was some chance of collision because she had no steam whistle and would have nobody to work it or to ring the bell. But, as I have observed, she was drifting out of the track of vessels. If she had drifted ashore, her whereabouts would not have been so soon discovered, and she probably would not have been reached in time to close the doors of No. 2 hold before the flood-tide made; but she might quite possibly have drifted on sand instead of rocks, and in the end suffered less.

I have done my best to appreciate her risk of total or partial loss, if the *San Onofre* had not taken her in tow. Now I come to the other side.

What was her risk of total or partial loss when she was (to use the phrase of Bailhache, J.) "aground on the rocks"?

Here I am much impressed by the survey of her damage. The grounding damage is separated in the report of survey from the collision damage. Counsel for the respondents commented on the little evidence that there was of plates in the bottom being holed. It is fair also to say that any holes into the ballast tanks would—if they also were not rendered leaky—be, I suppose, immaterial. But when one notices the way in which frames, angle-irons and floor plates were buckled, one says to oneself if instead of two plates holed there had been three or four, and if they had been in No. 1 or No. 3 hold, and if owing to the twisting or buckling the ballast tanks had been rendered leaky, would this ship have ever been got off the rocks, or, at the best, would she not have required expensive pumps to be brought alongside before she floated and during her towage to Barry?

When I weigh these considerations I do not say to which, if I were a judge of first instance sitting without the benefit of nautical advice, my judgment would incline. But I do say that, sitting as a member of your Lordships' House, I am unable to decide that Bailhache, J., acting with the advice of his assessors, was wrong. And here I would observe that there is some trace in the judgment of the Court of Appeal of this being a case, not so much of the appellate judges differing from the judge of first instance as of the assessors of the Court of Appeal differing from the assessors of the judge. As to this I would quote the words of the noble Lord, the Earl of Birkenhead, given in the opinion which he delivered in the collision case between these same two ships: "It would, I think, be intolerable if Admiralty appeals were treated as being not from one judge to another but from one assessor to another."

Upon the whole, my voice would be for allowing this appeal.

Lord Blanesburgh.—If I had to arrive at a conclusion in this case unassisted by the views which have now been expressed by the rest of your Lordships, I confess that I would myself have adhered to that which was reached by the Lords Justices in the Court of Appeal. I should have been led to it mainly by the complete reserve with which a study of this prolonged litigation leads me to regard the evidence of the master of the *Melanie*, which is open to the suspicion of adjustment to meet the supposed demands of the moment. In that attitude of reserve I should, I think, for myself have reached the conclusion of fact that, except as parcel of the towage operation, there would on this morning of the 27th Dec. 1916 have been no return to the *Melanie* either of her master or of any of her officers or crew. Waterlogged, as in earlier stages of the litigation it was suggested she was or was believed to be, she would, as the only practicable alternative to the towage operation, have been left in the Bristol Channel, in the fog, derelict and unattended. It was only faintly suggested in argument that on that hypothesis the order of the Court of Appeal was not, as I think it would have been, justified. But I have had the benefit of considering the judgments which have just been delivered. My distrust of some of the evidence in the case may be greater than is justified, and accordingly I defer to the result there intimated by your Lordships, acquiescing in the motion which has been made by the Lord Chancellor on the ground stated by him.

Appeal allowed.

Solicitors for the appellants, *Downing, Middleton*, and *Lewis*.

Solicitors for the respondents, *Thomas Cooper and Co.*

Feb. 5, 6, *and March* 13, 1925.

(Before Lords Cave, L.C., Dunedin, Atkinson, Sumner, and Buckmaster.)

Owners of the Steamship Matheos v. Louis Dreyfus and Co. (*a*)

on appeal from the court of appeal in england.

Charter-party—Demurrage—Detention of ship by ice not to count as lay days—Ship detained by ice before expiration of lay days—Alternative method of loading available before detention—Responsibility of charterers for delay—Measure of damages.

By a charter-party it was stipulated that the chartered vessel should proceed to S. for orders.

(*a*) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

When she arrived there she was ordered to B. to load a full cargo of wheat. Seventeen running days, Sundays and any other recognised holidays excepted, were to be allowed for loading and unloading, and the days on demurrage over and above the said lay days at 40l. per running day. By clause 11: "Except as herein provided, detention by frost or ice from Braila down to Sulina . . . shall not count as lay days." On the 10th Dec. the vessel, by order of the charterers, entered the dock at B. to load part of her cargo. On the 12th Dec. the water in the dock became frozen and in consequence it was impossible to move the vessel and she was detained there until the following April.

Held, (1) *that clause 11 referred to lay days and did not apply to a transit voyage. The effect of the words "from Braila down to Sulina" was to limit or define the operation of the clause so that it should take effect in the event of detention by frost or ice at any place between Braila or Sulina, both inclusive. The charterers were therefore protected and not liable for damages for the detention; and* (2) *that loading by hand during frost was, in a commercial sense, impracticable. The onus was upon the shipowners to show that a form of loading other than the proper and usual one was possible and that onus they had not discharged.*

Decision of the Court of Appeal (ante, *p.* 330; 131 *L. T. Rep.* 177) *affirmed.*

APPEAL by the shipowners from the decision of the Court of Appeal (Bankes, Scrutton, and Sargant, L.JJ.), reported *ante*, p. 330; 131 L. T. Rep. 177, *sub nom. Michalinos and Co.* v. *Louis Dreyfus and Co.* By the terms of a charter-party dated the 28th Nov. 1921 a steamship was chartered to go to Sulina for orders. Clause 7 of the charter-party provided that seventeen running days, Sundays and other recognised holidays excepted, were to be allowed for loading and unloading, and ten days on demurrage over and above the said lay days at 40*l.* per running day, or *pro rata.* Clause 11 provided that detention by frost or ice from Braila down to Sulina should not count as lay days. When the steamship arrived at Sulina she was ordered to proceed to Braila to load a cargo of wheat. She arrived at Braila on the 7th Dec. 1921 and entered the dock there by direction of the charterers to load part of her cargo on the 10th Dec. She was to have completed the loading of the cargo by coming out of the dock and loading in the river; but on the 12th Dec. the dock became frozen over and it became impossible for the ship to be moved. The result was that she had to remain in dock until the 9th March 1922, when the Danube became open for navigation, and for a further period during which she could not be loaded owing to the Roumanian Government having prohibited the export of wheat until the 22nd March. After the 22nd March her loading was completed and she left Braila on the 5th April 1922. The owners, having claimed demurrage and damage for detention, were awarded 4166*l.* by the arbitrator, who stated a case for the opinion of the court. The arbitrator found that although it would have been physically possible it was not reasonably practicable to load the vessel while she was lying in the dock. The charterers contended that clause 11 applied not only to detention by ice caused in transit between Braila and Sulina, but to detention caused in any part of the river between these two points. They also said that, the detention having taken place before they were in default, they were excused; and further that as the ship was detained before the lay days had expired, the owners would have been unable to do anything with her even if they, the charterers, had not been in default and that consequently the owners had not suffered any damage.

The Court of Appeal held, reversing the decision of Rowlatt, J. (reported 156 L. T. Jour. 362), upon the award of the arbitrator stated in the form of a special case, that clause 11 must be construed to mean that if there was ice which prevented the loading and that ice was within the limits specified, that is to say, from Braila down to Sulina, the charterers were entitled to rely upon the fact of ice being in the dock at Braila as a cause of prevention. The shipowners appealed.

W. N. Raeburn, K.C. and *S. L. Porter*, K.C. for the appellants.

W. A. Jowitt, K.C. and *C. T. Le Quesne*, K.C. for the respondents.

The House took time for consideration.

Lord CAVE, L.C.—This appeal concerns a claim by the owners of the steamship *Matheos* against the charterers of that vessel for demurrage and damages for detention.

Under the charter-party, which was dated the 28th Nov. 1921, the vessel was to proceed to a port in the Danube and there load from the factors of the freighters a cargo of wheat, and was to proceed to a port in the United Kingdom or on the Continent. Seventeen running days (Sundays and certain other days excepted) were to be allowed for loading and unloading, and ten days on demurrage at 40*l.* per day. The charter-party contained the following clause:

> (11) Except as herein provided detention by frost or ice from Ibrail down to Sulina, also detention by quarantine, shall not count as lay days.

The port selected as the loading port was Ibrail, also known as Braila, on the Danube. On the 7th Dec. 1921 the vessel arrived there, and notice of readiness to load was given to the charterers' agents. There were three usual and customary methods of loading grain at Braila—viz: (*a*) at the quay from silos in the docks; (*b*) from lighters in midstream at a place called the Baths; and (*c*) from the river bank by the use of gangways and manual labour. The charterers had sufficient cargo in the docks and in lighters to load the *Matheos*,

and the intention was to load a small part of the cargo in the dock and the remainder in mid-river. It was thought desirable to load first the grain in the dock; and accordingly, on the 10th Dec., the charterers' agents required the vessel to enter the dock and load the grain there. At this time a vessel called the *Valkenburg* was loading at the only available quay, and it was arranged that she should be moved and make way for the *Matheos*, which in the meantime was anchored outside and alongside the *Valkenburg*. On the 12th Dec. a severe frost set in and the dock became completely frozen over, and from that date until the following 9th March the *Matheos* and all other vessels in the dock remained icebound. On the 9th March 1922 the dock became clear of ice and the *Matheos* took her berth alongside the quay; but loading could not immediately begin, as the Roumanian Government was then holding up the shipment of wheat. On the 22nd March this prohibition was removed, and loading began and proceeded rapidly; and the vessel sailed on the 5th April 1922.

The time which elapsed from the 7th Dec. 1921, when the vessel was ready for loading, until the 5th April 1922, when she sailed, exceeded the time allowed for loading by ninety-seven and three-quarter days; and accordingly a claim was made for ten days' demurrage and damages for eighty-seven and three-quarter days' detention, amounting in all to a sum exceeding 4000*l.* The claim was referred to arbitration, and the arbitrator on the 11th July 1923 made his award, allowing the claim and stating a case for the opinion of the court. Upon the argument of the case Rowlatt, J. affirmed the award; but on appeal to the Court of Appeal that court held that the charterers were protected by clause 11 of the charter-party, and set aside the award. Hence the present appeal.

Mr. Raeburn, on behalf of the appellants, raised a number of contentions, some of which were disposed of during the argument, and the only questions to which I feel it necessary to refer are the following:

First, it was said that, having regard to the words "from Ibrail to Sulina" in clause 11 of the charter-party, that clause was only intended to have effect in the case of detention by frost or ice during the transit between these ports. This contention, though accepted by the arbitrator, was rejected by Rowlatt, J. and the Court of Appeal, and appears to be quite untenable. The clause refers to lay days, and there could be no question of lay days during the passage of the vessel down the Danube. The effect of the words is to limit or define the operation of the clause as applied in *Hudson* v. *Ede* (3 Mar. Law Cas. (O.S.) 114; 16 L. T. Rep. 698; L. Rep. 2 Q. B. 566) so that it should have effect in the event of detention by frost or ice at any place from Ibrail to Sulina, both inclusive.

Secondly, it was argued that the loading of the ship was not absolutely prevented by the ice, as the ship could have been loaded in the dock by manual labour either from the quay or from the lighters lying in the dock, and the time afterwards spent in loading could have been saved. To this it was answered by the charterers that it was commercially impossible for this to be done. This was a question of fact for the arbitrator, and par. 19 of his award is in the following terms:

> No attempt in any way was made to load the *Matheos* at any time between the dates above mentioned, viz., the 12th Dec. and the 9th March 1922, and although to do so in the position where she was might have been difficult and expensive, I am of the opinion that it would not have been physically impossible to do so by means of chutes and stages and manual labour; one reason admitted by charterers' witness for not loading the steamer during this period was that the cargo would probably have become heated in the steamer, and no insurers would have accepted the risk of insurance.

This finding is not as clear as it might have been, but it is undesirable, after the time which has elapsed since the award, to send it back for an amended finding. The paragraph must be construed as it stands, and I agree with the Court of Appeal in construing it as a finding against the commercial possibility of the course suggested. The arbitrator finds that loading by manual labour was physically possible, but difficult and expensive; and he refers, apparently with assent, to an argument showing that loading would have been useless owing to the heating which would have occurred and the consequent impossibility of effecting an insurance. I think he meant that loading by hand during the frost was in the commercial sense impracticable, and certainly there is no finding the other way. This argument therefore fails.

Mr. Raeburn desired to raise an argument as to the effect of the Government prohibition against loading, but it was found that the point had been abandoned in the court below, and it could not therefore be pursued.

In my opinion this appeal should be dismissed with costs.

Lord Dunedin.—Three questions arise on this appeal, the determination of which will settle whether the judgment complained of is right or should be altered.

The first is whether the words "from Ibrail down to Sulina" make the clause only apply to a transit from the one place to the other, and make the clause inapplicable to what happens at Braila itself. The umpire took this view, but both the learned judge who tried the case and the judges of the Court of Appeal held the opposite. I think they were clearly right. The clause is as to lay days, and lay days have no place in a transit voyage. The reason of the limitation is clear enough. It was to prevent questions as to detention of cargo by ice far up the river. The clause means detention by ice within the limits specified.

The second question, and on this the Court of Appeal has differed from the learned trial judge, is whether the loading in this case was

truly prevented by ice so as to cause detention, in view of the fact that the landing places in the river and at the bank would have been available had the vessel gone there. I agree with the Court of Appeal. I think the facts decide the matter. Once it is shown, as it was shown, that the charterer was within his rights in ordering the vessel into the docks, and that having got there the vessel could not get out again because of ice, it seems to me the matter is concluded. It is just the same case as the case of a choice of ports, of which *Bulman* v. *Fenwick* (7 Asp. Mar. Law Cas. 388; 69 L. T. Rep. 651; (1894) 1 Q. B. 179) is an example.

The third question, and it is this alone which has in my view raised any difficulty, is whether nevertheless in the circumstances the charterer might not have effected loading or partial loading lying where the vessel was, and thus have at least saved some time of detention.

The difficulty arises from the somewhat ambiguously worded finding of the umpire on the point. He says: "Although to do so [*i.e.*, to load] in the position where she was might have been difficult and expensive, I am of the opinion that it would not have been physically impossible to do so by means of chutes and stages and manual labour; one reason admitted by the charterers' witness for not loading the steamer during this period was that the cargo would probably have become heated in the steamer."

Now this finding must be read in the light of the fact that the charterers contended before the umpire, as he himself sets forth, that it was commercially impossible to load the vessel in its position by any way except the usual way by cranes from the berth, and it had been found that she was unable to get to the bank because of ice. I therefore come to two conclusions. First, I agree with the Court of Appeal that in view of the pleading the umpire in putting stress on the word physically must be held to have used it as the antithesis to commercially; and commercial possibility, not physical possibility, is the real question.

But, further, I think that, once the proper and usual mode of loading was negatived as rendered impossible by ice, it really fell on the owners to get from the umpire a finding of commercial possibility, seeing that that possibility could only rest on a novel and, so far as we can see, hitherto untried method. It is not as if the alternative method to the usual method, which *ex hypothesi* is found impracticable, was a usual one. Given impossibility by crane, I do not doubt that it would be incumbent on the charterer to prove impossibility by lighter. But this is quite a different thing, unused, untried, and problematical. In such a case it seems to me the onus shifts, and the owners on whom the shifted onus falls have not discharged it.

I agree that the appeal should be dismissed.

Lord Sumner.—It is found in the case stated, and has not been contested, that on the 7th Dec. 1921, at noon, the Greek steamer *Matheos* was an arrived ship. She was in her designated port of loading according to the charter; she was in fact ready to load at any accustomed loading place, as ordered by the charterers' agents, and she had given notice that she was so ready. Accordingly the lay days from that time were running against the charterers.

On the 10th Dec. orders were given to enter the dock, where grain was stored in silos, and to load there at a quay berth. This is one of three usual and customary ways of loading grain at Braila. The ship entered the dock without demur. For a vessel of her size only one quay berth was suitable from which to load at the silos.

The charter contained no express provision for shifting berths, and it was suggested at your Lordships' Bar that, in the absence of such a provision, the charterers could only require the ship to go to a loading place at which they could fulfil their entire obligation to load a full and complete cargo. From the findings of fact it appears, incidentally but still sufficiently clearly, that the *Matheos*, if fully laden, could not have got out of the dock for want of water on the dock sill. Beyond observing that the charter authorised the charterers to order the ship to one or two loading places in the Danube, and did not therefore require them to fill the ship at Braila, no opinion need be expressed on this contention, for, on learning that it had not been raised before the umpire, so that there had been no opportunity to give evidence as to such matters as the custom of the port and the power of the captain of a Greek ship to bind his owners by accepting the charterers' order, Mr. Raeburn very properly gave up the point.

On the 10th Dec. another ship, the *Valkenburg*, was already lying at the quay berth in question and loading from the silos, and at that time of year the river might be expected to freeze very shortly. Indeed, on that very day the port authorities gave public notice warning lighters and other craft to seek shelter, and many accordingly entered the dock, even though the still water there would probably freeze earlier than the running water in the river. Neither of these circumstances, however, prevented the quay berth in the dock from being a loading place to which the charterers might lawfully order the *Matheos*. Under the charter the risk of delay in reaching it was on them, unless they were protected by some exception, since the lay days had already begun to run, and beyond taking this risk they were under no obligation to select a loading place advantageous to the ship. The result was that the *Matheos* only reached a position parallel with the *Valkenburg* but some yards farther out from the quay; and there she remained when, on the 12th Dec., the dock became frozen over. The *Matheos* was frozen in until the 9th March 1922. The question is whether she was on demurrage or whether, as against the charterers her lay days were suspended.

The charterers' case is that clause 11 of the charter applied and protected them, for detention by ice occurred and such detention is not to count as lay days. It was for them to give evidence of facts which would bring them within the exception, and it was for the umpire to state his own conclusions of fact on the evidence before him.

Primâ facie the charterers' defence was established, for it was plain that the *Valkenburg* was frozen into the berth and that the *Matheos* was frozen out of it; but of course the charterers could not claim that ice had prevented loading, if the loading could and should have proceeded notwithstanding the ice. This, however, does not mean merely that it was physically possible to have put wheat into the ship, but that it was commercially practicable. There has been some dispute as to the meaning of the umpire's finding on this question. He recited the charterers' contention thus:

7. That it was commercially impossible and or impracticable to load the *Matheos* while she was in the ice in the dock . . . . Moreover, if it had been possible to load the *Matheos* while so detained in the ice, and if she had been so loaded, the wheat would have become or would have been in danger of becoming heated in the hold of the said vessel in the ice, and no insurer would have accepted such a risk.

On the other hand, the contention of the shipowners is thus stated:

3. (A) ii. In any case upon the evidence there was no prevention of loading, though there may have been greater difficulty in loading at Braila itself. The ship could have been loaded in the dock itself by hand, or might have been ordered to load in mid-stream or from the quay on the north bank of the river, both of which are admittedly usual loading places.

The finding is as follows:

19. No attempt in any way was made to load the *Matheos* at any time between the 12th Dec. 1921 and the 9th March 1922, and although to do so, in the position where she was, might have been difficult and expensive, I am of the opinion that it would not have been physically impossible to do so by means of chutes and stages and manual labour; one reason admitted by charterers' witness for not loading the steamer during this period was that the cargo would probably have become heated in the steamer and no insurer would have accepted the risk of insurance.

Counsel for the shipowners, to whom this point had become far more crucial in the Court of Appeal than it had been at the arbitration, when so many other points were still being put forward, argued, first, that the umpire meant to find that loading was commercially practicable during the period in question, though no doubt expensive; second, that as a matter of law the defence of excepted perils could not succeed, unless the charterers obtained an affirmative finding that such loading was commercially impracticable; and third, that his finding was at least ambiguous and that the case ought to be remitted to him for a clearer statement.

I should be most reluctant to advise your Lordships to remit the case. In the nineteen months that have elapsed since it was stated, and doubtless after hearing many other arbitrations in the meantime, the umpire has probably forgotten all about it, and, if so, evidence would have to be gone into about events that happened at Braila over three years ago.

I do not think that, in a matter which was peculiarly one for an expert, and on a point where he has not misdirected himself in point of law, it can be said that the charterers must necessarily fail, unless they obtain an express finding that the operation was commercially impracticable. If the evidence as to the ice had stood alone, the umpire could not have been required in law to demand evidence negativing the commercial practicability of alternative modes of loading and to reject the evidence of detention by ice, unless such further evidence was forthcoming. It has been decided that when a *primâ facie* case of excepted perils is met by an allegation of negligence (*The Glendarroch*, 7 Asp. Mar. Law Cas. 422; 70 L. T. Rep. 344; (1894) P. 224) or unseaworthiness (*The Northumbria*, 10 Asp. Mar. Law Cas. 328; 95 L. T. Rep. 618; (1906) P. 92) the burden of proof shifts to the party interested in establishing this allegation affirmatively, and I do not see why the same rule should not apply to an allegation of the existence of a practicable alternative mode to loading. If, in expressing his findings, the umpire negatives the allegation in silence by not giving effect to it (if indeed it was raised by the shipowners at all) I do not think that his award can be said to be defective on its face. It seems to me to be a pure matter of construction, and I am by no means prepared to dissent from the construction adopted by the Court of Appeal. Having gone so far as to say that the operation would not have been physically impossible, the umpire might well think that, if he went no further, anyone would understand (as, personally, I should do) that as a matter of business it was out of the question. The concluding words of his finding seem to leave no doubt. Something in the sentence must be misprinted. To substitute "ship's" for "charterers'" would clear this up, but we are assured that no ship's witness made such an admission. Let it be assumed then that "admitted" should be "asserted" or "alleged." Why should the umpire refer to this piece of evidence in his finding at all, if he did not mean that he found it to be both important and true? It cannot be an ironical way of finding that the charterers failed to resort to a practicable alternative because they wished to save their pockets. I think it is reasonable to impute to him another meaning. If the wheat heated from a detention of months under hatches, it might not merely be damaged but might rot and arrive at its destination no longer *in specie*. It is not a practicable thing, in addition to the expense of such a mode of loading, for the charterers to run the risk of losing the wheat uninsured, and for the

shipowner to run the risk of losing his freight at the end of the voyage and of being left to claim on his insurance on freight.

The questions on the effect of clause 11 are these: The umpire thought it only applied when the ship was proceeding from Braila down to Sulina. This view was abandoned in the Court of Appeal. As Scrutton, L.J. points out, "time used in passing along her voyage is not part of her lay days." At your Lordships' Bar it was suggested that, just as in marine policies there is a difference between an insurance "at and from" and one "from" only, so here this exception must be deemed not to apply "at" Braila but only, as in *Hudson* v. *Ede* (*sup.*), to the lighters bringing intended cargo from Braila down to Sulina, or that, as it was put in other words, it is a transit exception, not a stationary exception. If so, of course, the exception is nugatory as regards the ship, for the reason given by Scrutton, L.J., and the words now added to the clause as it stood in *Hudson* v. *Ede* (*sup.*) operate as a limitation on the exception as applicable to lighters. I think the words clearly apply to the detention of the ship at Braila, for they are words indicating the extremities of a section of the river, which is inclusive of the named ports, applying as they do to operations of loading, which are to take place at and in these ports.

Rowlatt J. took a third view—namely, that, as the charterers might have chosen either of two other loading-places, in which the exact detention that happened in the dock might not have happened, they had not brought themselves within the exception. "The charterers," he says, "could not invoke that clause, unless the prevention went to all the forms of loading, which were three, which were open to him at his option in Braila." Otherwise he would really be prevented from loading by his own selection of a loading place. He must take all the risk of the selected loading place proving to be more disadvantageous for loading than the others. This reasoning seems to me to be inconsistent with the fact that the order given was accepted, and that the dock was, when the order was given, a proper loading place. The risks of any change in the circumstances were the subject of provision in the charter itself, and there is nothing to restrict the charterers' choice in the manner suggested. I agree with the view of the Court of Appeal. The *Matheos*, being an arrived ship, was entitled to have a usual loading place intimated to her, but it was for the charterers to select for her, among the usual and proper places, one, which thereon became the place where her loading was to begin, and exceptions excusing delay in this loading attach and have relation to that place and mode of loading.

I have only to add that I think your Lordships could not but refuse, as was done during the argument, to permit questions to be raised as to the effect of the Roumanian Government's embargo, which had been advisedly disclaimed on the charterers' part before Rowlatt, J. No special ground for indulgence was shown, nor can it be said, by way of appeal, that the Court of Appeal was not entitled to hold the charterers to this disclaimer.

For these reasons I think that the order of the Court of Appeal was right and should be affirmed.

Lord ATKINSON and Lord BUCKMASTER concurred.

Appeal dismissed.

Solicitors for the appellants, the shipowners, *Holman, Fenwick,* and *Willan.*

Solicitors for the respondents, *Richards* and *Butler.*

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, Feb. 9, 1925.

(Before BANKES and ATKIN, L.JJ., and LAWRENCE, J.)

THE JUPITER (No. 2). (*a*)

APPEAL FROM THE ADMIRALTY DIVISION.

Foreign vessel—Writ in rem *by foreigner claiming possession—No request by diplomatic representative of country of ship's nationality to entertain suit—Action between foreigners—Jurisdiction—Discretion—Admiralty Court Act* 1840 (3 *&* 4 *Vict. c.* 65), *s.* 4*—Sale by foreign sovereign state—Indemnity—Action against purchaser—Whether sovereign state impleaded—Plaintiffs a company alleged to be annulled or "nationalised" by foreign law—Action in England—Authority of solicitors purporting to conduct case for the company.*

The Admiralty Court has jurisdiction to entertain a claim for possession of a foreign vessel within the territorial jurisdiction by one foreigner against another foreigner, but it enjoys a discretion to refuse to exercise such jurisdiction in proper cases.

The plaintiffs were a company incorporated under Russian law prior to the establishment of the Union of Socialist Soviet Republics in Russia, which at the time of action brought claimed to be carrying on business in France under a French name, and certain persons appointed under French law to conduct the business of the company. The plaintiffs issued a writ in rem *claiming to have possession of the steamship J. of the port of Odessa. In due course an unconditional appearance was entered on behalf of the defendants, an Italian company. It appeared that the J. was, until* 124 *management and control of the plaintiffs, or some of them. By decrees of* 1918 *and* 1919 *of the Union of Soviet Socialist Republics private property in shipping had been abolished,*

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

and the shares in the plaintiff company were annulled. In 1924, at Dartmouth, the J. was surrendered to the representative of the Soviet Government by her master, and was subsequently sold to the defendants by an agreement made between an English company on behalf of the Soviet Government and the defendants. The Soviet Government had undertaken to indemnify the defendants against any claims made against them in respect of the J.

Held, (1) *that the court had jurisdiction to entertain the action, and that the discretion which it possessed to refuse such jurisdiction ought not to be exercised in the circumstances of the present case. Observations of Atkin, L.J. upon the circumstances in which jurisdiction in such cases may be refused.* (2) *That the action did not implead the Soviet Government.* (3) *That the question whether the persons claiming to have the authority of the plaintiff company to maintain the action was a question of jurisdiction and not of plea, but ought in the circumstances to be referred to the judge at the trial.*

Appeal from a decision of Lord Merrivale, P. refusing to set aside the writ and subsequent proceedings in an action *in rem.*

The following statement of facts is taken from the judgment of the learned President delivered on the 19th Jan. 1925 :

" The *Jupiter* is a vessel which was trading in the autumn of last year, and no doubt has for years been trading, in a course of trade which brings her from time to time to English ports. She was for many years the property of what under Russian law was a lawful trading concern, which is described in one of the affidavits here by its Russian name ; and I believe it is described by the writ in this action by the French translation of the Russian name. Down to the downfall of the autocracy which held sway in Russia for so many generations, the proprietary of the vessel here in question carried on its business with its seat of management at Petrograd, its business headquarters as I understand at Odessa, and with its ships registered at Odessa. Until the years 1918 the *Jupiter* was being managed in the ordinary course of trade by the managers of her proprietors. I use as far as possible neutral expressions here.

" In Jan. 1918 there was issued in the name of the Soviet Republic a decree which abolished, or purported to abolish, private property in shipping ; and by a subsequent decree in March 1919 all the shares in the company which owned the *Jupiter* were declared annulled and the company was extinguished or purported to be extinguished. The *Jupiter* was on the high seas—where, in fact, I do not know—and she continued her trading. Her owners—those at least who had been her owners, her proprietors so far as they were still in being and so far as there was a proprietary interest in any individual—as to part of them at any rate—would appear to have become refugees and to have taken up their abode in France. In France steps were taken at French law, at the instance of those persons, to provide for the management of the *Jupiter* and other vessels which had been the property of the body of proprietors whom I have mentioned. The state of things brought about by sundry decrees of commercial tribunals in France—and in particular tribunals in the Mediterranean (the Tribunal of Commerce at Marseilles being the latest of them) was such that down to Dec. 1922 this vessel was under the direction of administrators who were subject to the control of French tribunals and appointed at the instance of persons for the time being registered in France, whether or not domiciled in France, I do not know.

" In Sept. 1922 the *Jupiter* in the course of her trading was in this country ; and she came to be laid up at Dartmouth and was in charge of her captain. Her captain, for reasons into which it is quite immaterial here to inquire, if I may apply an inapt legal expression to the transaction, attorned to the Soviet Government. He handed over the possession of the *Jupiter* to the representatives in London of the Soviet administration and held possession by their direction for them.

" As a result of that transaction a suit was instituted by arrest of the vessel claiming on behalf of those with whom the now plaintiffs are concerned to assert the rights of the old proprietors, or those of them who survive, in the *Jupiter.* That action was met by a motion for a stay of proceedings on the ground that by that action a foreign sovereign power was being impleaded. There could be no question but that that was a true allegation. The result of the motion was that in this court the action was stayed, and in the Court of Appeal the judgment of my colleague, Hill, J., was affirmed. (*The Jupiter*, 16 Asp. Mar. Law Cas. 447 ; 132 L. T. Rep. 624 ; (1924) P. 236.)

" Following upon that transaction, the Soviet administration entered into a contract which has been produced under which the administration purported by their agents, the Arcos Steamship Company Limited, domiciled in London, to sell and transfer to an Italian corporation the vessel *Jupiter* and all interests in her. It was to be a sale upon an undertaking to break up the vessel. I do not know that that in itself is material here, but it was coupled with an agreement by the vendors to indemnify the purchasers against all claims in British or Italian courts by third parties claiming in respect of the *Jupiter* by reason of matters occurring prior to the delivery of the ship.

" The ship was delivered to the purchasers under that agreement and apparently transferred by those purchasers to its present owners. It is held at the present time by an Italian transferee—I am not quite sure who is the transferee ; it is immaterial. The proprietary interests which are assailed are the interests which purport to have come into being with an agreement of the 18th Sept. 1924 between the Arcos Steamship Company and the Cantière Olivo Sociéta Anonima."

In these circumstances the present action was commenced by the plaintiffs, the Compagnie Russe de Navigation à Vapeur et de Commerce, by writ *in rem* directed to the steamship *Jupiter*, by which they claimed to have possession of the *Jupiter* decreed to them. In due course an unconditional appearance was entered on behalf of the "owners of the steamship *Jupiter* and (or) the Cantière Olivo Società Anonima," and bail was given in a sum of 8000*l*. The plaintiffs delivered a statement of claim, by which they claimed a declaration pronouncing them to be the lawful owners of the vessel and possession of her. Time was asked for the defence. Security for costs was asked and given. The defendants then gave notice of the present motion to set aside the writ and subsequent proceedings, upon the following, amongst other grounds: (1) that the action was between foreigners for possession of a foreign ship, and had been instituted without the consent of the defendants, and without any request from a representative of the foreign State of which either party was a national, and that the court had no jurisdiction or ought not to exercise any jurisdiction it possessed to entertain such an action; (2) that by a nationalisation decree of the Soviet Government the *Jupiter* had become their property, and that the plaintiff company had ceased to exist; (3) that the action impleaded the Soviet Government, which had sold the *Jupiter* free of incumbrances and maritime liens. It was futher contended, when the motion came on for hearing on the 12th Dec. 1924, that the persons instructing Messrs. William A. Crump and Son had no authority. The learned President accordingly gave leave to add as plaintiffs General Bourgois and two other persons appointed by the French courts to manage the business of the Compagnie Russe de Navigation à Vapeur et de Commerce. On the 19th Jan. 1925 the learned President dismissed the motion, granting leave to appeal.

The defendants appealed.

Dunlop, K.C. (*Dumas* with him) for the appellants. There is no jurisdiction to entertain an action between foreigners relating to the title to a foreign ship, unless the court is invited to do so by the diplomatic representative of the country to which the vessel belongs, or the parties consent. If there is jurisdiction under sect. 4 of the Admiralty Court Act 1840, such jurisdiction has always been declined:

> *The Martin of Norfolk*, 4, C. Rob. 293;
> *The Johan and Siegmund*, Edwards, 242;
> *The Sea Reuter*, 1 Dods, 22;
> *The Agincourt*, 1877, 2 Prob. Div. 239;
> *The Evangelistria*, 3 Asp. Mar. Law Cas. 264; 35 L. T. Rep. 410; (1876) 2 P. D. 241 (n).

Moreover, the writ impleads the Soviet Government, because its title to the vessel is called in question, the Soviet Government gave an indemnity in respect of any claims which might be made against the present defendants. [*Aksionairnoye Obschestvo A. M. Luther* v. *Sagor and Co.* (125 L. T. Rep. 705; (1921) 3 K. B. 532) was referred to.]

G. P. Langton and *K. S. Carpmael*, for the respondents, were not called upon.

BANKES, L.J.—This appeal from a judgment of the President raises several important questions. In an action brought *in rem* against the steamship *Jupiter* the plaintiffs raise the question as between themselves and all persons interested in the *Jupiter* as to the ownership and the right to possession of that vessel, and they claim a declaration covering both those points. Appearance was entered unconditionally, and the matter proceeded for a time; bail was asked for and given, and then the defendants who had entered an appearance and who claim to be the owners of the vessel by purchase from the Soviet Government of Russia lodged this motion in which they seek to get the writ and all subsequent proceedings set aside. In their notice of motion they set out the grounds at length. It is not necessary to refer to them particularly; there are nine of them, and they do not include a suggestion that the action is frivolous or vexatious or an abuse of the process of the court; they are all matters going to the jurisdiction of the court. The President decided that the action should proceed, and generally I am in entire agreement with the reasons which he has given for his decision, and with his decision itself.

Mr. Dunlop has taken three points in support of his argument that the President's view was wrong. His first point, as he originally formulated it, was that the action being an action *in rem* between two foreigners relating to the title of a foreign ship the Admiralty Court has no jurisdiction; but he modified that in the course of the argument, and he admitted that the court had jurisdiction, but he sought to establish that there is an accepted rule that the court will not exercise its jurisdiction unless with the consent of the accredited Minister of the country to which the disputants belong, or if both disputants consent. Upon that point we have been referred to a number of authorities, some of which were decisions of Lord Stowell early in the last century. I do not propose to refer to them; there are three of them between the years 1802 and 1811. I do not think that Lord Stowell there lays down any rule indicating that he thought that the court had no jurisdiction, but he did undoubtedly express the opinion that the court did not exercise that jurisdiction in the absence of these consents or requests, and he gave as his reason the fact that such disputes would have to be decided, or might have to be decided, according to foreign law, the ascertainment of which was in those days a matter of difficulty. He also indicated that the foreigners might not be content with the view of the law which was taken by an English judge. I think matters have progressed very far since that time, and it is common practice now for these courts to adjudicate on disputes between

foreigners and to ascertain the foreign law as a matter of fact and apply it; and I think myself that if the question ever had to be discussed at length, which is not the case here, there is a great deal to be said for the view of Hill, J. as expressed by him in *The Annette* (1919) P. 105) in commenting upon the decisions of Lord Stowell to which I have referred. But in regard to this first point of Mr. Dunlop, when once the admission is made that the court has jurisdiction it becomes a matter of mere discretion on the part of the court whether it will not exercise it, and in this case I entirely agree with the view of the President that, having the jurisdiction, the court should not refuse to exercise it. That disposes of the first point.

The second point is that indirectly the foreign sovereign State is impleaded in this dispute. That argument is founded upon this view of the matter: it is said that the plaintiffs are claiming this vessel on the ground that they, a Russian company, were the original owners of this vessel registered at Odessa, and that they always continued to be and remained the owners. The defendants say: "No; that is not so. Owing to the legislation of the Soviet Government your title to the vessel has been destroyed; and by the course of Soviet legislation the vessel became the property of the Soviet Government, and they sold her to us." It is true, as the President pointed out, that in the sale to the defendants on behalf of the Soviet Government an indemnity was given against any claim that might be made to the vessel, but, although that is the fact, it seems to me that the President's view is right; even under those circumstances it is not true to say that the foreign sovereign State is impleaded in this action, although one may see, as the President saw, great difficulties in the way of the plaintiffs ultimately getting over the point raised by the assertion, if it is proved, that the vessel became the property of the Soviet Government and that they sold her to the defendants. That, in my opinion, disposes of the second point.

The third point is one about which it is necessary to be careful, because of the decision in the *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (132 L. T. Rep. 99; (1925) A. C. 112). In that case one of the disputes between the parties was whether the plaintiffs had any authority to commence the action or prosecute the action in the name of the Russian bank. Incidentally, a point was taken as to whether or not that contention ought to have been raised by motion, and whether it was competent for the defendants to raise the contention by plea. That matter was discussed in this court, and on that point there was a difference of opinion, but ultimately the question was settled by the House of Lords definitely deciding that the point ought to have been taken by preliminary motion in accordance with a decision given some time ago by Warrington, J., as he then was, and that it was not competent for the defendants to raise it by plea. In these circumstances, it seems to me that we ought to be careful to protect the right of the parties here, and although this question of authority cannot be raised by plea, it ought to be one of the matters to be decided upon the trial; and I think it is competent for us under those circumstances to refer so much of this motion as relates to the question of authority to the judge at the trial, so that he may be properly seised of the matter which the parties desire to raise on this point. All that I need say about the question is that I certainly do not think it is made so plain that this court ought to shut the plaintiffs out from a full consideration of that question, as well as the other matters which are, to some extent, connected, and to some extent involve consideration of the Soviet legislation.

I think, therefore, that the order of this court should be that so much of the appeal as relates to matters other than the authority of the plaintiffs to maintain the action must be dismissed, and that so much of the appeal as relates to an application involving the authority of the plaintiffs should be referred to the judge at the trial.

The appeal will be dismissed. Plaintiffs' costs in any event.

Atkin, L.J.—I agree. The first question is as to the jurisdiction of the court to entertain this claim for possession by one foreigner against another foreigner in respect of a ship that is within the territorial jurisdiction. It appears to me now reasonably plain that there is jurisdiction in the court to entertain such claim. I think there was jurisdiction before the Admiralty Act of 1840, and in my opinion there is statutory jurisdiction by that Act.

The only question that is left is whether or not there is a discretion in the court to decline to exercise jurisdiction in such cases, and, if so, whether that jurisdiction ought to be so exercised in this case. As to that the law seems to me still to obtain that the court, in such a case, has a discretion as to whether it will exercise its jurisdiction or not, and in cases where the parties both belonging to a foreign State have merely taken the occasion of the ship being temporarily here to get a question of title, which depends on the municipal laws of another country, determined by the courts of this country, the court may in the exercise of its discretion decline to do so. But, in the facts of this case, there seems to me to be no reason why the court should not exercise its discretion and entertain the suit. The vessel has been in this country for a period of years, and the question arises in respect of her disposition by a contract entered into in this country by a limited company of this country—the Arcos Shipping Company Limited—and although questions may arise as to the right of title of the vendors to the defendants, yet it appears to me to be a case which can properly be tried in this country, and I see no reason for interfering with the discretion of the learned President in that respect.

The other question arises on the suggestion that this writ seeks to implead directly or indirectly a foreign sovereign. To my mind that is not the case. So far as the persons interested who have entered appearance are concerned, the defendants, who contend they are the owners, are alleged to be, and undoubtedly are, an Italian company, and it is only as against them that the plaintiffs seek to have possession. The Russian Government do not claim at the moment to be the owners or to have the right of possession, though they do say apparently that they passed their title to the defendants. Under those circumstances it seems to me to be a mere question of fact or of law as to whether or not the defendants, who are not a sovereign State, have in fact got a title to this ship, and no question, therefore, of impleading the foreign sovereign arises. It was put in another way. It was said that inasmuch as a declaration of the foreign sovereign must be taken to be conclusive as to title, and inasmuch as there is an affidavit in which the representative here of the Soviet Government says that they had a title in the ship but conveyed it to the defendants, it is frivolous and vexatious to make a claim contrary to that assertion. It appears to me that that is a question which raises points of difficulty which require further elucidation of the facts. I am not satisfied at present that the law is quite as plain as was suggested by Mr. Dunlop, and in any case the document which vouches for the delivery of the title of the ship to the defendants does not purport to convey the title from the Russian Government to the defendants, but from, as I say, an English company, the Arcos Shipping Company Limited, and they are the people who give the indemnity.

The third point raises an interesting question about the authority to use the name of the Russian company to sue. In respect of that the matter will eventually have to be regarded from several points of view. It may be that the Russian company is dissolved, and in that case it, of course, could not sue. That is a matter of plea. It may be that the Russian company, though not dissolved, has no longer property in the ship, because the property may have been nationalised and passed to the Russian Government. That, again, is not a matter of jurisdiction; it is a question of plea. But it may be that the Russian company, having the property in the ship, have not in fact given any authority to sue because their administrative powers may be in the hands of persons other than those who did give the authority to sue, whoever they may be. That is not a matter of plea, and is now decided to be a matter of motion, but it seems to me plainly to depend upon the determination of facts which are not before the court at the present moment, and may require careful investigation, and therefore if that matter arises in the course of the litigation, I think it ought to be determined by the Admiralty Court. There is the further point as to the other parties who have been added by amendment. As to that again, there is no question of jurisdiction, but merely the question whether those persons have the right to sue or not.

For these reasons it appears to me that at the present stage the learned President was right in refusing this motion, and I think, therefore, this appeal should be dismissed.

LAWRENCE, J.—I agree.

Solicitors for the plaintiffs (respondents). *William A. Crump* and *Son.*

Solicitors for the defendants (appellants), *Wynne-Baxter* and *Keeble.*

Feb. 8, 9, *and* 23, 1925.

(Before BANKES and ATKIN, L.JJ., and LAWRENCE, J.)

THE CHEKIANG. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Collision—Damages—Detention of warship—Measure of damage—Owner's repairs proceeding contemporaneously with collision repairs—Owner's repairs necessary for periodical refit—Time for overhaul advanced in order to take advantage of the vessel being in dry dock for collision repairs—Assessment of damages for detention of a non-profit earning vessel.

In every simple case of a claim by shipowners against tortfeasors whose liability is established or admitted, the question in assessing damages must be, "Has the shipowner proved that he has suffered any loss, and if so, how much?" Thus, if the whole of the time during which a vessel was detained was occupied by necessary owners' repairs as well as by repairs necessary to make good the collision damage, the work on both sets of repairs proceeding simultaneously and continuously and occupying the whole time, the owner is entitled to nominal damages only for detention, since his vessel has not been detained longer than is necessary to perform urgently needed repairs apart from the collision damage.

The defendants admitted liability for a collision between their vessel and a light cruiser, and the question of damages was referred to the registrar and merchants for assessment. After the collision the cruiser was sent for repairs to a dockyard. It appeared that she was due for her annual refit within four months of going into dock to perform the collision repairs, and it was accordingly decided by the naval authorities that she should go through her refit whilst the collision repairs were being carried out. The two sets of repairs accordingly proceeded simultaneously. At the reference the registrar allowed twenty days detention, that being the length of time which in his opinion could be

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

properly allocated to the repairs, at a daily figure based upon a percentage of the capital value of the ship. He also allowed a sum for the pay and allowances of the officers and crew whilst the repairs were being carried out. It was proved that the decision at once to refit the cruiser was not taken until after it was decided to perform the collision repairs. On appeal the report was upheld by the president.

Held, (1) *that the damages in collision cases being measured in accordance with the ordinary principles of common law, the registrar had proceeded upon a wrong principle in applying a fixed rule and ignoring considerations relevant to the question of the actual loss sustained by the plaintiffs by being deprived of the use of their chattel;* (2) *that there is no rule of general application for the assessment of damages for a non-profit-earning vessel;* (3) *that, if it could be shown that the period of collision damage enabled the owners to execute owners' repairs, the completion of which would otherwise with reasonable certainty have deprived the owners of some period of beneficial use, the time so saved may properly be taken into account in determining the loss sustained.*

Marine Insurance Company *v.* China Transpacific Steamship Company (The Vancouver) (6 *Asp. Mar. Law Cas.* 68; 1886, 55 *L. T.Rep.* 491; 11 *App. Cas.* 573, Ruabon Steamship Company *v.* London Assurance Company (9 *Asp. Mar. Law Cas.* 2; 81 *L. T. Rep.* 585 (1900) *A. C.* 6), *and* The Haversham Grange (10 *Asp. Mar. Law Cas.* 156; 93 *L. T. Rep.* 733; (1905) *P.* 307) *considered and distinguished.*

The Acanthus (9 *Asp. Mar. Law Cas.* 276; 85 *L. T. Rep.* 696; (1902) *P.* 17) *and* The Astrakhan (11 *Asp. Mar. Law Cas.* 390; 102 *L. T. Rep.* 539; (1910) *P.* 172) *explained.*

APPEAL from a decision of Sir Henry Duke, P. confirming a report of the registrar and merchant.

The plaintiffs were the Admiralty Commissioners, and the defendants were the owners of the steamship *Chekiang.* The defendants admitted liability in respect of a collision which took place at Hangkow, on the Yang-tse-Kiang, on the 22nd Aug. 1921, between the *Chekiang* and H.M.S. *Cairo*, a light cruiser on the China Station.

After the collision H.M.S. *Cairo* proceeded to Hongkong dockyard to undergo repairs, where she arrived on the 3rd Sept. 1921. She went into dry dock, where the work of repairing the collision damage was carried out. It appeared that she was due to undergo her periodical general refit in Dec. 1921, and, after it was known that the collision repairs would be carried out, it was decided that the refit should be performed at the same time as the collision repairs. The repairs necessary for the periodical overhaul, which involved an expenditure of some 4000*l.*, were therefore carried out simultaneously with the collision repairs. H.M.S. *Cairo* remained in the dockyard until the first week in Nov. 1921, during which time working parties were kept on board.

The following sums were respectively claimed and allowed in his report by the registrar:

	Claimed. £ s. d.	Allowed. £ s. d.
1. Cost of repairs *Cairo* .	675 1 1	675 1 1
2. Loss of use of H.M.S. *Cairo* for the period the 23rd Aug. to 27th Sept. 1921, inclusive, *i.e.*, 36 days at 100*l.* per day .	3600 0 0	2000 0 0
3. Pay and allowances of officers and men for above period . .	7460 17 4	3800 0 0
4. Survey fee and superintendence of repairs .	15 15 0	15 15 0
5. Office and incidental expenses . . .	21 0 0	5 5 0
		£6496 1 1

Interest was allowed thereon at 5 per cent. per annum from the 29th Oct. 1921 until paid.

The registrar gave the following reasons for his report:

"In this reference, the Lords Commissioners of the Admiralty claimed damages arising from a collision between the light cruiser *Cairo* and the *Chekiang* which occurred at Hankow on the 22nd Aug. 1921, and for which the *Chekiang* was to blame.

"The *Cairo* was temporarily repaired at Hankow and left that place on the 3rd Sept. for Hongkong, where she was permanently repaired. The *Cairo* was due for her annual refit in Dec. 1921, but it was decided that as the collision repairs would take some time the annual refit should be done at the same time. The combined work was finished on the 2nd Nov., but the Admiralty did not claim for loss of time in respect of the collision repairs beyond the 27th Sept. The defendants contended that they were not liable for any loss of time, or, in the alternative, for a shorter time than that claimed by the plaintiffs. As regards the time from the 22nd Aug. to the 2nd Sept., I am of opinion that this period cannot be taken into account in estimating the damages for loss of time. The *Cairo*, so far as can be ascertained, after the collision still fulfilled the purpose for which she was stationed at Hankow, and no evidence has been given to prove any loss to the Crown during that period. As regards the later period, it is clearly proved that the decision at once to refit the *Cairo* was not taken until after it was decided to repair the collision damage. The question, therefore, resolves itself into one as to the length of time which can be properly allocated to the collision work. The estimate of Mr. King-Salter, who was in charge of the work, was three weeks, and he is in a position to form a judgment. On the other hand, this estimate is an assumption only, and is not corroborated by any independent evidence. For the defendants two very competent witnesses estimated the time as seven days, which again is an assumption, and by gentlemen who did not see the work being done. The evidence of a person who has had charge of the work for the plaintiffs naturally but unconsciously has a bias in their favour, and

the weight of the defendants' evidence cannot be altogether passed over. The conclusion to which the merchant and myself have come is that a reasonable time to allow from the 3rd Sept. is twenty days.

"As regards the items in respect of officers' and crew's wages, there is evidence that they were employed to some extent on the refitment of the *Cairo*, and, having regard to this fact and to the time allowed, the amount allowed for this item is reduced to 3800*l*."

The defendants appealed against the allowance of items 2 and 3.

On the 12th Dec. Sir Henry Duke, P. dismissed the appeal and confirmed the report.

The defendants appealed.

Dunlop, K.C. and *R. F. Hayward* for the appellants.—The president applied a principle which has no application to a claim for demurrage, but applied only to the apportionment of dock dues. In *Ruabon Steamship Company* v. *London Assurance Company* (9 Asp. Mar. Law Cas. 2 ; 81 L. T. Rep. 585 ; (1900) A. C. 6) the question was liability for dock dues. In *The Haversham Grange* (10 Asp. Mar. Law Cas. 156 ; 93 L. T. Rep. 733 ; (1905) P. 307) the question was the same, but arose as between joint tortfeasors. In *Marine Insurance Company Limited* v. *China Transpacific Steamship Company* (*The Vancouver*) (6 Asp. Mar. Law Cas. 68 ; 1886, 55 L. T. Rep. 491 ; 11 App. Cas. 573) the question was one of repairs, not demurrage. The principles upon which damages are assessed in collision cases are identical with the principles applied in assessing damages at common law. The officers and crew were employed about the ship throughout the period of repair, and, the Admiralty thus having had the benefit of their services, their pay, &c., is not a proper item of loss. The rule for assessing damages for detention of a non-profit-earning vessel is of comparatively modern origin, but there is no rule that a percentage of the capital value of the vessel is the appropriate measure : the tribunal must look at the actual loss sustained.

Bateson, K.C. and *Balloch* for the respondents. —The president applied the right principles, which have been established and acted upon in the Admiralty registry for many years. *The Ruabon* (*sup.*) and *The Vancouver* (*sup.*) cases, and *The Haversham Grange* (*sup.*), which the appellants seek to distinguish, establish the principle, which has long been accepted in assessing damages in collision cases, that an owner may take advantage of his vessel being in dock for the purpose of undergoing collision repairs to perform owner's repairs without thereby reducing the damages which he can recover for detention.

[Reference was also made to the cases cited in the judgments.]

Cur. adv. vult.

Feb. 23. Bankes, L.J.—This is an appeal from the president affirming the report of the registrar. The objection to the report is that the registrar has assessed the damages to which the plaintiffs were entitled on a wrong principle.

The claim for damages was one made by the Admiralty, arising out of a collision between H.M.S. *Cairo* and the defendants' steamship *Chekiang* at Hankow on the 22nd Aug. 1921.

Liability was admitted, and the question of damages was referred to the registrar and merchant. Among the items of damage claimed were the following : Loss of H.M.S. *Cairo* for the period the 23rd Aug. to the 27th Sept. 1921, inclusive ; *i.e.*, 36 days at 100*l*. per day, 3600*l*. Pay and allowance of officers and men of H.M.S. *Cairo* for the above period, 7460*l*. 17*s*. 4*d*.

The report of the registrar so far as is material is as follows : "The *Cairo*, so far as can be ascertained, after the collision still fulfilled the purpose for which she was stationed at Hankow and no evidence has been given to prove any loss to the Crown during that period. As regards the later period, it is clearly proved that the decision at once to refit the *Cairo* was not taken until after it was decided to repair the collision damage. The question, therefore, resolves itself into one as to the length of time which can be properly allocated to the collision work. . . . The conclusion to which the merchant and myself have come is that a reasonable time to allow from the 3rd Sept. is twenty days. As regards the item in respect of officers' and crew's wages, there is evidence that they were employed to some extent on the refitment of the *Cairo*, and having regard to this fact and to the time allowed, the amount allowed for this item is reduced to 3800*l*."

It is plain from the language used that in arriving at the above decision the registrar considered that he was acting upon a settled principle. The word "therefore" plainly indicates this. The president took the same view. In dealing with the question of liability, as opposed to the question of amount, he sums up his decision in these words : "I come to the conclusion therefore that upon the crucial question of fact and upon the crucial principle of law, my judgment ought to be against the appellants."

The objection of the appellants to this judgment, and to the report of the registrar, is that under the two heads above mentioned no damages at all should have been awarded, or, alternately, a very much smaller sum, and that the amount of the damages has only been arrived at by applying a principle which has no application to the case.

I speak with hesitation upon a point with regard to which the experience of the registrar and of the president is so much greater than my own, but after listening to the arguments which have been addressed to us, and to the cases which have been cited, it does appear to me that some confusion has crept into the practice as a result of treating as applicable to such a case as the present decisions which were given under entirely different circumstances. The president treats the cases of *The Haversham Grange* (10 Asp. Mar. Law Cas. 156 ; 93 L. T. Rep. 733 (1905) P. 307), and *The Acanthus* (9 Asp. Mar. Law Cas. 276 ; 85 L. T. Rep. 696 ; (1902) P. 17) as the governing

authorities; and the report of the registrar indicates that he adopted the judgment in *The Acanthus* as indicating the principle upon which the damages in the present case should be assessed.

It is, I think, necessary to go back to the governing principle laid down in such clear language in *The Argentino* (6 Asp. Mar. Law Cas. 348, at p. 351; 1888, 59 L. T. Rep. 914, at p. 917; 13 Prob. Div. 191, at p. 200), and recently applied in *The Valeria* (16 Asp. Mar. Law Cas. 25; 128 L. T. Rep. 97; (1922) A. C. 242). The rule there laid down was that the damages recoverable from a wrongdoer in cases of collision at sea must be measured according to the ordinary principle of the common law.

The present is a simple case of a shipowner claiming damages against a single tortfeasor for damage done to his vessel by the negligence of the tortfeasor's servants. Whatever damages are recoverable in such an action, and whatever circumstances can be taken into consideration in arriving at the damages to be awarded, are the same damages and the same circumstances as it would be permissible to award, or to consider, had the collision taken place on land between vehicles belonging to the same class of owners. In both instances the plaintiff must prove his case, and must within the accepted rules establish the claim for damages which he sets up.

The present case is peculiar in this respect, that the plaintiffs are the owners of a non-profit-earning vessel. Until comparatively recently the claim of such an owner was not recognised in the Admiralty Court. That such a claim is now admissible is clearly established by the decisions in *The Greta Holme* (8 Asp. Mar. Law Cas. 317; 77 L. T. Rep. 231; (1897) A. C. 596), *The Mediana* (9 Asp. Mar. Law Cas. 41; 82 L. T. Rep. 95; (1900) A. C. 113), and *The Marpessa* (10 Asp. Mar. Law Cas. 464; 97 L. T. Rep. 1; (1907) A. C. 241). Bargrave Deane, J., whose knowledge of Admiralty practice was very extensive, indicates in his judgment in *The Astrakhan* (11 Asp. Mar. Law Cas. 390; 102 L. T. Rep. 539; (1910) P. 172) that so far as his experience went that was the first time the rule laid down in these cases had been applied to the case of a warship.

I must refer later to those cases in which the question of the matters which it is legitimate to take into consideration in assessing the damages in such a case are considered. Before doing so I wish to clear out of the way a number of decisions which have been referred to, and which, with respect to those who have thought differently, have no real bearing on this case. These decisions divide themselves into two classes. The one class comprises cases where the dispute has been between shipowners and underwriters, the question there depending upon their respective rights and obligations arising out of the contract into which they have entered. The other class comprises cases where the dispute has arisen between shipowner and joint tortfeasors, and where owing to the rule prevailing in Admiralty, the liability of the two tortfeasors *inter se* has been considered. Instances of the first class are *The Vancouver; Marine Insurance Co. v. China Transpacific Steamship Company* (6 Asp. Mar. Law Cas. 68; 55 L. T. Rep. 491; (1886) 11 App. Cas. 573), and *The Ruabon Steamship Company v. London Assurance Company* (9 Asp. Mar. Law Cas. 2; 81 L. T. Rep. 585; (1900) A. C. 6). The instance of the second class is *The Haversham Grange* (*sup.*). The Master of the Rolls, in the last-mentioned case, at p. 313 (10 Asp. Mar. Law Cas., at p. 160; 93 L. T. Rep., at p. 737) plainly indicates what the task before the court was when he says: "A sum had to be done to ascertain what the total cost of all the mischief was, and to apportion between the two delinquents the particular part of the cost attributable to the wrong caused by each of them." No such question arises in the present case, and the grounds of the decision are not in my opinion applicable to this case.

The same observation applies to the insurance cases. In the case of *The Vancouver; Marine Insurance Company v. China Transpacific Steamship Company* (*sup.*) in the House of Lords, Lord Blackburn says this: "I agree with the Master of the Rolls that the first question is what would be the measure of the average on the hull which the underwriters would have had to pay if there had been no warranty free of average on the policy." No similar question can arise in this case. There are two cases which require special consideration, *The Acanthus* (9 Asp. Mar. Law Cas. 276; 85 L. T. Rep. 696; (1902) P. 17), *The Astrakhan* (11 Asp. Mar. Law Cas. 390; 102 L. T. Rep. 539; (1910) P. 172). In both of these the dispute was as here between shipowners and a single tortfeasor.

In *The Acanthus* (*sup.*) the facts were that in order to repair the damage sustained in a collision for which the defendants were liable, the plaintiffs' vessel was dry-docked, and the plaintiffs (without causing delay or increase of dock expenses) took advantage of the opportunity to fit her with bilge keels. The report of the registrar contained this finding: "On the whole, however, we came to the conclusion that the plaintiffs had not before the collision been absolutely committed to doing the bilge keel work at that time, and that justice would be done by apportioning the expenses consequent on dry-docking the vessel, as well as the loss sustained through her detention between the bilge keel work and the collision repairs." All that need have been said about this portion of the report was that the registrar appeared to have applied a principle to the assessment of the damages which was unknown to the common law, and which a court of equity would not recognise. This is in substance what the president said, and he only applied this principle of the *Ruabon Steamship Company v. London Assurance Company* (*sup.*) to the extent of accepting and acting upon the Lord Halsbury's statement of the law in 9 Asp. Mar.

Law Cas., at p. 2; 81 L. T. Rep., at p. 586; (1900) A. C., at p. 9, where he says: "But it seems to me a very formidable proposition indeed to say that any court has a right to enforce what may seem to them to be just, apart from common law or statute. The courts no doubt will enforce the common law, and will apply it to new questions of fact which arise; but I cannot understand how it can be asserted that it is part of the common law that where one person gets some advantage from the act of another a right of contribution towards the expense from that act arises on behalf of the person who has done it." Had the facts in *The Acanthus* (*sup.*) justified the conclusion that the work done by the owner was necessary work, I venture to think that the president would not have referred to any question of contribution by the owner, but would have considered the question of whether the owner had in fact suffered any, and if so what, loss by the detention of his vessel during the time necessary to carry out those repairs. This is what was done by Bargrave Deane, J. in *The Astrakhan* (*sup.*). In that case the learned judge took the view that the time occupied by doing necessary owner's repairs should be excluded altogether from consideration in arriving at the damages payable by the tortfeasor, upon the ground that there was under the circumstances no evidence of any loss to the owner by reason of the detention of the vessel for the period necessary to carry out those repairs. For detention beyond that period the learned judge held that damages were recoverable.

In my opinion the question in every simple case of a claim by shipowners against tortfeasors where liability for damage to the owner's vessel is either established or admitted must be, Has the owner proved that he has suffered any loss, and if so how much? If the fact be that the whole of the time during which the vessel was detained was occupied by the repairs necessary to make good the collision damage, and by necessary owner's repairs, the work on both proceeding simultaneously and continuously, and occupying the whole time, the owner, in my opinion, would fail to establish a case for anything beyond nominal damages. In such a case as that, on his own showing, the vessel was not detained for a moment longer than was necessary to carry out urgently needed repairs, quite apart from the collision damage. If the question arises, as it does in the present case, whether the repairs carried out by the owner apart from the collision damage, though necessary, would not but for the collision have been done quite so soon as they were in fact done, the matter is not so simple. In every case it must be a matter of degree, and the tribunal whose duty it is to assess the damages must exercise its own common sense. There is no rule of law that because the owner's repairs were executed sooner than, but for the collision, they would have been executed, the time occupied by those repairs must be allowed in the time for which demurrage is awarded.

There is, further, no rule of law which prescribes the amount of the damages to which the owners of a warship or a non-profit-earning vessel are entitled in the event of detention to make good collision damage. The judgments in *The Marpessa* (*sup.*) in all three courts, and the view expressed by Lord Herschell in *The Greta Holme* (8 Asp. Mar. Law Cas., at p. 320; 77 L. T. Rep., at p. 234; (1897) A. C., at p. 605), are merely indications of principles which may be applied in cases where the facts warrant it. The broader and the truer view of the principle of general application is supplied by a statement of Lord Halsbury in *The Mediana* (9 Asp. Mar. Law Cas. 41, at p. 42; 82 L. T. Rep. 95, at p. 96; (1900) A. C. 113, at p. 118), where he is drawing the distinction between a claim for special and for general damages, he says: "But when we are speaking of general damages no such principle applies at all, and the jury might give whatever they thought would be the proper equivalent for the unlawful withdrawal of the subject-matter then in question. It seems to me that that broad principle comprehends within it many other things. There is no doubt in many cases a jury would say there really has been no damages at all. We will give the plaintiff a trifling amount—not nominal damages, be it observed, but a trifling amount; in other cases it would be more serious."

This case must go back to the registrar. I do not want to say anything which will make a difficult task more difficult. This I think I must say, namely, that in a case like the present there undoubtedly is a rule of law that the fact that a vessel is a non-profit-earning vessel is no reason why damage should not be awarded to the owner against a tortfeasor. In a case where a real loss is established principles have been indicated by the application of which it is legitimate to assess the money value of that loss. On the other hand there is no rule of law requiring the registrar to adopt any particular principle, or to award any particular sum in a case where in his opinion no substantial loss has been suffered. The judgments in *The Kingsway* (14 Asp. Mar. Law Cas. 590; 122 L. T. Rep. 651; (1918) P. 344), both in the court below and in this court, proceed, in my opinion, on this view of the law. The question of quantum in the present case is entirely for the registrar. He has actual facts before him on which to proceed. He has not to consider what may happen, but to deal with what did happen. If in his opinion the Admiralty as representing the owners of a special class of non-profit-earning vessel have, under the particular circumstances of this case, suffered no substantial loss, he is quite entitled to say so, and to award them what Lord Halsbury describes as a trifling amount. The appellants have, in my opinion, established the fact that the registrar did adopt a wrong principle in assessing the damages. The appeal, therefore, must be allowed with costs here and below, and the case remitted to the registrar for reconsideration.

Atkin, L.J.—In this case the *Chekiang* collided with H.M.S. *Cairo*, a light cruiser, at Hankow, and damaged the stern and adjoining plates of the *Cairo* above the water-line. The damage was repaired at Hongkong, took twenty days to complete, and cost 675*l.* The plaintiffs have been awarded 675*l.* for cost of repairs, and 5800*l.* for damages for detention, made up of 2000*l.* for loss of use, and 3800*l.*, pay and allowances of officers and men. The defendants object that the damages for detention are excessive, and have been assessed upon a wrong principle. After the naval authorities had determined to repair the collision damage, and after the *Cairo* had arrived at Hongkong for that purpose, it was decided that her annual refit should take place at the same time. It did take place, and took eight weeks to complete, proceeding concurrently with the repair of the collision damage, which, as I have said, took twenty days. During the whole of the eight weeks the officers and men remained on board the *Cairo*, some of them being employed in parties in some of the operations of refitting. The claim for loss of use is a claim of 100*l.* per day, arrived at roughly by taking five per cent. on the estimated capital value of the vessel at the time: record, page 3, question 9: "That has been the principle adopted in other cases, and is in accordance with the practice of this tribunal? (A.) Yes." This sum has been accepted without any further demur by the registrar and approved by the president. It seems to me clear that it was adopted as being correct both in principle and in accordance with practice. The claim for officers' and men's pay and allowance as made is at the rate of 207*l.* per day, and there seems to be no dispute as to the figure. Twenty days at 207*l.* per day would amount to 4140*l.* The learned registrar has allowed 3800*l.*; so that he has allowed the equivalent of the pay and allowances for the whole period of twenty days, less one-and-three-quarter days, or in other words, has allowed the defendant a deduction of something over eight per cent. on the whole amount for the period. It appears to me that the result has been arrived at on a wrong principle, by applying a fixed rule and ignoring considerations which must be relevant to the real inquiry what is the actual damage suffered by the plaintiffs. "The damages recoverable from a wrongdoer in cases of collision at sea must be measured according to the ordinary principles of the common law. Courts of Admiralty have no power to give more; they ought not to award less." This statement of the law by Bowen, L. J., in *The Argentino* (6 Asp. Mar. Law Cas. 348, at p. 351; 1888, 59 L. T. Rep. 914, at p. 917; 13 Prob. Div. 191, at p. 200) has been adopted in the House of Lords, and undoubtedly states the law binding upon the Admiralty Division and ourselves. The application of the principle is succinctly stated by Lord Loreburn, L.C., in *The Marpessa* (10 Asp. Mar. Law Cas., at p. 464; 97 L. T. Rep., at p. 2; (1907) A. C., at p. 244): "Now until the case of *The Great Holme* (8 Asp. Mar. Law Cas. 817; 77 L. T. Rep. 73; (1897) A. C. 596) the view appears to have prevailed that no damages beyond the actual loss in repairs, loss of wages and so forth, could be recovered where an injured vessel made no money for its owners and merely rendered services in dredging. That case corrected the error, and decided that in such a case general damages might be recovered as well as the cost of procuring another vessel to do the work; but it did not, and could not, lay down a rule of universal application for the ascertainment of the damages in each particular case. For the damages depend upon the facts and upon the actual loss sustained by the owner, which will vary in different cases." The only question, therefore, in each case is what was the actual loss to the plaintiffs arising from the deprivation of the use of their chattel? It is difficult enough to estimate the damages in this respect where the plaintiffs are the Admiralty suing in respect of the loss of the use of one of His Majesty's ships. In the case of vessels required for continuous use, but not for commercial purposes, it has been stated on eminent authority that the value of the services lost might be measured by the annual cost of the services year in and year out, including their cost of maintenance, interest on capital, and depreciation. See per Lord Loreburn in *The Marpessa* (*sup.*). I am not clear that this is intended to be laid down as a general rule; it seems to offend against the statement already made by the Lord Chancellor that no case could lay down a rule of universal application; and it is subject to the criticism directed to such a rule by the president and the Court of Appeal in the very case under appeal, where the decision below was affirmed. Nor is it clear that any such rule is applicable to a ship the value of whose use may vary immensely with the circumstances of the moment, in times of war and in times of settled peace, when commissioned and when laid up. But in any case a rule which is applicable where the plaintiffs are altogether deprived of the beneficial use cannot be applicable when they retain part or the whole of the beneficial use; nor does it appear right that the rule applicable to plaintiffs who but for the collision would in fact have put the vessel to beneficial use should be applied to plaintiffs as to whom it can be proved that during the period of repair they would not have put the vessel to beneficial use. And I think it also follows that if it can be shown that the period of collision damage enabled the owners to execute other repairs, the completion of which otherwise would with reasonable certainty have deprived the owners of some period of beneficial use, the time so saved with all proper discounts for uncertainty, &c., may properly be taken into account. In this case it is plain that the plaintiffs did not lose the whole beneficial use of the ship during the twenty days in question. They occupied her with her officers and men during the whole period; and during the same period were

engaged in carrying out her usual annual refit.

In estimating the actual loss to the owners, it seems to me that the above facts must be taken into account as tending to diminish the amount of damages which might be given if there was no such use. Whether the assessing tribunal should award any and what sum after taking into account all relevant factors, is a question for them. It is plain that in awarding the same sum as though there had been complete loss of use, a wrong principle has been adopted. The same considerations apply to the pay and allowances. The officers and men were in fact engaged upon the ship presumably on some, at any rate, of their usual duties; some of them were during the period of collision repair engaged in parties upon the refit. Moreover, they would be engaged in precisely the same way apart from the collision at the time when the vessel did undergo her annual refit in accordance with the prospective programme. It is for the assessing tribunal to take all these matters into consideration, and estimate what actual loss if any the plaintiffs sustained by the officers and men being engaged on the ship—dry dock in the circumstances—and not as they would have been had there been no collision.

In my opinion there is no direct authority on this particular matter, *i.e.*, where some use has been made by the owners of a non-commercial vessel during the period of collision repair, except *The Ancathus* (9 Asp. Mar. Law Cas. 276; 85 L. T. Rep. 696; (1902) P. 17), and *The Austrakhan* (11 Asp. Mar. Law Cas. 390; 102 L. T. Rep. 539; (1910) P. 175), in neither of which does the point seem to have been expressly argued. In *The Acanthus* (*sup.*) Sir Francis Jeune dealt in terms with dock expenses, which appear to me to raise a different question; and treated the damages for detention as following the division of the dock expenses. In *The Astrakhan* (*sup.*) Bargrave Deane, J., for purposes of damages for detention, deducted from the period of collision damage the time estimated for refitting repairs. I think that the latter view was correct. Dock expenses appear to me to raise such a different question. They are treated as part of the expenses of actual repair; and if they have been incurred primarily for repairing collision damage they form part of such collision damage. I do not see how it can be suggested that they were to be part of the cost of repairs merely because the owner takes advantage of the occasion to use the ship for purposes of his own; or to use the dock for executing other repairs for which he would not have engaged the dock but for collision repairs. If he engages the dock not only for repairing the damage of one collision, but also for repairing at the same time the damage of a second collision, it is right that the expenses should be divided between the two wrongdoers in estimating the damage to which each is liable; and so if he engages the dock for the purpose of repairing not only the collision damage but also damage which at that time it is necessary for him on his own account to make good. In each case the question seems to be one of fact whether the dock expenses are in fact part of the expenses of repairing the damage in respect of which the party sought to be charged is liable. The *Ruabon Steamship Company* v. *London Assurance* (9 Asp. Mar. Law Cas. 2; 81 L. T. Rep. 585; (1900) A. C. 6), so far as the claim was based on a right to contribution, is not relevant; so far as it decides that the underwriters must bear the dock charges as part of the cost of repair, it is in accordance with the view expressed above.

I may say with great respect that some of the dicta of Lord Halsbury in *The Mediana* (9 Asp. Mar. Law Cas. 41; 82 L. T. Rep. 95; (1900) A. C. 113) as to damages for detention of a chattel are a little difficult to reconcile with accepted views as to the measure of damages in such cases. One would think that the amount of the owner's loss in being deprived of his horse or his chair must depend upon the actual use which might be expected to be made of the horse or chair during the period of detention. If either could be in constant use there might be one amount of damages; but if it could be shown that neither would be used at all during the period of detention the damages would necessarily be less, though they need not be contemptuous. Small damages for detention of chattels in such circumstances are quite usual in actions of detinue.

For the reasons above given I think that this appeal should be allowed with costs here and below; and the report as to items 2 and 3 thereof be rejected and not confirmed, and the claim as to such items be remitted to the registrar and merchant.

Lawrence, J.—I concur.

Solicitors for the appellants, *Waltons and Co.*

Solicitor for the respondents, *Treasury Solicitor.*

Feb. 26, 27, *and March* 2, 1925.

(Before Sir Ernest Pollock, M.R., Atkin and Sargant, L.JJ.)

Cantiere Navale Triestina *v.* Handelsvertretung der Russe, &c., Naphtha Export. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party — Construction — Exception — Readiness to load—Demurrage—Vessel compelled to leave port by local military authority—"Restraint of rulers and people"—Absence from and subsequent return to port—Leading after delay—Voyage not frustrated.

A ship was chartered to proceed to a certain port and there to load a cargo. After she had arrived at the port of loading and had given

(*a*) Reported by J. S. Scrimgeour and H. Langford Lewis, Esqrs., Barristers-at-Law.

notice of readiness, she was compelled by the authorities in the port to leave before any cargo could be loaded. Later, she returned to the port of loading, and after a few days was allowed to load. Upon a claim by the owners for demurrage based upon a finding by the umpire that the lay-days ran continuously after the notice of readiness to load had been given, Roche, J. held that demurrage could not be claimed in respect of the period during which the ship was absent from the port of loading.

Held, by the Court of Appeal, that the charterers' obligation to load was absolute and unconditional and that time began to run from the date of readiness to load. The fact that the vessel was absent from the port for a period through no default of the owners did not excuse the charterers from liability for demurrage during that period, and the statement in Scrutton on Charter Parties, 11th edit., at p. 342, to the contrary effect was not supported by authority. The exceptions clause was not mutual, but only in favour of the shipowners. The delay and obstruction caused to the vessel, though a "restraint of rulers and people" could not therefore prevent the lay-days from running. The interference was of a temporary and capricious character, and did not frustrate the voyage or render it illegal.

William Alexander and Sons v. Aktieselskabet Dampskibet Hansa (14 Asp. Mar. Law Cas. 493; 122 *L. T. Rep.* 1; (1920) *A. C.* 88) *applied.*

Appeal from a decision of Roche, J. on a special case stated by the award of an umpire, Mr. Leck, K.C. The case was as follows:

1. By a charter-party dated the 16th Oct. 1922, and made between Cantiere Navale Triestina of Trieste, owners of the Italian tank steamer called the *Dora* (hereinafter called the owners) and, Handelsvertretung der Russ Soz. Fod. Soviet Republik Naphtha Export of Hamburg, charterers (hereinafter called the charterers), the *Dora*, then discharging at Rouen, was chartered to proceed to Batoum and there load a full and complete cargo of pale lubricating oil, and being so loaded therewith to proceed (as ordered on signing bills of lading) direct to Antwerp or Rotterdam in charterers' option and deliver the same.

2. The matter in dispute in the arbitration was the owner's claim for demurrage and for certain charges and expenses and for interest on the sums alleged to be due.

3. The most material provisions of the charter-party were as follows:

"(5) Two hundred and sixteen running hours (Sundays and holidays excepted), weather permitting, shall be allowed the charterers for loading and discharging, the charterers having the right of loading and discharging during the night, paying all extra expenses.

"(7) The laying days shall commence from the time the steamer is ready to receive or discharge her cargo, the captain giving six hours' notice to the charterers' agents, berth or no berth.

"(8) The demurrage shall be payable at the rate of 130*l.* per day, but if by accident a delay should take place at port of loading or discharge by fire or breakdown of machinery of charterers, the rate of demurrage shall be reduced to 65*l.* per running day for the time so lost and *pro rata* for part of a day.

"(9) The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, assailing thieves, arrest and restraint of princes, rulers and people, collisions, stranding and other accidents of navigation excepted, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners or other servants of the shipowners. Ship not answerable for losses through explosions, &c.

"(11) Owners to have an absolute lien upon the cargo for all freight, dead freight, demurrage and costs of recovering the same.

"This charter is subject to charterers' approval of the cleanliness of the vessel's tanks for the carriage of pale lubricating oil. Charterers undertake to inspect vessel's tanks at Rouen, and if approved such inspection and approval to be final."

4. On the 31st Oct. 1922 a telegram was sent from Moscow to the Soviet authorities at Batoum in the following terms:

"In view of the aggressive policy of the Italian Government, such as arresting our goods, you are requested to close at once the branch of Lloyd Triestino; not to send the goods to Italy; to stop the chartering of Italian steamers; to stop the admittance of Italian steamers to our ports; and to suspend generally any commercial relations with Italy. This decision is made in accordance with Narkominodal. Please confirm fulfilment. 31st Oct. No. 2451. (Sgd.) Assistant Commissioner for Foreign Trade Froumkin."

5. The tanks of the *Dora* had been inspected and approved on behalf of the charterers before she left Rouen. The *Dora* arrived in Batoum Roads early in the morning of Sunday, the 5th Nov., and about 8 p.m. on the same day the sanitary medical officer came on board and she got free pratique. About two hours later the maritime police came on board, closed and sealed the vessel's wireless and informed the master that all communication with the shore was prohibited. This prohibition continued until 5 p.m. on the next day, Nov. 6th, when the chief of the local maritime authorities came on board and informed the master that the prohibition was raised and that the master and crew were free to go ashore. Owing to the lateness of the hour the master did not go ashore that day, but he took the opportunity of sending ashore a letter addressed to the local agency of "Naphtha Export," informing them of the arrival of the *Dora*. There was no evidence that this letter was ever received by the agents. The next day, the 7th Nov., was a general holiday, being the anniversary of the Bolshevist Revolution. On the 8th Nov. the master went ashore and at 8 a.m. that day gave notice to the charterers' agents of the arrival of the *Dora* and that she was ready to load, and the agents accepted the notice and said that they would load the *Dora* first turn after the oil steamer *Ramella*, a British steamer expected to finish loading that evening or the following morning. At Batoum petroleum is loaded in a special part of the port called the Petroleum Harbour. When the master gave the agents notice on this day the *Dora* was ready to load and ready to enter the Petroleum Harbour as soon as the charterers had a berth for her. The lay hours under the charter-party began to run from 2 p.m. on the 8th Nov.

6. About 2 o'clock of the afternoon of the 8th Nov. while the *Dora* was lying in the Roads a motor launch with an officer and some soldiers came to the *Dora* and ordered her to leave Russian waters. The master of the *Dora* protested and also said it was impossible for him to leave without the vessel's health certificate. The officer thereupon left. Shortly afterwards a doctor of the health

authorities came on board with the health certificate and with an order in Russian, which was translated into English to the master of the *Dora* as follows : " With this note I let you know that at present steamship *Dora* under your command cannot take cargo here. This order does not depend on us. I give you the bill of health and compel you to sail away from Batoum anywhere you like and please." This was signed and stamped by the chief of the maritime authorities at Batoum. The master again protested and insisted upon seeing the authorities. This was allowed and he was taken before the chief of the maritime authorities, who, after hearing the master, withdrew the order, giving the master four hours to await further orders. At 11 p.m. an official of the maritime authorities came on board and gave the master a fresh order that the steamer must leave Batoum Roads not later than midnight. The *Dora* accordingly left Batoum Roads at 11.30 p.m. on the 8th Nov. She proceeded to Constantinople, the nearest convenient non-Russian port, and arrived at Constantinople at 4 p.m. on the 11th Nov.

7. After the *Dora* left Batoum representations were made by the agent at Moscow of the Italian Government, by the owners of the *Dora*, and by the charterers, to the Russian Government, with the result that permission was obtained to load the *Dora* at Batoum. It was, therefore, arranged by the owners and charterers that the *Dora* should return to Batoum and load. The *Dora* remained at Constantinople awaiting orders till the 21st Nov. on which day at 5 p.m. she received telegraphic orders to return to Batoum to load. The *Dora* accordingly left Constantinople at 10 a.m. on the 22nd Nov. for Batoum. The *Dora* arrived and anchored in Batoum Roads at 4.30 on Saturday, the 25th Nov. At 8 p.m. an officer of the military section of the port came on board and informed the master that he would not allow free pratique because the orders about Italian ships had not yet been revoked. He, however, gave permission for the *Dora* to remain at anchor until this particular case of the *Dora* was cleared up. At 4 p.m. on the 28th Nov. the military chief sent a note on board saying that orders had been received to allow the *Dora* to load. At 8 a.m. on the 29th Nov. the health doctor came on board and gave free pratique. In the evening a pilot having come on board, the anchor was raised and the *Dora* was proceeding to a loading berth, when orders came that the Dora was not to proceed inside but was to remain at anchor in the roads and the *Dora* again anchored. On the morning of the 30th Nov. at 7.45 a.m. a pilot came on board with orders for the *Dora* to proceed to the loading berth. The *Dora* accordingly entered the harbour and attempted to moor alongside the berth, but the weather was too bad to permit this to be done. The *Dora* was compelled to lie some distance off the loading berth, and as the weather got worse in the morning of the 1st Dec., the *Dora* was, by reason of the weather, obliged to leave the harbour and anchor again in the Roads. On the 2nd Dec. the weather improved, and in the afternoon the *Dora* was able to enter the harbour again and she was moored at the loading berth about 3 p.m. At 8.15 p.m. on the same day the loading began. The loading was finished at 8 a.m. on the 5th Dec.

8. If the lay time ran continuously (Sundays and holidays excepted) from 2 p.m. on the 8th Nov. to 8 a.m. on the 5th Dec., when the loading was completed, the 216 hours (or nine days), allowing for a Sunday, expired at 2 p.m. on the 18th Nov., and the *Dora* was sixteen days eighteen hours on demurrage at Batoum.

If the time when the Dora was not at Batoum from 11.30 p.m. on the 8th Nov. to 4.30 p.m. on the 25th Nov. did not count and allowance was made for Sundays and for bad weather, five days thirteen hours of the lay time allowed had been used when the loading was completed. If time did not count until the charterers ordered the *Dora* to a loading berth on the 30th Nov. and allowance was made for bad weather and for a Sunday, one day twenty hours of the lay time allowed had been used when the loading was completed.

9. It was contended on behalf of the owners that the charterers were responsible for all delays caused by the action of the Russian Government on the ground : (1) That the charterers were the Russian Government and responsible for all delay caused by their own acts ; and (2) if the charterers were not the Russian Government, that there were no exceptions in the charter-party which excused the charterers from liability for the delay in loading the *Dora* caused by the action of the Russian Government. The umpire found the following facts : In 1918 the naphtha industry in Russia was nationalised, and the management was entrusted to the General Naphtha Committee attached to the Fuel Department of the Superior Council of National Economics. In 1922 this management was superseded as from the 1st Oct. 1922, by the formation of the All Russian Oil Syndicate, commonly called the Naphtha Syndicate, the promoters and members of the syndicate being the State Oil Trusts, Agnepht Grosnepht and Embanepht. This syndicate was formed for the purpose of carrying on the trade in oil products under the general direction of the Superior Economic Council and the Head Fuel Administration. By its articles of association (ratified and approved by the Russian Government) the Naphtha Syndicate was to enjoy all the rights of a legal entity and to carry out independently in its own name for its own account all kinds of trading operations. The articles further provided that the responsibility of the syndicate to a third party should be confined to the property belonging to it and that neither the State nor the oil trusts should be responsible for the liabilities of the syndicate. Subsequently by supplemental regulations as to export administration of the Naphtha Syndicate an " Export Administration " was formed as a department of the syndicate, subordinate to the syndicate in all matters, it being also provided by these regulations that " the export administration shall at the same time carry on its work in full contact with the People's Commissariat for Foreign Trade and under the control of the latter." It was also provided that the Export Administration (or " Naphtha Export," as it was called) should carry out its export-import work through the medium of " Arcos " and the Trade Delegations of the People's Commissariat of Foreign Trade with the right of attaching to such its own branches and representatives. The charter-party of the *Dora* was made between the owners and Handelsvertretung der Russ. Soz. Fod. Soviet Republik Naphtha Export Charterers of Hamburg, and was signed " Handelsvertretung in Deutschland der R.S.F.S.R. (Naphtha Export) Zweigstehle Hamburg B. Fenrich." The umpire found that the charter-party was a contract by the Export Administration of the Naphtha Syndicate made as required by the above regulations through the medium of the Hamburg branch of the Trade Delegation in Germany of the Russian Federation of Soviet Republics. The umpire found that it was not a contract with the Russian Government but with the Naphtha Syndicate. The umpire held, on the construction of the charter-party, that there were no exceptions therein which excused the charterers

from liability for the delay in loading caused by the acts of the Russian Government.

10. While the *Dora* was loading there were some negotiations between the agents of the owners and the agents of the charterers as to an alteration of the port of discharge and as to orders for port of discharge being given in the course of the voyage, *i.e.*, at Gibraltar, any delay in giving orders to be paid for at the demurrage rate. Meantime the loading was completed and bills of lading were signed for Constantinople for orders. The *Dora* arrived at Constantinople on the 8th Dec. at 4 p.m., and the master was requested by the charterers' agents to wait a day at Constantinople to enable the agents to obtain orders. The *Dora* accordingly waited a day at Constantinople, and it was agreed at the hearing that one day's demurrage was payable by the charterers for this delay.

11. The *Dora* was ultimately ordered to discharge at Ostermoor, and the charterers were informed that the owners would exercise their lien for demurrage claimed and for freight which was payable under clause 2 of the charter-party at discharging port before commencing delivery of the cargo. The *Dora* arrived and was moored at a discharging wharf at Ostermoor about noon on the 28th Dec. Notice was given by the master at 1 p.m. and the lay time began to run from 7 p.m. on the 28th Dec. There was some delay in paying the freight and discharge did not commence till 5 p.m. on the 30th Dec. The discharge was completed about 10 a.m. on the 3rd Jan., the total time occupied in discharging being six days fifteen hours, not counting Sunday, the 31st Dec.

12. If the *Dora* was on demurrage at Batoum, then a further seven days fifteen hours demurrage was incurred at Ostermoor, making together twenty-four days nine hours demurrage. If only five days thirteen hours of the lay time was used at Batoum, then the total demurrage was three days four hours. If only one day, twenty hours of the lay time was used at Batoum, then no demurrage was incurred.

13. It was contended for the charterers that there was some delay in discharging at Ostermoor caused by delay by the master in posting the bills of lading, and also by payment of freight being required in a manner not provided for by the charter-party. The umpire found as a fact that there was no delay by the master and no wrong claim as to the freight; and, further, that no delay in discharging was attributable to either of these matters.

14. The owners also claimed from the charterers 875*l.* as the cost of fuel consumed in proceeding from Batoum to Constantinople and back to Batoum, together with 120*l.* for dues incurred at Constantinople. The umpire held that these sums were not payable by the charterers. The owners also claimed 384*l.* 10*s.* 11*d.* for extra expenses at Batoum and Ostermoor. The umpire found that under clause 5 of the charter-party the charterers were liable to pay 46*l.* 17*s.* 11*d.* claimed for overtime. No explanation was given showing how the other expenses were incurred or why they were payable by the charterers, and the umpire found that the charterers were under no liability for those other expenses.

The owners also claimed 260*l.* 8*s.* 4*d.* for the expenses of a representative sent to Moscow in connection with the negotiations that followed on the *Dora* being ordered to leave Batoum after her arrival on the 5th Nov. The umpire found that the charterers were not liable for those expenses. The owners also claimed interest on all the amounts claimed by them. The umpire found that the owners were not entitled to interest except in so far as they were entitled to a proportionate part of any interest accrued on the sum deposited in bank as hereinafter appears.

15. The owners having exercised their lien at Ostermoor the freight was paid, and a sum of 5472*l.* was deposited by or on behalf of the charterers in Hambros Bank, London, in respect of the other claims by the owners, to abide the result of the arbitration.

16. The umpire was of opinion that the lay hours ran continuously from 2 p.m. on the 8th Nov., and that none of the exceptions applied to excuse the charterers from liability for the delays caused by the acts of the Russian Government. On that basis the charterers were liable for twenty-four days nine hours demurrage, or a sum of 3168*l.* 15*s.*

17. Subject to the opinion of the court, the umpire awarded and determined that there was due and payable by the charterers to the owners the following sums: (1) 130*l.* for the admitted detention of one day at Constantinople waiting for orders; (2) 46*l.* 17*s.* 11*d.* for overtime; and (3) 3168*l.* 15*s.* for demurrage; in all the sum of 3345*l.* 12*s.* 11*d.* And the umpire awarded that the charterers should pay and release to the owners 3345*l.* 12*s.* 11*d.*, part of the sum deposited in Hambros Bank, together with a proportionate part of the interest accrued on the deposit. He also awarded that the charterers should pay the costs of the award, and that they should pay to the owners their costs of the reference.

18. The question for the opinion of the court was whether on the true construction of the charter-party and on the facts stated herein the award of the umpire for 3168*l.* 15*s.* for demurrage was right.

19. If the court was of opinion that the award was right, then the award should stand. If the court was of opinion that the award for 3168*l.* 15*s.* for demurrage was wrong, the award for that amount should be set aside and the umpire awarded such sum for demurrage as the court might decide to be the correct amount.

Claughton Scott, K.C. and *Langton* for the charterers.—The award of demurrage for the period after the ship had left the port of loading cannot stand. During that period, notwithstanding that notice of readiness had been given, the ship could not be ready to load; a ship cannot be "ready" unless she is able to load and in a position to do so. Unless she is in a position to load, she cannot properly be called an "arrived" ship. They referred to:

> *Ralli Brothers* v. *Compania Naviera Sota y Azuar*, 15 Asp. Mar. Law Cas. 33; 123 L. T. Rep. 375; (1920) 2 K. B. 287;
> *Good* v. *Isaacs*, 7 Asp. Mar. Law Cas. 212; 67 L. T. Rep. 450; (1892) 2 K. B. 555.

Raeburn, K. C. and *Sinclair Johnston* for the owners.—Once a ship is ready to load and notice of readiness has been given, there can be no interruption of the lay period unless it is caused by some breach of duty on the part of the owners. Here there was no such breach which prevented the cargo being put on board. As to whether her time continues to run after she has left the port of loading, however, it must be admitted that there is no authority.

Langton in reply.

Roche, J.—This is an award stated by an umpire in the form of a special case. The award was made in an arbitration between the shipowners and the charterers. The claim of

the shipowners was for demurrage. The umpire has awarded the shipowners a sum of 3168*l.* 15*s.* for demurrage. He has given alternative calculations and findings which would give an alternative and a much lesser sum for demurrage, namely a sum which was to be computed on the basis of the ship having been some three days and four hours on demurrage instead of twenty-four days nine hours on demurrage which is the period represented and covered by the award of 3168*l.* 15*s.* The question submitted by the umpire for the decision of the court is whether on the true construction of the charter-party and on the facts stated herein his award of so much for demurrage was right.

The facts as found by the umpire may be summarised, I think compendiously as follows: The ship chartered was an Italian tank steamer called the *Dora*. She was chartered by a body carrying on business in Russia which is found by the umpire to be what we should call a corporation or legal entity independent of, in the sense that it is separate from, the government of that country; although as regards its management, the management is under the control and direction and superior authority of the government of the country, which is said to have nationalised the industry with which this corporation deals, as well as other industries. The industry dealt with by the charterers was the oil industry and the charter-party was for a loading of a cargo of oil in the tank steamer *Dora* at the port of Batoum. What happened, as found by the umpire, was that the ship arrived at Batoum; but at the time in question there was some dispute of a diplomatic nature between the Russian Government, or Russia, and Italy; and somebody whose names are given, but whose relations to the superior Government, and whose authority under the law of the land, if any, is not specified or found, sent the ship away and did so after she had been at Batoum for some hours after she had given notice of readiness to load. She went away after protest and after some negotiations with the authorities, and being ordered to leave not merely the port but Russian waters, she went to the nearest neutral port—Constantinople—and then after certain negotiations she came back and arrived back on the 25th Nov. She had left on the 8th Nov. She was not loaded, or the loading was not begun until the 2nd Dec. Some of the period of delay between the 25th Nov. and the 2nd Dec. was occasioned by bad weather, and the obligations of the charterers to load, which otherwise were absolute in the sense that a fixed time or rate for loading was provided for, were qualified by the words "weather permitting," and the umpire has deducted, in any view on the material point and the material calculation, the period when time was lost between the 25th Nov. and the 2nd Dec. by bad weather. But from and after the 25th Nov. the *Dora* was at Batoum again and was ready to load. The delay occasioned otherwise than by bad weather during that period seems to have been caused by a misunderstanding as between some authority at Moscow and the local authorities.

Now there are obviously two periods as to which different considerations may apply. The first period is the 8th Nov. to the 25th Nov. when the *Dora* was either under orders to leave Russian waters or was actually away from Russian waters. The other period is after she had arrived back, when this interference with her movements had been removed and she was allowed back into the port and was allowed to stay there.

The argument before the umpire seems to have taken a rather different course from the course that it has taken before me. The points taken as stated by Mr. Langton to me and accepted by the other side on behalf of the charterers seem to have been threefold: Firstly, that what happened was a restraint of princes, and that the charterers were protected by an exception of restraint of princes from the responsibility for delay caused by the operation of that clause. The second point was that it was implied in a contract such as this that performance should be lawful and that in the circumstances the performance of this contract was illegal and unlawful by the law of the country where the performance was due. He cited in support of that contention the recent case of *Ralli Brothers* v. *Compania Naviera Sota y Aznar* (123 L. T. Rep. 375; (1920) 2 K. B. 287). The third point was that at all events the ship was not lying at the port during a considerable part of the time which is in dispute, and that not being there it could not be claimed on behalf of the shipowners that lay-days would count. The third point seems to have become rather obscured in the subsequent consideration of the case, partly I think because it would have been difficult to prove or support the second one as to illegality but more largely because with regard to the question of restraint of princes the shipowners replied with a point which raised considerable difficulty and was one of considerable interest. They set up the contention that the charterers and the person who is said to have imposed a restraint, the Government of Russia, were one and the same person and that you could not rely upon a clause which you put into operation yourself. Therefore the hearing of the case, as is frankly borne out by the statement of Mr. Langton as to what happened and is more clearly evidenced, if possible, by the finding of the umpire in par. 16 of the case, seems to have been almost, if not entirely, limited to the question of the operation of the exceptions clause and the merits or validity of the replication to the plea on that point set out by the charterers. Par. 16 of the case is as follows: "I am of opinion that the lay hours ran continuously from 2 p.m. on the 8th Nov. and that none of the exceptions applies to excuse the charterers from liability for the delays caused by the acts of the Russian Government. On this basis the charterers are liable for twenty-four days nine hours demurrage or a sum of 3168*l.* 15*s.*"

That being so the three points have been raised again before me, and I wish to make it plain that nothing has happened on the hearing of this case which makes any of these points more or less open than they were when the case came to me. They have all been taken by the charterers.

Mr. Langton corrects me by saying that he did not make the point that the vessel was not present at the port. That is a matter which may be unfortunate because I am going to base my decision on that point on the ground that I think that that point is apparent on the face of the case and is involved in the questions: "Whether on the true construction of the charter-party and on the facts stated herein my award"—that is the award of the umpire—"is right." I confess I thought that that was what Mr. Langton was referring to when he said that he quoted the case of *Austin Friars Steamship* (7 Asp. Mar. Law Cas. 503; 71 L. T. Rep. 27). That probably was because I had not that case before me when counsel was citing it to me. Those three points were therefore either taken before the umpire or appear upon the face of the award, and I have to consider what my decision is with regard to them.

With regard to the point as to the restraint of princes—whether that exception is or is not one that is available on behalf of the charterers, I do not propose to decide that point, because for other reasons I think that the charterers are entitled to succeed to the same extent as they would succeed if the clause were mutual. I only say that that point has been argued before me. The principle is clear. It is laid down in the decision of the *Akticselskabet General Gordon* v. *The Cape Copper Company Limited* (26 Com. Cas. 289). (2) The principle is that in each case in considering whether an exception such as this enures for the benefit of one party only or for both parties, the question depends upon the construction of the charter-party. I only further venture to express an opinion that on the whole the inclination of my mind is at present to think, for the reasons advanced by Mr. Raeburn, particularly the presence of other clauses dealing with the obligation to unload, that if my decision on this point was necessary it would not be in favour of the charterers, but would be in favour of the shipowners.

But there is another point which I confess seems to me to be conclusive against the contention of the shipowners. Between the 8th Nov. and the 25th Nov. the ship was not at the port. She was not at the port by reason of the cause which the umpire finds. That cause, summarily stated, was that authorities who were powerful in the port and whose orders would be enforced sent her away and she went. She did not go away as has been suggested in argument by Mr. Raeburn, because the charterers could not load and that she might as well be somewhere else. She went away because she had to go away. Counsel on behalf of the charterers cited as part of his argument the words of authorities, happily still living, as reported in art. 129 of Scrutton on Charter-parties. The words relating to demurrage are as follows: "If the ship has to be removed from the port, or becomes unfit for loading or discharging, *e.g.*, by reason of collision, the period of such removal or unfitness will be cut out from the period of demurrage." The first observation is that this passage is directed to a demurrage period, but I think it is clear that the argument is the same, and the conclusion must be the same, if it is not *a fortiori*, with regard to the period of lay days. The second observation is that the authority cited for that proposition is *Tyne and Blyth Shipping Company* v. *Leech* (1900) 2 Q. B. 12) and that the decision in that case is on some other matter, and that so far as the proposition is concerned it is founded, if at all on that case, on the fact that counsel for the ship did not venture or care to claim in respect of a period in which the vessel was absent from the port. Therefore I think the proposition must rest and stand or fall on its own merits. I confess that in my view it is sound and whatever be the cause the owners of a ship whose ship is not at a port but which goes away from a port cannot during that period say that the lay-days can count. There may be exceptions to that, as for example, if the facts were such as Mr. Raeburn put, a declaration of the charterers that they will not or cannot load, and then the resort of a ship to some other place as a convenient place of waiting. That is one matter. But, speaking generally, the counting of lay-days involves the ship's lying at the port at which the lay-days are to count and at which the loading is to be done. In the present case, through no breach of contract on the part of the shipowners, but by a misfortune which was, certainly as regards the shipowners, covered and excused by the exceptions clause, the ship had to go away from the port. In my judgment during that period the lay-days do not and cannot count for the benefit of the owners of the *Dora*.

That being my decision it is unnecessary for me to decide the other point that was taken as to the implication of the term that the charterers should be excused, or that either party should be excused if through the operation of the law of the land the performance of the contract was not possible. I say it is unnecessary to decide that point for this reason: In my judgment there are no facts found in the case which would carry the matter further in time than I have on the ground which I have just decided, and lastly, and more important, there are no facts found in this case which are necessary for the determination of the question whether in law in the circumstances of this case such a contract should be implied or such an illegality was in existence. There is no finding as to whether the acts and doings of the various authorities, whether central or local, were capricious or were lawful, or by what law or right they were done; whether they were merely temporary, as would

rather appear to be the case, or whether they were final and continuous, at any rate until revoked or until the law were altered.

In these circumstances I feel myself quite unable to embark on the difficult question which has been adumbrated before me rather than fully argued, on this point of the question of foreign law which was fully discussed in the case of *Ralli Brothers* v. *Compania Naviera Sota of Aznar* (*ubi sup.*) to which I have already referred, and in a great number of other authorities which, if they have to be considered again, as I think is highly possible, had certainly better be considered in a case where their consideration is necessary for the decision of the case. Having regard to the state of the authorities I think it is probable that they will have to be considered in a court higher than this one.

The effect of that is that I say the award is correct on the true construction of the charter-party and on the facts stated therein so far as it awards demurrage for three days four hours, but incorrect in so far as it awards other or further demurrage.

The shipowners appealed.

Raeburn, K.C. and *Sinclair Johnston* for the appellants.

Claughton Scott, K.C. and *Langton* for the respondents.

The arguments and the authorities cited are fully dealt with the judgments of the court.

Cur. adv. vult.

March 2.—The following judgments were delivered :

Sir Ernest Pollock, M.R.—This is an appeal from a judgment of Roche, J. given on the 8th Dec. on a special case stated by the umpire in an arbitration, Mr. Leck, K.C. The claim is by shipowners for demurrage under a charter-party dated the 16th Oct. 1921, by which the Italian tank steamer *Dora* belonging to the Cantiere Navale Triestina was chartered to the respondents to this appeal. The umpire held the respondents liable for demurrage for twenty-four days nine hours or in terms of money 3168*l.* 15*s.* subject to the question for the court what is the true construction of the charter-party in relation to the facts stated by the umpire. Roche, J. held that the respondents were not liable to pay the above sum to the appellants but were only liable for 411*l.* 13*s.* 4*d.* The owners appeal claiming that the award in their favour for 3168*l.* 15*s.* shall stand and the charterers cross appeal claiming that they are not liable for any sum for demurrage. It is important to refer to certain clauses of the charter-party and to give a short summary of the relevant facts stated in the special case.

Of the charter-party I am going to read one or two clauses. Clause 5 is as follows : " Two hundred and sixteen running hours (Sundays and holidays excepted), weather permitting, shall be allowed the charterers for loading and discharging, the charterers having the right of loading and discharging during the night, paying all extra expenses. (7) The laying days shall commence from the time the steamer is ready to receive or discharge her cargo, the captain giving six hours' notice to the charterers' agents, berth or no berth."

Clause 8 provides that demurrage shall be payable at the rate of 130*l.* per running day. Clause 9 contains exceptions the act of God, perils of the sea, arrest and restraint of princes, rulers, and people, and so on.

Now the award finds certain facts. [His Lordship stated the facts and proceeded.]

The question therefore is whether the umpire was correct in his view that the lay days began on the 8th Nov. and ran continuously and that none of the exceptions apply to excuse the charterers from liability. In my judgment and subject to what I am going to say hereafter that view is correct.

The contract contained in the charter-party is absolute. It contains the phrase : " The laying days shall commence from the time the steamer is ready to receive or discharge her cargo—berth or no berth." Hence the vicissitudes which are incurred are *primâ facie* deemed to be at the cost of the charterers. Mr. Raeburn cited three cases which establish, if cases are needed to establish, such a principle : (*Thiis* v. *Byers*, 3 Asp. Mar. Law Cas. 147 ; 34 L. T. Rep. 526 ; 1 Q. B. Div. 244 ; *Budgett and Co.* v. *Binnington and Co.*, 6 Asp. Mar. Law Cas. 592 ; 63 L. T. Rep. 742 ; (1891) 1 K. B. 35 ; and *William Alexander and Sons* v. *Aktieselskabet Dampskibet Hansa*, 14 Asp. Mar. Law Cas. 493 ; 122 L. T. Rep. 1 ; (1920) A. C. 88). The liability generally is stated there first of all by Lord Finlay. That is to say, the charterer " is answerable for non-performance of the engagement if he has agreed to load or unload within a fixed period of time whatever the nature of the impediments " unless they are covered by exceptions in the charter-party or arise through the fault of the ship-owner or those for whom he is responsible ; " and Lord Shaw, quoting a passage for Lord Selborne in *Postlethwaite* v. *Freeland* (4 Asp. Mar. Law Cas. 302 ; 42 L. T. Rep. 845 ; 5 App. Cas. 519 ; (1920) A. C., at pp. 97, 98) says : " If by the terms of the charter-party he (the charterer) has agreed to discharge it within a fixed period of time that is an absolute and unconditional engagement for the non-performance of which he is answerable whatever may be the nature of the impediments which prevent them from performing it and which cause the ship to be detained beyond the time stipulated." It is clear that the onus lies on the charterer to get rid of that liability which could have been provided for in the exceptions. Roche, J. held that the words which are found in the well-known book by Scrutton, L.J. on Charter-parties and Bills of Lading 11th edit., art. 129, can be used here to excuse the charterer in respect of the period of time during which the vessel has left Batoum and was at Constantinople. The words in the text are :

"If the ship has to be removed from the port or becomes unfit for loading or discharging, *e.g.*, by reason of a collision the period of such removal or unfitness will be cut out from the period of demurrage." And for that proposition *Tyne and Blyth Shipping Company* v. *Leech, Harrison, and Forwood* (1900) 2 Q. B. 12) is cited. It is not suggested that that case is a decision to that effect. What is pointed out is that in that case a demand was not made for demurrage during days which the vessel was absent from the port of loading, that absence being due to a collision which she had suffered, and, as I understand it, it is said that attitude was adopted in that case because by acquiescence between the parties you may derive some authority for the proposition that where the absence of the vessel during part of the lay days has occurred through some outside and extraneous cause demurrage ought not to be charged as against the charterer. Roche, J. in his judgment referring to that case says of it: "The second observation that I desire to make is that the authority cited for that proposition—namely *Tyne and Blyth Shipping Company* v. *Leech* (*sup.*) is a decision on some other matter and that so far as the proposition laid down in the text-book is concerned it is founded if at all on the case on the fact and counsel for the shipowners did not venture or care to claim demurrage in respect of a period in which the vessel was absent from the port. Therefore I think the proposition must rest and stand or fall on its own merits. In my opinion the proposition is sound, and that the owners of a ship whatever be the cause goes away from the port where she is to be loaded before she is loaded cannot during period of her absence from the port say that the lay days can count." Now that statement embodies a very wide proposition indeed. Roche, J. invites acceptance of the proposition on the ground that it rests on its own merits. Personally without some definite authority binding on this court I could not accept so wide a proposition, a proposition for which, so far as I can discover, there is in fact no absolute authority, and the proposition is one which appears to me to run counter to the general rule of law which I have repeated in the passages which I have read from the case which was before the House of Lords, *William Alexander and Sons* v. *Aktieselskabet Dampskibet Hansa* (*sup.*). It appears to me therefore that the judgment of Roche, J. which is based on the acceptance of that proposition cannot stand.

But Mr. Claughton Scott said that apart from that ground on which Roche, J. gave his judgment he can excuse the charterers from liability on several grounds. This first was, he said that the vessel was not in fact a ready ship. That is to say, although she had reported at Batoum and had given notice that she was ready to load, a notice which at the end of six hours expired and introduced a corresponding liability, that having regard to the difficulties which began on or about two o'clock on the 8th Nov. it cannot be said that the *Dora* was a ready ship. Now we have to take the facts as found by the umpire. He has intended to find that the lay hours under the charter-party began to run from 2 p.m. on the 8th Nov. In effect that means he held the vessel was a ready ship at 8 a.m. on that day, and it appears to me that we are bound by that finding. It is a matter of opinion as may be contended from the statement made under par. 16: "I am of opinion that the lay hours commenced at 2 p.m. on the 8th Nov." Then I think that in law the umpire was right, and it appears to me that the position of the *Dora* is, if not governed by, well illustrated by, *Armement Adolf Deppe* v. *John Robinson and Co.* (14 Asp. Mar. Law Cas. 84; 116 L. T. Rep. 664; (1917) 2 K. B. 204). In the case where there was a term equivalent to this, namely, that she was under an absolute liability, berth or no berth, when she had reached the place, that she should be immediately made ready as soon as she could go alongside, it was held that lay days commenced to run. Having regard to the findings in the award and the law applicable to these findings it appears to me that the umpire was right in holding that the lay hours began as from 2 p.m. on the 8th Nov.

The next point is that the exception clause, act of God, restraint of princes, &c., applies mutually for the benefit of shipowners and charterers, and inasmuch as what prevented the *Dora* from loading was a restraint of rulers and people the charterers are entitled to rely on that clause. In support of that our attention has been called to three cases—*Barrie* v. *Peruvian Corporation* (1896, 2 Com. Cas. 50). That was a decision of Matthew, J. and a decision of Bigham, J. in *Newman and Dale Steamship Company* v. *British and South American Steamship Company* (9 Asp. Mar. Law Cas. 351; 87 L. T. Rep. 614; (1903) 1 K. B. 262), where Bigham, J. reluctantly followed a decision of Matthew, J. Now in regard to these two cases it is plain that they are based on the fact tnat the exceptions clause was a very particular one, not what might be called the more ordinary form, and I cannot apply the reasoning of these cases to establish the fact that clause 9 of the present charter-party is a mutual clause. The third case referred to was *Aktieselskabet General Gordon* v. *Cape Copper Company* (26 Com. Cas. 289). The head note of that case runs as follows: "In deciding whether a particular provision in an exceptions clause in a charter-party applies in favour of both shipowner and charterer, or applies only in favour of one or other party to the exclusion of the other, regard must be had to the exact wording of the clause in question and to the construction of the charter-party as a whole, and no assistance can be obtained from the decisions of other cases unless the circumstances in those other cases were substantially identical."

That decision is binding on us, and it appears to lay down, if it was necessary to lay down, the rule that in all these cases one must

look at the particular clause which has to be construed, and that little assistance is to be found from other clauses which may have been construed otherwise. I come back, therefore, to look at this clause itself. I do not think, as I have said, it is covered by or that any assistance is to be derived from *Barrie* v. *Peruvian Corporation* (2 Com. Cas. 50) or *Newman and Dale Steamship Company* v. *British and South American Steamship Company* (9 Asp. Mar. Law Cas. 351; 87 L. T. Rep. 614; (1903) 1 K. B. 262), and looking at the clause itself I come to the conclusion it enured for the benefit of the shipowners only and not for the benefit of the charterers. I do not think, therefore, that the charterers are excused by virtue of the exceptions of clause 9. Then Mr. Claughton Scott said that in this case both parties were really prevented by *vis major*, so that neither party could complete the contract, that the action of the Russian Government in sending the vessel away from Batoum was such an overriding act as to render the liability of the charterers far different from what it was ever intended to be, either by the express terms of the charter-party or terms which must be implied. For that he quoted *Ford* v. *Cotesworth* (3 Mar. Law Cas. (O.S.) 109; 19 L. T. Rep. 634; L. Rep. 5 Q. B. 544) and *Cunningham* v. *Dunn* (3 Asp. Mar. Law Cas. 595; 38 L. T. Rep. 631; 3 C. P. Div. 443). I think it important to say a word or two about these two cases. *Ford* v. *Cotesworth* was a case in which there was a difficulty in the vessel getting to her destination in consequence of a possible visit of the Spanish Fleet to the fort of Callas. It is important to observe that in that case there was no positive undertaking to load or discharge cargo in a given number of days, and the application there made of *vis major* to excuse delay is expressly stated by Martin, B. to be applicable because there was no positive undertaking to load or discharge in a given number of days. By his express words he does not intend to alter the general liability as I have stated it. He says: "In this case there is only an implied contract on the part of the defendants, for there is no positive contract whatever on their part." Having put this case into the category where there is only an implied contract and no positive undertaking he applied the rule of *vis major*. So in *Cunningham* v. *Dunn* (*sup.*), which follows *Ford* v. *Cotesworth* (*sup.*), there is again no absolute contract, and the basis of the decision appears to have been that both parties were conscious of the fact that the vessel, if she took as dead weight munitions of war, would have a difficulty and possibly an over-riding difficulty, in entering a Spanish port. That knowledge, being knowledge on the part of both parties to the contract, it was possible to imply a term in the contract under which there should be no liability if this difficulty known to both sides became vital to the enterprise. In effect the two cases amount to this, that where both parties are prevented by *vis major* so that neither party is ready to perform his contract, then neither party can sue the other, that is, in a case where there is no absolute contract on the part of the charterer, and in a case where the term which has to be considered is at best one of implication only.

These cases stand, but it is not to be forgotten that there are two well-known older cases, *Blight* v. *Page* (1801, 3 Bos. & P. 295n) and *Barker* v. *Hodgson* (1814, 3 M. & S. 267). In both of these cases the charterer, who had entered into an absolute contract, was held to be liable. Lord Ellenborough says in *Barker* v. *Hodgson* (*sup.*): "Is not the freighter the adventurer who chalks on the voyage, and is to furnish, at all events, the subject-matter out of which freight is to accrue? The question here is on which side the burthen is to fall." And he comes to the conclusion that the contract which had been entered into by the charterers being one in which no relief was given by the exceptions on him rested the liability for the delay. These two cases, and the cases of *Ford* v. *Cotesworth* and *Cunningham* v. *Dunn* (*sup.*), have been said to stand together on the ground that in the last two there was no absolute contract for a fixed number of days for loading or discharging, whereas there was in the two earlier cases. Further, I cannot find that in *Ford* v. *Cotesworth* or *Cunningham* v. *Dunn*, in the application of the doctrine of *vis major*, there is a general doctrine to be applied which would excuse the charterer in what, after all, is a vicissitude or difficulty not unlikely to occur at a Russian port and one which might have been foreseen. For both during the war and since the war difficulties arising from port prohibitions have not been uncommon.

Next it is said by Mr. Claughton Scott that the contract became illegal, that there was an illegality which would prevent his clients from carrying out their duty under the terms of the charter-party. It appears to me it is important to consider the nature of these acts which created the illegality on the finding and statements of facts in the award. It appears that there was a somewhat uncertain attempt to put in force a port regulation and it is not every apparent illegality which is to be so treated. In *Embiricos* v. *Sydney Reid and Co.* (12 Asp. Mar. Law Cas. 513; 111 L. T. Rep. 291; (1914) 3 K. B. 45) Scrutton, L.J. said of a restraint of princes: "It was, in the language of Lush, J. in *Geipel* v. *Smith* (1 Asp. Mar. Law Cas. 268; 26 L. T. Rep. 361; L. Rep. 7 Q. B. 404), likely to continue so long and so to disturb the commerce of merchants as to defeat and destroy the object of a commercial adventure like this. If there is such a likelihood and probability the fact that unexpectedly the restraint is removed for a short time does not involve that the parties should have foreseen this unexpected event and proceeded in the performance of an adventure which at one time seemed hopelessly destroyed." In *Andrew Millar and Co.* v. *Taylor and Co.* (114 L. T. Rep. 216; (1916) 1 K. B. 402) it was held that where a prohibition of export had been

imposed the plaintiff should have waited a reasonable time before repudiating the contract in order to see whether this prohibition was of such a nature as was likely to continue and to prevent the agreement being carried out within a reasonable time. It appears to me that the difficulty which arose at Batoum, which is claimed to be an illegality, is one to which it was not possible immediately to attribute any characteristic—certainly not the necessary characteristic—of an illegality and having regard to the cases I have referred to and applying the sort of tests that ought to be applied to see what was its nature, it appears to me that the charterers cannot claim that this port regulation and prohibition made the contract illegal or frustrated it or made it illegal for them to continue their contract in the sense that they were discharged from that obligation.

The last case which was relied on by Mr. Claughton Scott was *Ralli Brothers* v. *Compania Naviera Sota y Aznar* (15 Asp. Mar. Law Cas. 33; 123 L. T. Rep. 375; (1920) 2 K. B. 287). That is a case in which it was held that a prohibition, or rather a regulation, of the Spanish Government which provided that no freight should be paid at a rate in excess of 875 pesetas per ton applied and made it impossible and illegal to carry out the terms of the contract as entered into. But, in my judgment, that case does not govern the present. It is important to recall that the decision related to a part of the contract which was vitally affected by the law of Spain. By the contract the owner and consignees of a cargo were to pay freight, one moiety on the arrival of the ship at Barcelona, the other moiety on the discharge of the cargo. An action was brought by the Spanish owners against the English charterers where liability had been reserved, and Lord Sterndale said: "I think the clauses as to place of payment constitute part of the obligation to pay and are not merely instructions." Warrington, L.J. said: "There is no absolute obligation on the part of the charterers that they will themselves pay but only that payment shall be made in a particular way—namely by foreigners at a foreign port." And (1920) 2 K. B., at p. 296) he said: "I think it must be held that it was an implied condition of the obligation of the charterers that the contemplated payment by Spaniards to Spaniards in Spain should not be illegal by the law of that country." Scrutton, L.J. said: "I accept the contention of the shipowners that the charterers remain liable for freight in spite of the provision that half of it was to be paid by the receivers. But I think they remain liable to pay Spanish currency at the Spanish port of discharge to the Spanish company resident in Spain." And he adds that so to pay it for the carriage of goods is illegal by the law of Spain. The court were considering the effect of illegality on the totality of the contract left to be performed. Warrington and Scrutton, L.JJ. were treating it as the contract although in origin it was part of a larger contract contained in the charter-party. The citation of *Metropolitan Water Board* v. *Dick, Kerr, and Co.* (117 L. T. Rep. 766; (1918) A. C. 119) and what is said (1920) 2 K. B., at p. 301) seems to point to this view being the dominant view in the minds of the Lords Justices, also the broad decision stated by Scrutton, L.J., *ibid.* 304, that that proposition is to be confined to a contract the main consideration of which is found to be or to become illegal. But whether that be the true explanation or not I cannot accept the view that the capricious and uncertain manner in which a port regulation was enforced created an illegality in the sense referred to in the cases quoted. Still less did it cause a frustration of the enterprise. Neither can I hold that *Ralli Brothers* v. *Compania Naviera Sota y Aznar* (*sup.*) applies to this case. It does not alter the clear and definite liability of the charterers under such a charter-party as this, which contains a fixed time for loading or discharging, berth or no berth, to pay demurrage if the lay hours are exceeded in a manner not excused by other conditions or exceptions of the contract. The statement of law to which I have referred in *William Alexander and Sons* v. *Aktieselskabet Dampskibet Hansa* (*sup.*) still remains and it seems to me, for these reasons, the charterers have not shown that they are excused from their liability to pay to the shipowners. When I have considered the various grounds put forward on behalf of the charterers I do not find any which excuses them in a charter like this from their liability to pay when they have failed to load within the time limited by the lay hours. In these circumstances it seems to me that Roche, J.'s judgment must be set aside and the appeal allowed and judgment entered for the appellants for 3168*l.* 15*s.* with costs.

ATKIN, L.J.—This is a claim for demurrage brought by the owners of an Italian ship against the defendant company on a charter by which the defendants chartered the ship to proceed to Batoum and there load a cargo of oil. The charter was a fixed time charter and provided for a rate of demurrage with no restriction upon the time during which the rate of demurrage was payable. The defendants were found by the arbitrator to be an independent entity—that is to say, independent of the Russian Government, though it is plain that they were very closely associated with the Russian Government, and are found by the award to be in fact controlled by the Russian Government. But for the purpose of this case we have to treat the matter as if the defendants were an ordinary commerical company. The first question arises by reason of the vessel being absent from the port of Batoum for a period from the 8th Nov. until the 25th Nov., and it is said that the absence of the vessel during the period prevented the lay days from running from and expiring in that period. I think, so far as this matter is concerned, it must be taken on the footing as found by the arbitrator, that notice of readiness had been given under the charter-party on the morning of the 8th Nov., and in fact they had begun to run somewhere about two o'clock on that date. Therefore, for the purpose of

this case, we are considering a period in which the lay days had begun to run but had not expired before the ship absented herself from the port. She absented herself from the port because she was constrained to do so by a display of force on the part of the executive authority at the port of Batoum, and we have to consider the defence that is raised as to the illegality arising from the circumstances under which she was compelled to leave. But the first point is a simple one and quite independent of illegality. The judge says this in substance. The ship arrives at the port and gives her notice and the lay days begin to run, but if the ship absents herself from the port, then the lay days no longer run, because it is a condition of their running that the ship should be present in the port, not, of course, that she should be at the berth and in fact loading, but that she should in fact be at the port. Now that is a very simple proposition, and the question is whether that is in accordance with the law relating to shipping transactions. It appears to me there is no authority at all for the proposition, and it is quite contrary to the propositions of law that have been established for a great number of years and have the authority of the House of Lords. The judge bases himself upon a statement in a text-book of which certainly I should be the last person to deny the authority—the last edition of Scrutton on Charter-parties and Bills of Lading—and it states that " if the ship has to be removed from the port or becomes unfit for loading or discharging, *e.g.*, by reason of a collision, the period of such removal or unfitness will be cut out from the period of demurrage." For that is cited *Tyne and Blyth Shipping Company* v. *Leech, Harrison, and Forwood* (1900) 2 Q. B. 12). That made its appearance for the first time in the text-book after the decision of that case. With the greatest respect, I think that case is no authority at all for the proposition for which it is cited. In that case the *City of Newcastle* had been chartered to load a cargo of ore at Poti on a fixed time charter and fixed time for demurrage. The vessel arrived on the 11th Feb., when the lay days began to count, and ten running days for loading expired on the 24th Feb., but no quay berth was available. On the 4th March, while lying at anchor in Poti Roads, still waiting for a berth, another vessel collided with and damaged her, and on the 7th March she proceeded to Constantinople for repair. If she had remained she would have got a berth by the 8th March and completed her loading by the 16th March. On the 19th April she again arrived at Poti, but lost her turn again. The plaintiffs claimed demurrage from the 24th Feb. to the 4th March, and from the 19th April to the 10th June, a period of fifty-two days, but not for the period when the *City of Newcastle* was incapacitated by reason of the collision. The defendants admitted liability for the demurrage they would have been liable to pay on the supposition that she would have got a berth on the 8th March. The decision of the judge was that the plaintiffs were entitled to recover. He held that when she returned to Poti she again went on demurrage. " I think that, although no claim has been made on either side in respect of the period during which the vessel was away at Constantinople, the period of demurrage was resumed without any break in the continuity of the obligation when she got back to Poti, and that it lasted for the time claimed for in this action." So far from that being an authority that the absence of the ship prevents demurrage from being claimed, it appears to me to be a direct authority that in some cases, at any rate, the absence of the ship does not prevent demurrage from being claimed. The judge quotes the quite familiar instance of a ship being driven from a port by stress of weather, being obliged to run away from the port and being obliged to go there again. In these circumstances, in a fixed time charter, I should have thought there could be no doubt at all that demurrage was payable on the principle for which there is ample authority, that in such a charter there is an absolute obligation on the charterer to load the vessel within the time that is stipulated for loading her, and that he is not excluded from doing that by any cause unless it is a cause for which he has stipulated in a properly drawn exception from such absolute liability, or unless it arises by reason of the shipowners' default.

It really is hardly necessary to cite authority for it, but there happens to be a very recent authority in the House of Lords in reference to the matter: (*William Alexander and Sons* v. *Aktieselskabet Dampskibet Hansa* (*sup.*). It is a Scottish case. There a vessel was chartered to proceed to Archangel and load a cargo of timber and thereafter to proceed with the cargo to Ayr. The charter-party provided that the cargo was to be loaded and discharged at the rate of not less than 100 standards per day, whether berth available or not, " always provided the steamer can load and discharge at this rate," and that, in the event of the steamer being detained beyond the time stipulated as above for loading and discharging, demurrage should be paid at 70*l.* per day and *pro rata* for any part thereof. The ship duly arrived at Ayr, and if the discharge had been carried out at the stipulated rate it would have been completed in six and one-third days, but owing to a shortage of labour at the port, it occupied thirteen and one-third days. The shipowner claimed seven days' demurrage.

Lord Finlay said (14 Asp. Mar. Law Cas., at p. 494; 122 L. T. Rep. 2; (1920) A. C., at p. 94): " On this appeal a great many cases were cited laying down the rule that if the charterer has agreed to load or unload within a fixed period of time (as is the case here, for certain *est quod certum reddi potest*) he is answerable for the non-performance of that engagement, whatever the nature of the impediments unless they are covered by exceptions in the charter-party or arise through the fault of the shipowner or those for whom he is responsible. I am here adopting in substance

the language of Scrutton, L.J., in his work upon charter-parties and bills of lading, art. 131 of the authorities. I will mention only *Budgett and Co.* v. *Binnington and Co.* (6 Asp. Mar. Law Cas. 592; 63 L. T. Rep. 742; (1891) 1 Q. B. 35), and I will refer specially to the judgment in that case given by Lord Esher. Although no authority upon the point was cited which would in itself be binding upon your Lordships' House, there has been such a stream of authority to the same effect, that I think it would be eminently undesirable to depart in a matter of business of this kind from the rule which has been so long applied, even if your Lordships felt any doubt as to the propriety of these decisions in the first instance. I myself have no doubt as to their correctness, and I understand that this is the opinion of all your Lordships."

Therefore, it appears to me unless the defendants can show that the absence of the ship arose from a default of the shipowners, and that they plainly did not do so, or unless they show that it is covered by an exception in the charter-party, and I think they have failed to do that, then they are liable in this case unless they can succeed upon the further ground of illegality which is not mentioned in the House of Lords because it did not arise. Perhaps I may put the matter in another way. It is said that the time should not run while the vessel was away from the port, because during the time obviously the vessel was not ready and willing to load. That appears to be disposed of by the authority I have mentioned which indicates that it is not an implied condition of the right of a shipowner to demurrage in these circumstances that she should be ready and willing to load, and, if authority were needed, that express point is dealt with in *Budgett and Co.* v. *Binnington and Co.* (*sup.*) by Lindley, L.J. as follows: "This stipulation is in terms unconditional, and it has frequently been called an absolute contract, by which I understand an unconditional contract. What we have to consider is whether there is any implied condition attached to this contract. It is argued that there is such a condition, and that it may be expressed by saying that the shipowner shall be able and willing to do his part in the unloading and that, if he is not so able and willing, the freighter is relieved from the consequences of a breach on his part. Such a statement is far too wide; for, if it were true the cases of *Thiis* v. *Byers* (*sup.*); *Porteus* v. *Watney* (4 Asp. Mar. Law Cas. 34; 39 L. T. Rep. 195; 3 Q. B. Div. 227, 534), and *Straker* v. *Kidd and Co.* (4 Asp. Mar. Law Cas. 34*n*; 3 Q. B. Div. 223), would have been improperly decided. I agree that there is an implied term in the contract, and that is, that the shipowner shall not prevent the freighter from performing his part of the contract; and if it is shown that this has happened, the freighter is discharged."

Indeed, if one comes to think it, there can be no reason why the absence of the ship from the harbour, once she has left and the lay days have begun to run, without any fault on the part of the owner, should prevent demurrage from running. A ship may be prevented from loading by causes quite outside the will of either the shipowner or charterer, and yet the charterer is still liable for demurrage. It appears to me to make no difference whether the vessel is in harbour fifty yards away from a berth and cannot get to the berth or whether she is fifty miles away. In either case the charterer has undertaken to load and is liable for the delay because he has entered into a contract to load the ship within a certain time, and if he does not he pays a fixed sum for the delay. In these circumstances I am quite unable to agree with the judge in the views that he took as to the absence of the ship from the port.

But that compels us to decide another point on the question of illegality. It is said the reason why the vessel was away from the port was that in fact it was illegal for her to take on board a cargo at all, and it was illegal also for her to remain in the harbour. It is said that this illegality operated from a period before she arrived at the port. It operated when she arrived, so as to prevent her being an arrived ship, it prevented her from being ready to load, and it prevented her, at any rate for the period during which she was absent, from being able to say that there was a valid contract running obliging the charterer to load so that the lay days apparently would not expire while she was absent. The judge has not decided this point, deeming it unnecessary to decide it. In that respect it appears to me he cannot have accepted the full argument of the defendants, because there is no doubt that if there is illegality it is a plea which is not confined to the period of absence from the port, and, indeed, the strongest way of putting it for them is to say that the illegality operated so as to prevent the lay days from ever running. That is the matter that we have to consider. The point about illegality is really based on a decision of the Court of Appeal in *Ralli Brothers* v. *Compania Naviera Sota y Aznar* (*sup.*), which is a famous case because it related to the most valuable cargo that was carried during the war. It was there said that by Spanish law it was illegal to pay more. As far as I can see no one ever suggested that the effect of the illegality in that case was to destroy the contract or to invoke the doctrine of frustration. It was merely a defence to that portion of the contract relating to freight. Scrutton, L.J.: "I should prefer to state the ground of my decision more broadly and to rest it on the ground that where a contract requires an act to be done in a foreign country, it is, in the absence of veryspecial circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country."

It is said that in the circumstances of this case it was illegal for the charterers to load

or for the shipowners to put on board the cargo at the time when the vessel arrived, and that the contract was subject to the implied term that it was no longer continued valid. In the view I take of this case the question does not arise, because to my mind, whatever the bearing of the doctrine of illegality upon a contract to load and to pay demurrage it depends upon proving illegality, and I thnik in this case nothing that could be considered illegal within the meaning of the rule has been proved. Illegality at foreign law is a question of fact, and we must take the facts as found by the learned umpire. It appears to me that all the facts he has found are these. There appears to have been about this time some temporary cause of diplomatic friction between Russia and Italy, and a communication emanated from the executive department of the Russian Government at Moscow addressed to the Soviet authorities at Batoum that in view of the aggressive policy of the Italian Government they were to stop the admittance of Italian steamers to the port, and suspend generally any relations with Italy. It appears to me that is a piece of executive action on the part of the executive authorities at Batoum, and it certainly produced no very certain results as far as the executive a thorities at Batoum were concerned. There is no doubt that when the vessel first arrived she was told there were difficulties ; she was not to communicate with the shore, and she must go away. The master remonstrated and said he must get his clearance. Thereupon he was allowed opportunities of getting clearance. He was allowed to wait for a certaln time, and then he was told that the order was withdrawn, and that there was no difficulty. He went on shore, gave notice to the charterers' agents. It must always be remembered that the charterers were in very close touch with the particular executive authorities who issued this order, and the charterers' agents accepted notice of readiness to load and said they would load as soon as they had finished loading another steamer then at the berth. The notice of readiness expired about two o'clock on that particular day, and thereupon the executive authorities again began to assert themselves, but again with somewhat uncertain effect. Eventually military force arrived, and the ship was told to go. The whole result of that appears to me merely to indicate that here was action of the executive authority, uncertain, somewhat capricious, and temporary in its character, and it appears to me very far removed from such illegality as is said ought to be assumed to be the subject of an implied term by the parties at the inception of the contract of charter-party. It is precisely the kind of conduct which is ordinarily covered by what is known as "restraint of princes." I do not say that restraint of princes may not operate because of the contract becoming illegal according to the law of the port, but it certainly is not co-terminous with illegality, and in this case I find no illegality at all. In these circumstances it seems to me unnecessary to consider the further questions that would arise if it had been illegal. Therefore I do not decide the point. I merely reserve the question as to what would be the effect on a contract to load in a certain time for a temporary illegality appearing either when the ship first arrived or commencing to operate when she had arrived and after the lay days had begun, each of which may give rise to difficult considerations of law.

I agree with the Master of the Rolls that it is unnecessary to consider the cases of *Ford* v. *Cotesworth* (*sup.*) and *Cunningham* v. *Dunn* (*sup.*). *Cunningham* v. *Dunn* seems to have been misunderstood. It is not a claim by a shipowner against a charterer in respect of an absolute obligation by the charterer to load a ship, but it is a claim by a charterer against the ship for not staying to be loaded in a case where there was no permanent illegality preventing the charterer from putting the chartered cargo on board the chartered ship, and as no one had ever contended that the absolute obligation imposed on a charterer was extended to a ship it was an ordinary case for a charterer claiming damages against a ship for not staying to be loaded when it could be proved that if the ship had stayed the charterer would not have been able to put a single ton of cargo on board. How any plaintiff could recover in those circumstances it is quite impossible to understand.

That brings me to third point argued, which the judge found it unnecessary to decide although he had expressed an opinion on it in favour of the shipowners, namely, that here the exceptions were mutual, that there was an exception of restraint of princes which relieved the charterers from being under an obligation to load the ship. That question turns on the construction of the charter-party and there are only two clauses I need refer to on that matter. [His Lordship read clauses 8 and 9 and continued] : Clause 8 said demurrgae was to be payable. The other clause was the exceptions clause. The question arises whether those exceptions are inserted only in favour of the shipowners or whether they are inserted in favour of the charterers. There is no rule, each charter has to be considered on its merits, and it is a question of construction looking at the charter-party as a whole whether or not the exceptions operate in favour of the charterer as well as the shipowner. The best decision I have found is in *Aktieselskabet General Gordon* v. *Cape Copper Company* (26 Com. Cas. 289) and the judgment of Scrutton, L.J. decided in 1921. In that case it was held that the exceptions clause, which very closely corresponded with the exceptions clause in this case did not operate in favour of the charterers. Scrutton, L.J. said : "The question in this case is one which ever since I was at the Bar has been argued with considerable heat by counsel concerned in it—whether or not certain provisions in the charter-party avail for the protection of the charterer or only for the

protection of the shipowner. In my view it is quite impossible to lay down any general rule which will enable that question to be answered. Charter-parties vary infinitely in their terms. In the view of the history of the matter you cannot answer the question without a careful study of the terms of the particular charter-party concerned; and a decision on that particular charter-party will only govern charter-parties in a very similar form."

I think that is the right view, and in my opinion it would be wrong to lay down any general rule. It is a pure question of construction; *primâ facie* the exceptions are put in for the benefit of the shipowner. Looking at the contract in the present case it appears to me that the general exceptions are so broad that they can be more reasonably applied to the shipowners' liability than to the charterers' liability. It seems to me construing this contract as a whole that the exceptions are not mutual, and that the charterers are only able to excuse themselves for time lost by reason of the express causes mentioned in clause 8. Therefore they are not excused. The result is that the award of the arbitrator is right in awarding the full amount of demurrage claimed, and the appeal must be allowed with costs.

SARGANT, L.J.—The award involves the finding of fact that the lay days or hours began at 2 p.m. on the 8th Nov. The ship is found in par. 5 to be an arrived ship, *i.e.*, ready to discharge, at 8 a.m. on the 8th Nov, when notice to that effect was given to the charterers. The lay days or hours would therefore begin six hours later, namely, at 2 p.m., and the award contains a definite statement to that effect at the end of par. 5. That being so, the finding that "about 2 p.m. and thereafter till 11.30 p.m. there were uncertain and contradictory orders given by the authorities,' does not, in my judgment, negative the definite previous finding that the lay hours began at 2 p.m.

The events which subsequently happened certainly did not amount to a frustration of the enterprise or a putting an end to the contract of affreightment, and the only question left is, in the words of Lindley, L.J., in *Budgett and Co.* v. *Binnington and Co.* (*sup.*), on whom does the risk fall. Here there is to start with an absolute or unconditional contract by the charterers to load and unload within a definite number of hours, 216 running hours—nine days—and failure to comply with this absolute contract *primâ facie* makes the contracting party liable for the resulting loss unless there is some qualification in the charter-party of this absolute contract. The mere absence of the vessel from the port during the lay days does not, I think, exclude this absolute contract. The only relevant qualification must be one introduced by the general exception clause.

Now as to this clause two questions arise, namely, first, whether the cause of the delay is within the words of the general exception clause, and, secondly, whether this clause applies here in favour of the charterers. As to the first question, I think that the delay was due to restraint of princes, rulers, and peoples within the terms of clause 9—the general exception clause—and this position was accepted by Mr. Raeburn, and it is to be remarked that such a restraint necessarily in many cases involves anyone resisting it in an illegality. I cannot see that any illegality is shown in this case otherwise than such as would have been involved in a resistance to the executive. But on the other hand I am of opinion that clause 9 is not a clause in favour of the charterers so far at any rate as a claim for demurrage is contained. It is true that the second half of clause 9 applies in terms to the ship only, and it was contended that this shows by way of contract that the first part of the clause rather indicate that its exceptions are in favour of the owners only; and there are other clauses in the contract excusing charterers (particularly as to claims for demurrage) which cover some of the same ground in clause 9 and are more particular in their operation—see specially clause 8 and also clauses 14 and 15.

Solicitors for the appellants, *Thomas Cooper and Co.*

Solicitors for the respondents, *Wynne-Baxter, and Keeble.*

March 30, 31, *April* 1, *and* 29, 1925.

(Before Sir ERNEST POLLOCK, M.R., ATKIN and SARGANT, L.JJ.)

BUERGER v. CUNARD STEAMSHIP COMPANY. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Bill of lading—Non-delivery of goods shipped—Original destination changed by mutual consent — Deviation — Over-carriage — New contract not adhered to—Loss of goods—Exceptions clause inapplicable—Shipowners liable for loss as common carriers.

In an action to recover damages for non-delivery and loss of goods shipped from London to Odessa under a bill of lading containing an exceptions clause as to value, which would have protected the shipowners had the contract been carried out, it was proved that the destination of the goods was changed by mutual consent, as to three cases to Constantinople and as to the remaining five cases to Batoum. The contract of carriage as so altered was not adhered to, the goods were not discharged either at Constantinople or Batoum, or delivered to the plaintiff or his agent at any other port in the Black Sea, but were put ashore at Novorossisk or some other port and pillaged or lost.

Held, that on the facts there was not mere misdelivery but deviation from the voyage contracted for, and therefore the exceptions clause

(a) Reported by H LANGFORD LEWIS, Esq, Barrister-at-Law

had no application, and the shipowners were liable for the loss of the goods on the basis of common carriers. The exceptions clause is only available to the shipowners when they are doing what they have contracted to do.

Decision of Rowlatt, J. reversed.

Neilson v. London and North-Western Railway Company (126 *L. T. Rep.* 307; (1922) 1 *K. B.* 192, *affirmed*; 127 *L. T. Rep.* 469; (1922) 2 *A.C.* 263), *applied.*

APPEAL from a decision of Rowlatt, J.

The plaintiff, in March 1919, shipped eight cases of cloth, the value of which was about 360*l.* each to Odessa in the defendant company's steamship *Verentia*, and brought this action to recover damages for their non-delivery and loss. The defendants pleaded that they were protected by an exceptions clause in the bill of lading under which they were not to be liable in respect of goods of any description of a value exceeding 20*l.* per package unless the value was declared at the time of shipment, and extra freight to be agreed was paid. It was admitted that the value of the goods was not declared nor was any extra freight paid. Upon the arrival of the steamship at Constantinople it was discovered that the Soviet Army was approaching Odessa, and it was agreed between the representatives of the parties that delivery of the goods at Odessa being impracticable, three cases should be discharged at Constantinople and the remainder at Batoum. This new contract, however, was not carried out. The facts are stated fully in the judgments of the Master of the Rolls and Atkin, L.J. Rowlatt, J. held that the exceptions clause applied to the voyage as altered by mutual consent. The plaintiff appealed.

R. A. Wright, K.C. and *Van den Berg* for the appellant.

W. A. Jowitt, K.C. and *J. Dickinson* for the respondents.

The arguments and the cases relied on sufficiently appear from the judgments.

Cur. adv. vult.

Sir ERNEST POLLOCK, M.R.—Under a bill of lading dated the 24th March 1919 the plaintiff shipped on board the defendants' steamship *Verentia*, then lying in the Port of London and bound for Odessa, eight bales of cloth to be carried to and delivered at Odessa to the plaintiff or his assigns. Each of the said bales was of the value of about 360*l.* or rather more.

The vessel was unable to proceed to Odessa owing to political disturbances and trouble there, and so, as the plaintiff alleges it was verbally agreed after the arrival of the steamship *Verentia* at Constantinople, that the defendants should discharge and deliver three of the bales at Constantinople and carry the remaining five cases to Batoum and deliver them there. As part of this agreement the plaintiff paid 25*l.* to the defendants as and for landing charges in respect of the three bales which were to be landed at Constantinople, and 17*l.* 15*s.* extra for the freight on the five bales to be carried on to Batoum.

The defendants have failed to deliver any of the eight bales or to account for them to the plaintiff, and the plaintiff in this action seek to recover their value as damages from the defendants for breach of their contract of carriage on the basis of their liability being that of common carriers.

The defendants deny that their liability was that of common carriers, and rely upon the protection given by the bill of lading which they claim attached at all times to the carriage of the bales. The defendants in particular rely upon and exception therein as follows: "Nor for any goods of whatever description which are above the value of 20*l.* per package unless the value be herein expressed and extra freight as may be agreed paid." And to the clause introducing the exceptions and conditions which runs: "And those exceptions shall apply from the inception to the termination of the company's liability in connection with the goods."

The intended voyage of the steamship *Verentia* from London was to have been as follows—Constantinople, Constanza, Batoum, Novorossisk, Odessa, thence back again to Constanza and Constantinople. It appears from the facts stated in the "points of claim" that while the vessel was at Constantinople on her outward voyage, when it was realised that a call at Odessa was impossible, an agreement was reached whereby the destination of five of the bales was changed from Odessa to Batoum, and from the evidence that as the bales were found to be covered by some 300 tons of other cargo, making it very inconvenient to reach them, the remaining three bales, which by this new agreement were to be discharged at Constantinople, should be carried on the round voyage and unloaded on the vessel's return there, homeward bound.

Rowlatt, J., before whom the case was tried, has found that as regards the five bales, their transit to Batoum was to be "on the same terms as they were to be carried to Odessa simply substituting Batoum for Odessa." I agree that this inference is correct. As regards the three bales which were to be discharged at Constantinople he finds that they are to be treated "just as if they were still on board the ship lying at Constantinople." I have some difficulty in accepting this view. No doubt the shipowners could object to discharging them at Constantinople, except on the terms to which he agreed, but if the goods were to be carried on a complete voyage round the Black Sea, the plaintiff might well ask for different conditions from the shipowners. But whether this point is decided one way or the other does not make any difference to my decision. Rowlatt, J. held that all the eight bales were carried on their amended voyages on the terms of the bill of lading, and that the exception that I have referred to was effective to discharge the plaintiff from liability, for it is common ground that the plaintiff did not

express the value or pay extra freight so as to release him from its effect. Rowlatt, J. therefore dismissed the action except in so far as he ordered the repayment of the 25*l.* for landing charges at Constantinople to be repaid to the plaintiff. The plaintiff appeals.

The learned judge did not give effect to the point which has been the main ground of appeal before this court—namely, that by reason what is broadly called "deviation" the exceptions in the bill of lading ceased to have effect. It is important to state the facts as to the fate of the eight bales. As to the three that were destined for Constantinople there is definite information given on the 31st Aug. in answer to inquiries by the defendants' agents in July, that these bales were discharged at Novorossisk when the steamship *Verentia* called there as she did from the 26th June–4th July and "will be forwarded to you by next steamship." They were thus discharged at an unexpected port, and were kept in the defendants' custody for a month or so at Novorossisk. As to the other five bales the evidence is not so clear. It may be definitely stated that they were not delivered at Batoum, and the probability is that they also were carried on to Novorossisk; the evidence satisfies me that in respect to all the eight bales the terms of the bill of lading were abrogated by the deviation from the voyage intended by the new agreement.

Mr. Jowitt has contended for the defendants that there was not a deviation but a misdelivery, and that if Rowlatt, J.'s view that the bill of lading still applied to the new transit of the goods as agreed is right, there is nothing to prevent the exception having effect, for there was not a deviation which abrogated the terms of the contract of carriage—only a different mode of carrying out that contract. It is necessary therefore to examine some of the authorities cited on either side to determine the quality of the adventures that befell the goods.

It is well to start with the proposition simply stated for the court by Grove, J. in *Lilley* v. *Doubleday* (44 L. T. Rep. 814; 7 Q. B. Div. 510) which followed *Davis* v. *Garrett* (6 Bing 716): "If a bailee elects to deal with the property entrusted to him in a way not authorised by the bailor, he takes upon himself the risks of so doing, except where the risk is independent of his acts and inherent in the property itself."

The principle thus enunciated has been again and again applied to cases of carriage both by sea and land. To take some of the more recent—in *Balian* v. *Joly Victoria Company* (6 Times L. Rep. 345) an exception as to a limit of value was held not to protect the shipowner from liability for damage to bales of tobacco carried to London not on the vessel—though apparently on a better one—and not by the route, contemplated by the bill of lading. That case was followed in *Joseph Thorley Limited* v. *Orchis Steamship Company Limited* (10 Asp. Mar. Law Cas. 431; 96 L. T. Rep. 488; (1907) 1 K. B. 243, 660) where the vessel called at three additional intermediate ports in the course of her voyage. Lord Collins, M.R. (1907) 1 K. B., at p. 667) said: "The principle underlying those judgments seems to be that the undertaking not to deviate has the effect of a condition, or a warranty in the sense in which the word is used in speaking of the warranty of seaworthiness, and if that condition is not complied with, the failure to comply with it displaces the contract. It goes to the root of the contract, and its performance is a condition precedent to the right of the shipowner to put the contract in suit."

The case *Internationale Guano en Superphosphaatwerken* v. *McAndrew* (11 Asp. Mar. Law Cas. 271; 100 L. T. Rep. 850; (1909) 2 K. B. 360) offers a good illustration of both limbs of the proposition stated by Grove, J. to which I have referred. The vessel deviated by calling at Seville after leaving her first port of discharge, Algeciras, and before she reached her second, Alicante. It was held that the deviation put an end to the contract as from the beginning of the voyage, and that the shipowners could not rely upon the exceptions in the bill of lading, and were under the obligations of common carriers—as to the damage caused by the delay. But inasmuch as some of the damage was due to the nature of the cargo, and not to failure to carry the goods with reasonable dispatch, they were not responsible for the former.

Scrutton, L.J. has recently in *Neilson* v. *London and North-Western Railway Company* (126 L.T. Rep. 307, at p. 311; (1922) 1 K.B. 192, at p. 201) stated the law as follows: "I decide this case on two broad principles of great importance in all these contracts of carriage. First that when a carrier seeks to protect himself by exceptions, unless they are so worded as to indicate clearly a contrary contention, they only apply when the excepted events happen in the course of his carrying out the contract, and do not apply when they happen while he is doing something which he has not contracted to do." The second principle was that the shipowner must protect himself by clear and unambiguous language. It is not questioned that the shipowners—if not common carriers—are subject to similar liabilities.

It is true in some cases apparent breaches of the contract of carriage have been held not to be such as to go to the root of and displace the contract—to use the words of Lord Collins quoted above. Thus in the *Broken Hill Proprietary Company Limited* v. *Peninsular and Oriental Steam Navigation Company* (14 Asp. Mar. Law Cas. 116; 116 L. T. Rep. 635; (1917) 1 K. B. 688) an exception which permitted the defendants to overcarry goods beyond their point of destination still applied although the vessel reached the latter port but did not wait there long enough to discharge the goods, because as a mail steamer she was under contract and penalties as to time. In effect it was held the contract of

carriage must be regarded as made subject to the vessel's duties and disabilities as a mail steamer and was not displaced by the vessel's inability arising from that character to deliver the goods. So, too, in *Bruce Marriott and Co.* v. *Houlder Line Limited* (13 Asp. Mar. Law Cas. 550; 115 L. T. Rep. 846; (1917) 1 K. B. 72) it was decided that a general ship known to have to call for her cargo at successive ports and to load and discharge accordingly must not be held to have abrogated the contract or failed to fulfil a condition precedent to it, if she temporarily puts out some cargo on to the quay at a port of call in order to stow that and fresh cargo better. Swinfen Eady, L.J. said that both parties must be presumed to have contracted with reference to the known usual, well-established, and even necessary course of business.

Stress was laid by Mr. Jowitt for the respondents on the case of *Baxters' Leather Company* v. *Royal Mail Steam Packet Company* (11 Asp. Mar. Law Cas. 98; 99 L. T. Rep. 286; (1908) 2 K. B. 626), but that case does not assist the defendants. There is in it a clear statement by counsel, adopted in the Court of Appeal, that a shipowner in the absence of special contract incurs the same liability as a common carrier: (see (1908) 2 K. B., at p. 631). As the president said, the question in the case was one of construction. *Primâ facie* the shipowners were liable for the loss of goods shipped which they failed to deliver at their destination. There was a clear exception in the bill of lading limiting their liability either wholly in the case of certain goods or partially in the case of others. One source of liability was negligence. It was held upon the construction of the bill of lading that the limitation applied and extended to cases where a loss arose through negligence.

The present facts do not constitute a misdelivery to a wrong or unauthorised person; as in *Smackman* v. *General Steam Navigation Company* (11 Asp. Mar. Law Cas. 14; 98 L. T. Rep. 396), where fruit was delivered through the fault of agents to the wrong persons, and it was held that the shipowners were protected by an exception designed to meet that case. There is no evidence that the eight bales were ever out of the custody and possession of the defendants. There is evidence that some of them were overcarried on a voyage never contemplated and detained by the defendants themselves at the port where they were improperly discharged.

It is useful to look at one or two cases in which the facts have been held to establish "deviation." They afford illustration and tests as to what is in effect deviation from the route contracted for, upon which if allowed, the conditions of the contract apply. In *Mallet* v. *Great Eastern Railway Company* (80 L. T. Rep. 53; (1899) 1 Q. B. 309) some fish was to be sent from Lowestoft to Jersey—the route selected was through London and thence by the steamer from Weymouth. In fact, by mistake it was sent by steamer from Southampton. There was delay and consequent loss, the defendants relied upon a condition of the contract of carriage relieving them from all liability for delay except upon proof that such delay arose from wilful misconduct on the part of the defendants servants. Day, J. in giving judgment, said (1899) 1 Q. B., at p. 311): "The defendants entered into a contract with the plaintiffs, to send his goods to Weymouth. Without his consent they altered the contract and sent his goods by a different route. The defendants contend that they are protected from liability for that delay by the terms of the consignment note. But I am of opinion that that is not so. The delay referred to in the consignment note is a delay in the performance of the contract. But that is not this case. Here the delay arose in consequence of the defendants' doing something which was wholly at variance with the contract." The defendants were held liable.

In *Foster* v. *Great Western Railway Company* (90 L. T. Rep. 779; (1904) 2 K. B. 306)t he railway company were protected by a clause relieving from all liability for delay except upon proof of wilful misconduct on the part of the company's servants. Some fish was overcarried to Taunton, beyond Exeter where it ought to have been transferred to a truck for carriage to Southampton en route for its destination to Jersey. It was sent from Taunton to Weymouth and so to Jersey, admittedly the best alternative route. The Divisional Court on appeal from the County Court, held that the clause applied and protected the railway company. They found a distinction from the decision in *Mallett* v. *Great Eastern Railway Company* (*sup.*).

Those two cases came up for consideration in *Neilson* v. *London and North-Western Railway Company* (126 L. T. Rep. 307; (1908) 2 K. B. 192). In that case some goods were delivered to the defendants to be carried from Llandudno to Bolton by the ordinary route through Chester and Manchester. At Manchester owing to the address labels having been detached from the truck in which they were, the goods were separated—some were sent to stations indicated by old labels upon them, some were stored in the cloak room and forwarded later, with consequent delay in delivery. The defendants sought to protect themselves by a condition similar to those already cited in *Mallett's* and *Foster's* cases. The railway company were held liable because the condition did not apply to the journey on which the goods were in fact sent. Atkin, L.J. (1908) 2 K. B., at p. 204) said: "These exceptions do not apply unless the goods are being carried on the journey stipulated for," and spoke of the "principle as applicable to contracts of carriage by sea, by river, by land, contracts of marine insurance and contracts of bailment." *Foster* v. *Great Western Railway Company* was overruled.

In the House of Lords (127 L. T. Rep. 469; (1922) 2 A. C. 263) that decision was upheld.

case, wrongly taken out of the van to the cloak room at Manchester. The five packages, once it is ascertained that they were carried past Batoum, are for the defendants past praying for. In these circumstances I think that the defendants have no answer to the claim for non-delivery of the cases, and that judgment must be entered for the plaintiff with costs.

SARGANT, L.J.—Agreeing as I do with the result of the judgments that have just been delivered, I will express myself as briefly as possible.

On the two points that are specifically dealt with by Rowlatt, J. in his judgment, I have come to the same conclusion as he did. I think that the effect of the fresh arrangement that was made at Constantinople by Mr. Macdonald, the agent of the plaintiff, was merely to change the destination of the eight cases of cloth in question and to substitute Batoum for Odessa as to five of the cases, and as to the remaining three cases to substitute Constantinople on the steamer's return voyage in place of Odessa, and this being so, I am of opinion that in other respects the terms of the original bill of lading applied to the carriage to the substituted destinations. Further, though the very stringent conditions of the bill of lading are printed in regrettably small type, I do not think that the plaintiff is entitled on this ground to escape from the obligation of these conditions. For the evidence is clear that he assumed that the conditions were ordinary conditions, and that he never took the trouble to read them, or to attempt to read them. According to my judgment the plaintiff's claim must be dealt with on the footing that the conditions of the bill of lading, including that as to value, applied to the substituted carriage of the goods in question.

But this does not exhaust the matter, for the plaintiff took another important point which is not specifically mentioned in the learned judge's judgment, viz., that the conditions of the bill of lading applied only to the carriage agreed on, whether as originally arranged or as subsequently modified, and that there was such a deviation from the agreed carriage as swept away the whole of the special conditions, and left the defendants subject to liabilities substantially equivalent to those of common carriers. That this is the consequence of a real and substantial deviation is not disputed. The difficulty here is in ascertaining whether there was such a deviation, paticularly as there is some uncertainty as to the facts with regard to the five cases that were arranged to be carried to Batoum.

On the whole, however, I have come to the conclusion that these five cases were not landed at Batoum, but were carried on to Novorossisk and landed there together with the three cases destined to return to Constantinople. The suggestion that these five cases were landed at Batoum and stolen there is purely conjectural. There are letters, not long after the steamer's departure from Batoum, which distinctly state that the five cases were not landed there, and there is a strong probability that, originally consigned as they were to Odessa together with the other three cases which were undoubtedly landed at Novorossisk, they in common with the three cases were involved in the same mistake.

If this is so, or if the five cases having failed to be landed at Batoum were landed at Poti, an intermediate port of call between Batoum and Novorossisk, this extra carriage beyond Batoum was, in my judgment, a deviation never contemplated in the modified arrangements between the parties, and therefore not protected by the conditions of the bill of lading. For though the steamer might have taken the ports in any order and might, had it proved advisable, have called again at Batoum on the way back to Constantinople, it has never been suggested that there was any intention of doing so after Batoum had once been left, and so the carriage beyond Batoum was in fact a carriage quite additional to, and outside the carriage agreed on. Hence as to these five cases the defendants are outside the protection of the special conditions of the bill of lading, and are liable for the loss that has been sustained.

As to the three cases the matter stands on a somewhat different footing. Down to the time of their arrival at Novorossisk, they were being carried on the agreed voyage as modified, and if they had been temporarily put on shore there with a view of discharging other cargo, and had been damaged or stolen before re-shipment, the conditions of the bill of lading would have applied: (see *Bruce, Marriott, and Co.* v. *Houlder Line Limited.* 13 Asp. Mar. Law Cas. 550; 115 L. T. Rep. 846; (1917) 1 K. B. 72). But they were in fact delivered to, and subsequently held by the defendants' agents at Novorossisk as goods reaching their destination, and this is in my judgment a deviation from the contract of carriage sufficient to deprive the defendants of the benefit of the conditions or exceptions in their favour, so far as loss resulted from unauthorised delivery and retention. I agree, therefore, that the appeal should be allowed as to all the eight cases of cloth.

Appeal allowed.

Solicitors for the appellant, *Cosmo Cran and Co.*

Solicitors for the respondents, *W. A. Crump and Sons.*

Monday, May 4, 1925.

(Before BANKES, SCRUTTON, and ATKIN, L.JJ.)

VAN NIEVELT GOUDRIAN AND CO. STOOMVAART MAATSCHAPPIJ v. C. H. FORSLIND AND SON. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Demurrage—Lay days—Arrival at place of loading—Delay before obtaining a berth for discharging—Custom of the port.

By charter-parties printed in the Scanfin (1924) form, to which certain typed additions were made, vessels were chartered to bring pit props from the Baltic to West Hartlepool. Clause 13 of the printed form provided that the cargo should be discharged in the customary manner as fast as the vessel could deliver during the ordinary working hours of the port, and by clause 15, should the vessel not be discharged with dispatch in the manner provided, demurrage was to be paid at the rate of 40l. per day. Clause 24, which was typed, provided that the owners should pay the charterers dispatch money for all time saved in loading and discharging at the rate of 20l. per day, and by clause 26 the cargo was "to be loaded and discharged according to the custom of the ports, but not less than the average rate of 100 fathoms per weather working day, Sundays and holidays excepted, reversible."

At West Hartlepool the docks were owned by the railway company, and vessels could only discharge their cargo in their turn at the berths assigned to them by the railway company. When these steamers arrived at West Hartlepool they found the port congested, with the result that there was delay in discharging their cargoes.

In an action by the shipowners claiming demurrage,

Held, that clause 26 imposed upon the charterers the obligation to discharge in a fixed time, and the vessel being an arrived ship when she arrived within the limits of the port of West Hartlepool, the obligation of the charterers to discharge ran from the date of such arrival.

Decision of Rowlatt, J. affirmed.

APPEAL from a decision of Rowlatt, J.

The plaintiffs, who were shipowners of Rotterdam, claimed demurrage from the defendants, timber merchants of West Hartlepool, in respect of two steamships, the *Alkaid* and the *Bellatrix*, which had been chartered by the plaintiff, as owners, to the defendants for the purpose of bringing cargoes of pit props from the Baltic to West Hartlepool. The defendants denied that demurrage was due, and claimed dispatch money. The steamers were chartered by charter-parties, the printed part of which was in the Scanfin (1924) form to which certain additional typed clauses were added. Clause 13 of the printed part provided that the cargo should be discharged "in the customary manner as fast as the vessel can deliver during the ordinary working hours of the port on the quay and (or) into lighters and (or) craft and (or) wagons and (or) into bogies and thereon stowed and (or) stacked as customary at the port of discharge, the consignees having the right to select any one or more of these alternatives if customary and available at the time of discharge."

Clause 15 provided that should the vessel not be discharged with dispatch in the manner provided, demurrage should be paid at the rate of 40*l*. a day. Clause 26, which was another of the typed clauses, provided as follows: "Cargo to be loaded and discharged according to the custom of the ports but not less than the average rate of 100 fathoms per weather working day, Sundays and holidays excepted, reversible."

Clause 24, which was one of the typed additional clauses, provided that the owners should pay the charterers dispatch money for all time saved in loading and discharging at the rate of 20*l*. per day.

When the vessels arrived at West Hartlepool the port was much congested, and great delay occurred before they could reach discharging berths. The docks at West Hartlepool were owned by The London and North-Eastern Railway Company, and vessels could only discharge at the berths allotted to them by the railway company, and had to wait their turn.

The plaintiffs accordingly claimed demurrage for the time during which the steamers were waiting for berths at which to discharge, and they said that the steamer was an arrived ship ready to discharge from the time she arrived in port, and that the lay days commenced to run from that date. On the other hand, the defendants contended that the vessel was not an arrived ship until she had reached the quay, the custom of the port of West Hartlepool being that vessels were always discharged at the quay, and that the lay days only commenced to run from then.

Rowlatt, J., having given judgment for the plaintiffs, the defendants appealed.

Bernard Campion, K.C., and *F. Kingsley Griffith* for the appellants.

R. A. Wright, K.C., and *G. R. Mitchison*, for the respondents, were not called upon.

BANKES, L.J.—In this class of case it seems to me upon the authorities that there are two questions which have to be answered, and those two questions depend upon the construction of the charter. The first question is this: When did the vessel become an arrived ship? and the second: having fixed the date when she became an arrived ship, does the charter-party provide for a discharge within a fixed number of days after the date of arrival, or for a discharge within a reasonable time after the date of arrival? The result upon the claim of demurrage may be entirely different.

I think that that is a true view of the position. That is made quite plain by Phillimore, J.'s judgment in *Hulthen* v. *Stewart*

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

(9 Asp. Mar. Law Cas. 285, 403; 6 Com. Cas. 65), which went to the House of Lords and was ultimately affirmed there (88 L. T. Rep. 702; (1903) A. C. 389). In that case Phillimore, J. calls attention to the distinction between the cases where the provision of a charter-party is for a loading or discharge within a fixed time, or for a loading or discharge within a reasonable time. The learned judge, after having given his decision in reference to that particular charter, says: "I have considered all the cases which have been referred to in the course of the arguments, but a certain number of them appear to me to have no application to the present case. I refer to those cases in which the charter-party provides for the ship to be discharged in a fixed number of days. Cases such as these are governed by entirely different considerations from the present."

The questions one has to answer in this case, therefore, are (*a*) when was this vessel an arrived ship? Now, the charter provided and provided only, that she was to proceed to West Hartlepool; and I think that the decision in *Leonis Steamship Company Limited* v. *Rank Limited* (10 Asp. Mar. Law Cas. 398; (1908) 1 K. B. 499), decides beyond all question that this vessel was an arrived vessel when she arrived within the limits of the port of West Hartlepool; and, copies of the bills of lading having been given, she was an arrived ship as from that time.

Then (*b*) does the charter-party provide for a delivery within a fixed number of days, or within a reasonable time? I do not know whether that matter was gone into in the court below: I do not think Rowlatt, J. refers to it, and the point turns entirely, as it seems to me, upon the true construction to be placed upon clause 26. Does clause 26 impose upon the charterer the obligation to discharge in any fixed time or within a fixed number of days? It does not say so in terms, but it seems to me that the terms are so clear that you are able to arrive at a fixed time by a simple calculation. The provision is that the cargo is to be discharged (quite true, according to the custom of the port, but) at "not less than the average rate of 100 fathoms per weather working day." It seems to me, therefore, if you calculate the quantity of cargo and consider how many weather working days were taken to discharge that cargo at that minimum rate of 100 fathoms per weather working day, you do arrive at a fixed number of days. Under those circumstances it seems to me that the obligation of the charterer here was to discharge within that time or pay demurrage. I am unable to give effect to the argument which has just been addressed to us that because, under clause 13, an option is given to the charterer to require the vessel to discharge in one of four ways, therefore she was not an arrived ship when she arrived at West Hartlepool. That point seems to me to be entirely covered by *Leonis Steamship Company Limited* v. *Rank Limited* (*sup.*).

The other point as to whether the charterer is to discharge within a reasonable time or within a fixed time depends upon the construction of clause 26. In my opinion, it is a charter for discharge within a fixed time.

For these reasons I think that the decision of Rowlatt, J. was right, and that the appeal must be dismissed with costs.

SCRUTTON, L.J.—I have listened to Mr. Campion's interesting and ingenious argument with great care, and with a certain amount of hope that it might convince me, because I recognised a superior and improved version of the argument which I had unsuccessfully presented to the Court of Appeal in *Leonis Steamship Company Limited* v. *Rank Limited* (*sup.*); but though I have listened with all the care I can, it appears to me that this case is decided by the judgment of this court in that case.

As long as I can remember there has been controversy between shipowner and charterer as to who is to bear the risk of waiting at a port for a berth. On the one hand the charterer has said: "How ridiculous it is that my time for loading or discharging should begin before I have got into a berth where I can load or discharge; and until the ship gets to the place where I can load or discharge it is absurd to make me pay for time waiting to get there." On the other hand, the shipowner has said: "You have your cargo at the port, and it is for you to make arrangements for the berth; and if you cannot get a berth, why should my ship be waiting about at my expense when it is due to the fault of your arrangements that you cannot get a berth." There was a series of cases which adopted the charterer's view where the charter ran in the form of proceeding to a berth as ordered; then there was a class of cases to proceed to a dock; then there was the case to which Mr. Campion referred. The argument was that the charter says you are to load in the customary manner, and the customary manner is at a berth; so that the clause means that you have to go to a berth, and the lay days therefore do not begin until you are at a berth in the dock. That argument was rejected. Then there came a series of absolutely conflicting cases as to what was to happen. If the charter was simply to go to a dock, did the lay days begin when you got to the place where ships were waiting to load; or as the charterer had the right, not expressly under the charter but implied in the decision in *The Felix* (3 Mar. Law Cas. (O.S.) 100; 18 L. T. Rep. 587; L. Rep. 2 A. & E. 273), to say to what berth in the port the vessel should go, was it not the fact that the lay days did not begin until the ship had got to that berth? In *Leonis Steamship Company Limited* v. *Rank Limited* (*sup.*), counsel at that time specialising in commercial cases did, I think, cite to the Court of Appeal every case that had ever been decided on the point, with the result that the court said: "When you have ordered a ship to go to a port the lay days begin when the ship is at the freighter's disposal within the commercial area of the named place." Kennedy, J. expressly approves at p. 523 of the passage

of the late Mr. Carver's valuable work : " When the place named is a port, or other wide district, the lay days begin when the ship is ready, and at the freighter's disposal, within the named place in its commercial sense ; though she may not be in a position to take in or discharge cargo, and though she may not be at the wharf, dock, or other part of the place to which the charterer may have properly required her to go."

I take the *Leonis Steamship Company Limited* v. *Rank Limited* (*sup.*) case to decide that it is not enough that under the decision in *The Felix* (*sup.*) the charterer has the right to say : "Proceed to this berth to load." That does not postpone the time when the lay days begin until the time when the ship has reached the berth to which the charterer has a right to order her. She is to proceed to the port, and when she has got to the port the lay days begin. I argued to the contrary, and I have forgotten whether I thought I was right or not, but I argued it with great vigour, and my argument failed. As I have said, I am afraid the improved version of the argument which Mr. Campion has addressed to us must also fail, because we are bound by the decision in *Leonis Steamship Company Limited* v. *Rank Limited* (*sup.*).

With regard to the point as to dispatch money, I respectfully think that there is nothing in that.

ATKIN, L.J.—This is a question which is continually arising and about which there is a long line of cases. I think we are precluded by authority from giving effect to Mr. Campion's argument. It appears to me plain that in considering this question the first matter you have to look at is what is the contract between the parties —what are the clauses in the charter-party which deal with demurrage—because demurrage, after all, is only a conventional sum agreed between the parties as compensation to the shipowner for the delay in either loading or discharging his ship beyond a specified time. In every case the first thing that you have to look at is, what have the parties expressly agreed upon in the matter ; and in any case you have to determine what they have agreed as to the discharge by the charterer, the time for discharge, the place of discharge, and when the time begins.

That matter is not necessarily concluded by merely examining the clauses which impose upon the ship the obligation to proceed to a berth. You do not necessarily determine the provisions as to the amount of demurrage merely by considering what point the ship should proceed to, whether to a port, a dock, or a berth, though that matter is a matter which no doubt has to be considered.

I think that the authorities compel us to hold that, when the parties have agreed that a ship is to be either loaded or discharged in a fixed time, or a time fixed by reference to a stated standard, then the obligation of the charterer to load begins when the ship has arrived at her contract destination. It is material to consider whether the ship is an arrived ship or not, but that, of course, may be varied. In fact, the parties might agree to some other time at which the lay days are to commence ; as they sometimes do agree in a charter-party so far as loading, at any rate, is concerned, that the obligation to load is only to commence at the expiration of a certain notice which is to be given when the ship is an arrived ship.

In the case of *Hulthen* v. *Stewart* (*sup.*), there was a charter-party which seems to me in substance to be a charter in precisely the same form as the printed clauses in this charter-party. There there was an obligation upon the charterer to load in the customary manner, very much in the form expressed in the relevant clause here. In that case it was decided by Phillimore, J., and the House of Lords obviously thought it right, that the obligation upon the charterer to load did not arise until the vessel had in fact got her berth. If Mr. Campion had to deal with the printed clause alone, I think there would be a great deal to be said for him. It is to be noted that in the case of *Leonis Steamship Company Limited* v. *Rank Limited* (*sup.*) there was an express provision as to when the lay days were to begin, which, of course, would relieve the court of any difficulty ; but in this case there is to my mind a fixed time for loading, and if so the case comes within what was said by Lord Macnaghten in *Hulthen* v. *Stewart* (*sup.*) at p. 394 : " It is, I think, established that, in order to make a charterer unconditionally liable, it is not enough to stipulate that the cargo is to be discharged ' with all dispatch ' or ' as fast as steamer can deliver,' or to use expressions of that sort. In order to impose such a liability the language used must in plain and unambiguous terms define and specify the period of time within which delivery of the cargo is to be accomplished."

To my mind, the question is whether clause 26 does define in plain and unambiguous terms the period of time within which the delivery of the cargo is to be accomplished. To my mind clause 26 does ; it varies the printed clause, and it puts a contractual obligation upon the charterer. It says : " Cargo to be loaded and discharged according to the custom of the ports, but not less than the average rate of 100 fathoms per weather working day, Sundays and holidays excepted, reversible."

It appears now that the object of that clause was to vary the provisions of the printed clause, and to turn that which was a customary rate into a fixed rate. Thus, we have a fixed rate charter-party. *Leonis Steamship Company Limited* v. *Rank Limited* (*sup.*) is, no doubt, a leading decision, and the decision in that case is that the time for loading commences when the ship is an arrived ship, and she is an arrived ship when she gets into the port. In those circumstances it appears to me that the decision of the learned judge was right, and the appeal must be dismissed.

Appeal dismissed.

Solicitors : for the appellants, *Bell*, *Brodrick*, and *Gray*, agents for *Harrison* and *Son*, West Hartlepool ; for the respondents, *Botterell* and *Roche*, agents for *Botterell*, *Roche*, and *Temperley*, West Hartlepool.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Friday, April 24, 1925.

(Before Roche, J.)

Zachariassen v. London General Insurance Company Limited. (a)

Insurance (Marine) — Loss — Representative action — Judgment — Interest—Liability of underwriters to pay interest—Judgments Act 1838 (1 *&* 2 *Vict. c.* 110), *s.* 17.

The plaintiff in Nov. 1920 *insured his sailing vessel on hull and materials for* 35,000*l. on a voyage from Newport Mews to Gothenburg against risks of "mines only, Norwegian conditions, including missing." During the currency of the policy the vessel was lost and a claim was made under the policy for the loss of the vessel, and it was arranged that the action which had been started to enforce the claim should be treated as a representative action. Four of the several insurance companies taking part in the insurance were made formal defendants in the action, and the underwriters who had subscribed the policy and were not sued agreed that the defendants should defend the claim as representing all the underwriters. The agreement recited that the underwriters were desirous of having their liability legally determined, and provided that, in consideration of the assured abstaining, at their request, from bringing any action in respect of the claim other than that already commenced against the four defendant companies, they would be bound by the result of that action as if separate actions had been brought against them, and such separate actions had been, upon their application, consolidated under the usual consolidation order. The agreement also provided that if by any judgment the said four defendants should become liable in the action to pay any sum or sums for principal, interest, or otherwise in respect of the claim under the policy, the other underwriters would pay the rateable proportion due from them respectively. The action against the four defendants was heard by Rowlatt, J. in July* 1923, *and resulted in judgment for the plaintiff. The defendants appealed, but the Court of Appeal affirmed the judgment of Rowlatt, J. in favour of the plaintiff. The money due under the judgment of Rowlatt, J. was deposited in the joint names of the solicitors of the parties and earned interest at the rate of* 2 *per cent. About* 150 *days elapsed between the date of the judgment of Rowlatt, J. and the decision of the Court of Appeal, dismissing the appeal, and the plaintiff in that action claimed interest (to be reckoned in accordance with sect.* 17 *of the Judgments Act* 1838) *at* 4 *per cent. The defendants in the present action refused to pay their proportionate part of that interest, although willing to pay their share of the principal sum received. They claimed that they were only liable for their proportionate shares of sums actually given in the judgment of Rowlatt, J.*

Held, (1) *that the defendants were bound by the result of the representative action. The result of that action was that a judgment was obtained, and by the operation of the Judgments Act* 1838 *interest was added to the sum given in the judgment until date of payment. The defendants were therefore liable to pay their share of the interest claimed, and there was nothing in the agreement to preclude or minimise that liability. The defendants were liable not only for interest expressly awarded in the judgment, but also to interest added to the judgment by operation of the statute,* i.e., *the Judgments Act* 1838.

Action in the Commercial List.

The plaintiff, who was the assured under certain policies of marine insurance on his sailing vessel the *Albyn*, claimed to recover from the defendants, who, with other underwriters, had underwritten one of the policies, their proportionate part of the interest due under section 177 the Judgments Act 1838 (1 & 2 Vict. c. 110), on a judgment which had been recovered against the underwriters in a representative action, the defendants having agreed to be bound by such judgment.

The facts are fully stated in the headnote and the judgment.

Malcolm Hilbery for the plaintiff.

W. L. McNair for the defendants.

Roche, J.—This action raises a very short and comparatively simple point. In 1923, the plaintiff, being insured for 35,000*l.* under policies of insurance on a sailing vessel called the *Albyn* on a voyage from Newport Mews to Gothenburg, brought an action on one or more of those policies; and he brought it against underwriters other than the present defendants. The present defendant company had underwritten one of the policies on the *Albyn*. The defendants in the action so brought in 1923 I will describe as the underwriters in the test action.

The plaintiff ultimately recovered judgment in the test action, but before he had recovered judgment in the test action the present defendants had, with others, entered into an agreement with the plaintiff, agreeing, as it is compendiously stated in ordinary phraseology, to be bound by the result of the test action. The present proceedings raise a question with regard to the meaning and construction of that agreement.

The agreement was dated the 5th Jan. 1922. At that date the claim under the insurance policies was being put forward to the several underwriters. The plaintiff recovered judgment on the 24th July 1923 against the underwriters in the test action. Under the Judgments Act 1838, s. 17, the amount adjudged,

(a) Reported by T. W. Morgan, Esq., Barrister-at-Law.

being the judgment debt, carried interest at the rate of 4 per cent. per annum from the time of entering up the judgment, or from the time of the commencement of this Act in cases of judgments then entered up and not carrying interest, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment.

The case was carried to the Court of Appeal by the defendants in the test action. The Court of Appeal was of the same opinion as Rowlatt, J., and accordingly the plaintiff held his judgment. Owing to the intervention of the Long Vacation and the ordinary period of proceeding to the Court of Appeal, there was a considerable period—nearly half a year—between the dates of the judgment of the court of first instance and the judgment of the Court of Appeal. Underwriters in the test action, of course, had to pay interest at 4 per cent. for that period that elapsed between the judgment of Rowlatt, J. and the date at which, after the judgment of the Court of Appeal, they satisfied that judgment. There was during that period a form of stay in being which was accompanied by a deposit in joint names in accordance with a very common practice. The interest earned on that deposit was less than the statutory interest of 4 per cent.; and the difference between the statutory interest and the deposit interest had to be paid by the defendants in the test action out of their own pockets.

The question which arises in this action is, whether the defendant company, having agreed to be bound, in a certain manner, were under liability to pay merely a proportion of the sum originally adjudged by the judge of first instance as due under the policy, for the amount of the loss and interest from the time when the loss became payable, until the judgment, or whether the defendant company were liable in addition to pay its proportion and equivalent amount in respect of the statutory interest which accrued after the date of the judgment of the court of first instance until the date of payment?

The plaintiff claims that he is entitled to recover from this defendant as well as from the defendants in the test action interest in that sense from the date of the judgment of the court of first instance. The defendants, on the other hand, contend that all that they are liable for is their own equivalent sum due from them in respect of the sum adjudged in the test action, with the addition of deposit interest which was earned under the deposit arrangement which existed.

The matter turns principally on the construction of clause 1 of the agreement of the 5th Jan. 1922, which provides as follows: "That in consideration of the matters which are mentioned we"—"we" includes the defendants in this action—"will be bound by the result of the said action against the said defendants"—"the said defendants" are the defendants in the test action—"or any substituted defendants as hereinafter mentioned, so far as such result relates to the policies subscribed by us respectively in the same way and upon the same terms as we respectively should have been bound by such result if such separate actions had been commenced against us and such several actions had been upon one application consolidated by the usual Consolidation Order."

Now the plaintiff says that that clause provides quite simply that the defendant company will be bound by the result of the action, and that the result of the action was that a judgment was obtained; and that by the operation of the statute, that judgment carried certain interest, and the certain interest became added to and included in the judgment; and that, accordingly, these defendants are bound to pay just as if that judgment was against themselves, not because they are parties to the judgment or the judgment is against them, because of their agreement to be bound by the result of the action.

That contention is I think a sound contention; but it was put that, whatever might have been the effect of clause 1, if it stopped after the words "hereinafter mentioned," or stopped at the words "so far as such result relates to the policies subscribed by us respectively," and if the end of that clause is looked at and also if clause 3 of the same agreement is looked at, it is plain that the parties did not contemplate any such result.

Mr. McNair, counsel for the defendant company, whose very ingenious and elaborate argument I appreciated in every respect, put the matter in this way. He said that by clause 3 of the said agreement, there was a provision for payment of certain interest by a defendant in the position of these defendants, and that interest meant interest given or adjudged to be due or proper to be paid in an action on the policy by virtue of the Civil Procedure Act 1833, and referred to interest such as was in fact adjudged by Rowlatt, J., as payable under this policy; and it did not refer to and was not capable of being held to refer to interest payable under the Judgments Act 1838.

He further said that it was manifest by reason of divers provisions in clause 3, including in particular a clause stipulating the payment by a defendant in the position of these defendants within fourteen days after taxation, that it was not intended that there should be an obligation to satisfy such a defendant's liability within fourteen days or to pay interest unless the sum was paid in satisfaction. I have only to say this, that there is nothing at all to show that the word "interest" which is followed by the words "or otherwise," has not the widest possible significance in clause 3; and there is no reason why it should not refer to interest due under the statute or recovered under the Judgment Act 1838, quite as much as interest due under the statute or recovered under the Civil Procedure Act 1838; and, in the second place, the other provisions of the clause do not seem to me to be at all sufficient to remove

from the defendants the obligation which fell on them, in my judgment, by virtue of clause 1.

There is nothing, I think, making it at all plain that it is not intended that a defendant in the position of the present defendants should not be liable to exactly the same measure of liability as the defendants in the test action. Indeed, the whole scheme, both of clause 3 and of the agreement taken as a whole seems to me to be directed to and to accomplish the object of putting all the defendants, whether in the test action or in the stayed actions (those defendants on what may be called the waiting list), in exactly the same position.

The other argument on which I should say something is an argument which goes back to clause 1 of the agreement and depends on a consideration of the terms of the usual consolidation order, which consolidation order is referred to in clause 1 of the agreement.

The usual consolidation order appears to be the order set out in Chitty's Forms, 15th edit., at p. 265, that is to say, in the course of Part 5, chapter 9, of that work. Now I do not intend to devote any length of time to the interpretation of that order, but I observe that the penultimate paragraph on p. 266 of Chitty's Forms, on which Mr. McNair's argument mainly depends, seems to me to be wrongly stopped in the edition to which I am referring; and I think that the comma which appears after the word " default " should really appear, if a comma should appear at all, after the word "amount," and if the fourth and fifth paragraphs on that page are read together, interpreting them as I interpret them, I see nothing to preclude the defendants from a liability to pay pursuant to such an order just this amount of interest which it is now claimed that they should pay.

Accordingly, a reference to the order in question seems to be to do nothing in its turn to take away from these defendants the liability which I think was imposed on them by the agreement in this case.

For these reasons, the defence, in my judgment, fails, and there will be judgment for the plaintiff for 49*l.*, together with the costs of this action; and this being a test action involving other sums, and an action which, by its very nature is very proper to be considered in the High Court and not in the County Court, I certify that the costs shall be on the High Court scale.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Henry Hilbery* and *Son.*

Solicitors for the defendants, *Ballantyne, Clifford,* and *Co.*

Thursday, July 23, 1925.

(Before ROCHE, J.)

PROCTOR, GARRATT, MARSTON LIMITED *v.* OAKWIN STEAMSHIP COMPANY LIMITED. (*a*)

Charter-party — Orders as to port of discharge to be given to ship after arrival at port of call—Obligation of ship to wait for orders at port of call.

By a charter-party, dated the 26th June 1924, the charterers chartered a steamer to bring a cargo from R. The charter-party provided: " (4) That being so loaded the steamer shall with all convenient speed proceed to St. V. . . . for orders to discharge at a safe port in the United Kingdom or on the Continent. . . . (22) Orders as to port of discharge are to be given to the master within twenty-four hours after receipt by consignees of master's telegraphic report to consignees of his arrival at the port of call. . . ."

The steamer left R. with a cargo of maize on the 2nd July 1924 and arrived at St. V. at 2.40 p.m. on Saturday, the 2nd Aug. About twenty-four hours before arriving at St. V. the master sent a wireless message to the charterers in London saying that he was nearing St. V., and on arrival there he cabled to them that the ship had arrived and was awaiting orders. Owing to the fact that Monday, the 4th Aug., was a Bank Holiday, the cable did not reach the charterers until Tuesday, the 5th Aug. The steamer left St. V. at 8 p.m. on the 2nd Aug. for Las P., where she arrived on the 7th Aug. the master having arranged that any message which might come for him should be forwarded to the ship by wireless from St. V.

On the 6th Aug. the charterers sold the cargo as " shipped in good condition per steamship W. arrived St. V." The purchasers, having learned that the ship was not at St. V. awaiting orders, refused to accept the cargo except at a reduction of 302l. 4s. 8d. from the contract price.

The charterers claimed this sum from the owners as damages for breach of contract in not waiting at St. V. until they received orders as to port of discharge or, alternatively, in not waiting for a reasonable time after the expiration of twenty-four hours. The umpire held that the owners were not liable to the charterers by reason of the fact that the steamer did not wait at St. V. Upon a case stated for the opinion of the court,

Held, that it was an implied term of the charter-party that the ship should wait at St. V. for twenty-four hours and a reasonable time thereafter. In view of the fact that she arrived on the 2nd Aug. and that the 4th Aug. was a Bank Holiday, she should have waited until at least the 6th Aug. The charterers had broken their contract with the purchasers of the cargo, and the damages they had to pay by way of reduction from the contract price

(*a*) Reported by J. S. SCRIMGEOUR, Esq., Barrister-at-Law.

were not too remote. The charterers were therefore entitled to the damages claimed.

AWARD in the form of a special case stated by the umpire, Mr. Stuart Bevan, K.C., for the opinion of the court.

By a charter-party, dated the 26th June 1924, the owners, the Oakwin Steamship Company Limited, chartered their steamship, the *Watsness*, to the charterers, Proctor, Garratt, Marston Limited, Rosario. The matter in dispute in the arbitration was the charterers' claim for damages in respect of the failure of the master of the steamship to wait, after arrival at St. Vincent (the port of call), for orders from the charterers as to port of discharge, and in sailing from St. Vincent before receiving such orders.

The material clauses of the charter-party were :

(2) That the steamer . . . shall proceed as ordered by the charterers to the undermentioned ports or places, and there receive from them a full and complete cargo of wheat and (or) maize and (or) rye.

(4) That, being so loaded, the steamer shall with all reasonable speed proceed to St. Vincent (Cape Verde) or Las Palmas or Teneriffe (Canary Islands) or Madeira or Dakar at the master's option for orders (unless these be given to him by charterers on signing bills of lading) to discharge at a safe port in the United Kingdom or on the Continent within certain named limits.

(22) Orders as to port of discharge are to be given to the master within twenty-four hours after receipt by consignees of master's telegraphic report to consignees . . . of his arrival at the port of call, and for any detention waiting for orders after the aforesaid twenty-four hours the charterers or their agents shall pay to the steamer 30*s*. sterling per hour. The master shall give written notice to the charterers before signing final bills of lading whether he will call at St. Vincent, Las Palmas, Teneriffe, Madeira, or Dakar for orders. Should cable communication with the port of call be interrupted steamer shall proceed to Lisbon, Queenstown or Falmouth at the master's option for orders, and the master is to advise charterers' agent of his arrival at the port of call.

The charter-party contained the usual exceptions clause.

The steamer left Rosario under the charter-party on the 2nd July 1924 with a cargo of maize. Before the ship left the master orally informed one of the managers in the charterers' office that the ship would be calling at St. Vincent and probably at Las Palmas. No point arose between the parties as to the service of a written notice by the master under clause 22 of the charter-party, and the arbitration proceeded upon the footing that such written notice should be taken as having been given.

The final bill of lading signed at Rosario commenced as follows : "Shipped on board the *Watsness* now lying in the port of Rosario and bound for orders to St. Vincent. . . ."

The steamer arrived at St. Vincent on the 2nd Aug. 1924 at 2.40 p.m.

Before leaving Rosario the charterers had given the master a written notice instructing him on arrival at port of call to apply to them at 87, Leadenhall-street, London, for instructions.

About twenty-four hours before the steamer's arrival at St. Vincent, her master had sent a wireless message to the charterers at their London address advising them that the ship was proceeding to St. Vincent waiting for orders.

On Saturday, the 2nd Aug. 1924, after arrival at St. Vincent, the master cabled to the charterers at their London office : "*Watsness* arrived ; awaiting orders." This cable was received by the charterers at 9 a.m. on Monday, the 4th Aug. 1924, a Bank Holiday.

By a contract in writing, dated the 6th Aug. 1924, the charterers sold the cargo as "shipped in good condition per steamship *Watsness* arrived St. Vincent" to Messrs. William H. Pim, Junr., and Co. Limited, and on the same day cabled to the master at St. Vincent to proceed to Bilbao to discharge. Meanwhile, however, the steamer had waited at St. Vincent until 8 p.m. on the 2nd Aug., when she left, the master having instructed his agents that if any message should come through for him they were to transmit it to him by wireless.

The steamer arrived at Las Palmas at 2.30 p.m. on the 7th Aug., and on arrival there the master received the charterers' orders to proceed to Bilbao, forwarded by his agents from St. Vincent by wireless.

On the 14th Aug. 1924 Messrs. Pim and Co. Limited, the buyers, having learned that the steamer was not at the date of their contract awaiting orders at St. Vincent, refused to accept the cargo upon that ground, and the market being down, the matter was subsequently compromised by the charterers and Messrs. Pim by the latter accepting the cargo with a deduction of 302*l*. 4*s*. 8*d*. from the contract price.

It was contended on behalf of the charterers :

(*a*) That under the provisions of the charter party it was the duty of the master to wait at St. Vincent until he received orders as to port of discharge or alternatively to wait for a reasonable time after the expiration of twenty-four hours.

(*b*) That the leaving St. Vincent without such orders and before the expiration of twenty-four hours constituted a breach of the charter-party.

(*c*) That by reason of such breach the charterers had suffered damage and special damage in the said sum of 302*l*. 4*s*. 8*d*.

It was contended on behalf of the owners :

(*a*) That they had committed no breach of the said charter-party.

(*b*) That the master was under no obligation to wait at St. Vincent (i.) after the expiration of twenty-four hours, or (ii.) at all, provided that before leaving he had made effective arrangements to have his orders forwarded to him by wireless.

(*c*) That the charterers were under no liability to Messrs. Pim under their contract for sale.

from the defendants the obligation which fell on them, in my judgment, by virtue of clause 1.

There is nothing, I think, making it at all plain that it is not intended that a defendant in the position of the present defendants should not be liable to exactly the same measure of liability as the defendants in the test action. Indeed, the whole scheme, both of clause 3 and of the agreement taken as a whole seems to me to be directed to and to accomplish the object of putting all the defendants, whether in the test action or in the stayed actions (those defendants on what may be called the waiting list), in exactly the same position.

The other argument on which I should say something is an argument which goes back to clause 1 of the agreement and depends on a consideration of the terms of the usual consolidation order, which consolidation order is referred to in clause 1 of the agreement.

The usual consolidation order appears to be the order set out in Chitty's Forms, 15th edit., at p. 265, that is to say, in the course of Part 5, chapter 9, of that work. Now I do not intend to devote any length of time to the interpretation of that order, but I observe that the penultimate paragraph on p. 266 of Chitty's Forms, on which Mr. McNair's argument mainly depends, seems to me to be wrongly stopped in the edition to which I am referring; and I think that the comma which appears after the word "default" should really appear, if a comma should appear at all, after the word "amount," and if the fourth and fifth paragraphs on that page are read together, interpreting them as I interpret them, I see nothing to preclude the defendants from a liability to pay pursuant to such an order just this amount of interest which it is now claimed that they should pay.

Accordingly, a reference to the order in question seems to be to do nothing in its turn to take away from these defendants the liability which I think was imposed on them by the agreement in this case.

For these reasons, the defence, in my judgment, fails, and there will be judgment for the plaintiff for 49*l*., together with the costs of this action; and this being a test action involving other sums, and an action which, by its very nature is very proper to be considered in the High Court and not in the County Court, I certify that the costs shall be on the High Court scale.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Henry Hilbery* and *Son.*

Solicitors for the defendants, *Ballantyne, Clifford*, and Co.

Thursday, July 23, 1925.

(Before Roche, J.)

Proctor, Garratt, Marston Limited v. Oakwin Steamship Company Limited. (a)

Charter-party — Orders as to port of discharge to be given to ship after arrival at port of call—Obligation of ship to wait for orders at port of call.

By a charter-party, dated the 26th June 1924, the charterers chartered a steamer to bring a cargo from R. The charter-party provided: "(4) That being so loaded the steamer shall with all convenient speed proceed to St. V. . . . for orders to discharge at a safe port in the United Kingdom or on the Continent. . . . (22) Orders as to port of discharge are to be given to the master within twenty-four hours after receipt by consignees of master's telegraphic report to consignees of his arrival at the port of call. . . ."

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The charterers claimed this sum from the owners as damages for breach of contract in not waiting at St. V. until they received orders as to port of discharge or, alternatively, in not waiting for a reasonable time after the expiration of twenty-four hours. The umpire held that the owners were not liable to the charterers by reason of the fact that the steamer did not wait at St. V. Upon a case stated for the opinion of the court,

Held, that it was an implied term of the charter-party that the ship should wait at St. V. for twenty-four hours and a reasonable time thereafter. In view of the fact that she arrived on the 2nd Aug. and that the 4th Aug. was a Bank Holiday, she should have waited until at least the 6th Aug. The charterers had broken their contract with the purchasers of the cargo, and the damages they had to pay by way of reduction from the contract price

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The final bill of lading signed at Rosario commenced as follows : "Shipped on board the *Watsness* now lying in the port of Rosario and bound for orders to St. Vincent. . . ."

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On the 14th Aug. 1924 Messrs. Pim and Co. Limited, the buyers, having learned that the steamer was not at the date of their contract awaiting orders at St. Vincent, refused to accept the cargo upon that ground, and the market being down, the matter was subsequently compromised by the charterers and Messrs. Pim by the latter accepting the cargo with a deduction of 302*l*. 4*s*. 8*d*. from the contract price.

It was contended on behalf of the charterers :

(*a*) That under the provisions of the charter party it was the duty of the master to wait at St. Vincent until he received orders as to port of discharge or alternatively to wait for a reasonable time after the expiration of twenty-four hours.

(*b*) That the leaving St. Vincent without such orders and before the expiration of twenty-four hours constituted a breach of the charter-party.

(*c*) That by reason of such breach the charterers had suffered damage and special damage in the said sum of 302*l*. 4*s*. 8*d*.

It was contended on behalf of the owners :

(*a*) That they had committed no breach of the said charter-party.

(*b*) That the master was under no obligation to wait at St. Vincent (i.) after the expiration of twenty-four hours, or (ii.) at all, provided that before leaving he had made effective arrangements to have his orders forwarded to him by wireless.

(*c*) That the charterers were under no liability to Messrs. Pim under their contract for sale.

(*d*) That in any case the damages claimed were too remote and were irrecoverable.

The umpire found as a fact that if the charterers were under any liability at all to Messrs. Pim such compromise was a reasonable and proper one for the charterers to make. He also found that if there was a breach of the charter-party by the owners the damages to which the charterers would be entitled by reason of such breach, if any, would (subject to their being recoverable in law as not being too remote) be the sum of 302*l*. 4*s*. 8*d*. so paid by the charterers to Messrs. Pim. Subject to the opinion of the court, however, he awarded that the owners were under no liability to the charterers by reason of the fact that the steamer left St. Vincent in the circumstances above set out.

Kennedy, K.C. and *Van Breda* for the charterers.

C. R. Dunlop, K.C. and *H. L. Holman* for the owners.

ROCHE, J.—This matter comes before me in the form of a special case stated by an umpire. The question submitted for the opinion of the court is whether, on the true construction of the charter-party, and on the facts stated in the special case, the award of the umpire is right or wrong. The award is the award of a learned King's Counsel, sitting as umpire, and as I am about to differ from him, and to say that his award is wrong, I think it only right to add that I differ from him with less hesitation than I might otherwise do, because I am informed that the case was not argued before him by any representatives of the parties, other than the two lay arbitrators, who were associated with him in the reference.

The matter that I have to decide is practically one of construction and law. It is true, I think, that I am obliged to draw certain inferences from the facts stated by the umpire as his findings of fact in the case. I am not sure that the express findings entirely exhaust the matter, but there are inferences which do seem to me to flow from them, and I think that must be one of the matters left by the award to me.

The facts may be summarised as follows: The arbitration was between the charterers and the shipowners, and in the arbitration the charterers were the claimants. The claim arises out of an alleged breach of contract by the shipowners in not waiting at all, or for a sufficient time, at the port of call, or which became the port of call, stipulated for in the charter-party by reason of certain acts and decisions described in the case.

The charter-party, which is dated the 26th June 1924, was for a voyage of a ship called the *Watsness* to proceed to a loading place or places in the River Parana, thence to proceed to one of various named places, which included St. Vincent and Las Palmas, for orders, and thence to a port of discharge in the United Kingdom, or on the Continent, between certain limits. The charter-party further provided, by clause 22, as to the giving of the orders for the port of discharge at the port of call. I need not re-read clause 22, but it may be taken as part of my judgment, and as if it had been read. It is sufficient for me to say that, although it provides for the giving of the orders, and mentions that the time for giving them is to be within twenty-four hours after receipt by the consignees of the master's telegraphic report to the consignees of his arrival at the port of call, and although it provides for the payment of money for detention beyond the twenty-four hours so mentioned, the clause does not, in terms or expressly, provide that the ship shall stay for the twenty-four hours, or for any further period of waiting during detention upon payment.

What happened was this. Before the vessel left the port of loading, and upon signing the bills of lading, St. Vincent was chosen and became the port of call. The vessel arrived at St. Vincent on the 2nd Aug., which was a Saturday, at 2.40 p.m. The master cabled to the charterers in London that day that the ship had arrived at St. Vincent, and was awaiting orders. At eight o'clock that night he left St. Vincent and went on his way, having instructed his agents that if any message should come through to him they were to transmit it to him by wireless. I think it may thus be inferred that his ship was fitted with wireless apparatus, and at that time, when he sailed on his way, the cable had not even been received by the charterers. It is found by the case that it was received by the charterers at 9 a.m. on Monday, the 4th Aug. 1924, August Bank Holiday. I read that statement to mean, although it is not quite unambiguous, that the cable was in fact received by the charterers there, and was not merely handed in to an empty office. It is perfectly plain that little or no business could be done there on the Monday, and the cargo was not in fact sold by the charterers, the claimants in the arbitration, until Wednesday, the 6th Aug. When they sold the cargo on Wednesday, the 6th Aug., they did so under a contract of that date which forms part of the case. That contract not only describes the *Watsness*, as "arrived at St. Vincent," but by attached clauses mentions what options the buyer had as to giving orders as to discharging; clauses which, by their necessary meaning or plain implication, involve this, that orders had not yet been given and that the buyers had the right to give the orders. Orders were given for the discharge at Bilbao, and they, in fact, went to St. Vincent and were transmitted by the agents whom the captain had instructed to communicate with him by wireless, and by wireless reached him when he was on his voyage. He was then, in fact, at Las Palmas, whether for coaling or other purposes I know not; but the case is just the same as if the vessel was on its voyage and the wireless message had been received when she was at sea.

It was said by the charterers at the arbitration that it was a breach of the charter and that they sustained damage thereby. The damages they claimed were the sum of rather over 300*l.*, and that sum is arrived at in the following way. The buyers, there being said to be a falling market—but that is not relevant to this case, although that may be a motive for their action—claimed as soon as they found the vessel was not at St. Vincent at the time of the contract, that a condition of the contract had been broken, and that they were not bound to take the cargo, and claimed to reject it. That matter was put to arbitration, as between the charterers, the present claimants, and their buyers, and was compromised by a compromise which the umpire, in terms, finds to be a reasonable and proper one, at the sum of 302*l.* 4*s.* 8*d.* That compromise, of course, involved the proposition that there was a breach of a condition of the contract as between the charterers, the sellers of the cargo, and the buyers of the cargo, in respect of the absence of the vessel from St. Vincent. The owners contended before the umpire, and they have contended before me, that there was no breach of the charter-party, and that if there was it was only a breach for which the charterers were entitled, not to the 300*l.* in question, but merely to nominal damages, and that those damages were too remote, and too remote for, I think, two reasons; firstly, that they did not naturally flow from the breach of contract by the shipowners, if there was any; and, secondly, it was said that they were not connected with the transaction at all, and could not be recovered, and were accordingly too remote because the charterers, the sellers, did not break their contract with the buyers; in other words, that it was not a condition of the contract of sale that the vessel was, or should be, remaining at St. Vincent for orders.

There are several matters I have to decide in order to decide whether or not the charterers are entitled to the damages in question. If there was a breach of contract, but the damages are too remote, the charterers are only entitled to nominal damages. The umpire has stated an alternative finding of 40*s.* damages; but in my judgment the charterers are entitled to more than nominal damages, and to damages to the extent which they claim. I so decide for the following reasons. It may be that since this form of charter-party was framed—it is a form in general use—and adopted, the use of wireless telegraphy had either been introduced or had become very common, and that may be a reason for altering the contract to be entered into between the charterers and the shipowners; but it is not a sufficient reason for doing what, substantially, I think I am asked to do, namely, to decide that the charter-party bears a different meaning from the meaning which it seems to me it plainly has. The plain and necessary meaning of this charter-party, in my judgment, is that "port of call" should not be read as "port of call merely for the despatch of the telegraphic report to the consignees of the arrival of the ship," and entitling, as the shipowners contend, the master, having made such report, to proceed immediately on his way and get his orders anywhere else. But those words, in my judgment, mean a place for the receipt of orders in regard to the port of discharge, and by necessary implication the charter obliges the shipowners to keep their ship at the port of call for twenty-four hours and at any rate a reasonable time thereafter.

I am not going to enumerate the cases which deal with implications. That matter has been so fully, and so often, dealt with by courts of much higher authority than this, that it seems unnecessary that I should do so. It is sufficient to say that I quite recognise in dealing with implications, one has to imply only what is necessary to give a business efficacy to a contract, and not terms such as might be reasonable for the parties to provide as between themselves. Now, going on that principle, I think it is to be implied from this contract that the ship should remain twenty-four hours, and at least a reasonable time thereafter—I say at least a reasonable time thereafter because it seems to me also unnecessary to decide a controversy which has arisen as to whether, in the case of the time that a ship has to wait on demurrage, the time is to be fixed by a consideration of those circumstances which, in an ordinary case, are proper to be considered in arriving at what is a reasonable time, or whether there is no limit to the period which a ship has to wait, except that she has to wait until the other party has manifested an intention of repudiating the contract. I am referring, in mentioning that there is such a controversy or question, to such cases as *Wilson and Coventry Limited* v. *Otto Thoresen's Line* (11 Asp. Mar. Law Cas. 491; 103 L. T. Rep. 112; (1910) 2 K. B. 405), and *Inverkip Steamship Company Limited* v. *Bunge and Company* (14 Asp. Mar. Law. Cas. 110; 117 L. T. Rep. 102; (1917) 2 K. B. 197).

The ship in this case did not wait twenty-four hours at the port of call, and, under those circumstances, did not wait a reasonable time thereafter, but in order to connect the damages claimed with the action of the shipowners it is necessary that I should decide whether the ship was bound to wait there until the 6th, when the orders were given, and when the contract of sale was entered into. That last matter, the formation of the contract of sale in question, is perhaps the material matter from this point of view. It is here that there seems to be the lacking of an express finding of the umpire, but as no application has been made for me to send the matter back to him, I think that I must be taken to draw such necessary inferences from the facts that are stated as are requisite for a decision on the case; and in the circumstances, having regard to the findings that the 2nd Aug. was a Saturday, the 3rd was a Sunday, and the 4th Aug. was the August Bank Holiday, I think it is a proper inference to draw that the ship ought to have remained

at the port of call, namely, St. Vincent, until the 6th Aug. at any rate, which, after all, would have been little more than twenty-four hours after the lapse of the twenty-four hours from the receipt by the consignees of the master's telegraphic report.

Accordingly I hold, firstly, that there was a breach of the shipowners' contract when the ship sailed from St. Vincent on the 2nd Aug. Secondly, I hold that the ship ought to have been there under the contract when the orders arrived on the 6th Aug. Thirdly, I hold that the charterers and sellers broke their contract with their buyers by reason of the facts which I have already mentioned. In other words, I hold that it was a condition of the contract of sale of the 6th Aug. 1924 that the "*Watsness* was still at St. Vincent, and that the right of altering the place of discharge was still open then, and it follows from what I have already said that, in my judgment, both under the charter-party and under the contract of sale, the meaning of the document is that orders are to be given whilst the vessel is at the port of call.

Now upon these findings, there remains only one other point, namely, whether the damages are too remote. In my judgment they are not too remote. It was, I think, the probable, if not the natural, result of the absence of the vessel, that the buyers of the cargo would, or might, claim to reject it on the ground that the vessel had left the place at which they were entitled to have her when the orders were given. It was assumed by Mr. Holman, who put his points on behalf of the shipowners very clearly, that because the vessel was not, in fact, delayed on her voyage by what she did, that therefore the action of the buyers was unnatural, and such as ought not to be contemplated, or expected. But I think it right to observe that it is not speed that is always desired by the parties to a contract; they may desire all such delay or lapse of time as is provided for by the contract in order that they may make their business arrangements for either the sale of the cargo, or for its landing, discharge and reception.

In those circumstances I hold that these damages are not too remote, and I answer the question of the umpire in the sense that I indicated at the beginning of my judgment by saying that, for the reasons I have given, in my opinion the award is wrong, and the consequences which follow upon that are enumerated and defined by the umpire—that the owners must pay to the charterers 302*l.* 4*s.* 8*d.* and certain costs.

Judgment for the charterers.

Solicitors for the charterers, *Richards* and *Butler*.

Solicitors for the shipowners, *Holman, Fenwick*, and *Willan*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Monday, March 23, 1925.

(Before Lord MERRIVALE, P.)

THE EL OSO. (*a*)

Damage action — Preliminary act—Practice —Action between parties whose vessels have not been in collision with each other—R. S. C. Order XIX., r. 28.

Where the parties to a damage action are the owners of vessels which have not been in collision with each other the practice as to requiring preliminary acts under R. S. C. Order XIX., r. 28, is a matter for the discretion of the court. In such cases the proper course is that there should be the communication between the solicitors which commonly takes place in Admiralty cases, and that the solicitors should ascertain whether the parties are ready to file preliminary acts under Order XIX., r. 28. If both parties are not ready to deliver preliminary acts, or one of them declares himself unable or unwilling, then the matter should be raised by summons.

Dicta *of Lord Merrivale, P. to the effect that if in such a case an order is made for preliminary acts to be filed, such order is not properly complied with by the party whose vessel has not been in collision filing a blank preliminary act.*

SUMMONS on appeal from an order of the assistant-registrar ordering the plaintiffs to deliver a statement of claim and dismissing their application for an order that the defendants should file a preliminary act.

The plaintiffs, the owners of the steamship *Glenshane*, claimed to recover damage sustained by reason of a collision between the *Glenshane* and the steamship *Corcove*, which they alleged to have been caused by the negligent navigation of the defendants' steamship *El Oso*. The defendants having intimated that they were not ready to file a preliminary act, the plaintiffs took out a summons for an order that a preliminary act should be filed, and the defendants took a summons for an order that the plaintiffs should file a statement of claim within a fixed time. The assistant-registrar dismissed the plaintiffs' summons and made an order that the plaintiffs should file a statement of claim. The plaintiffs appealed.

Order XIX., r. 28, of the Rules of the Supreme Court, provides as follows:

> In actions in any division for damage by collision between vessels, unless the court or a judge shall otherwise order, the solicitor for the plaintiff shall, within seven days after the commencement of the action, and the solicitor for the defendant shall within seven days after appearance, and before any pleading is delivered, file with the registrar, master, or other proper officer, as the case may be, a document to be called a Preliminary Act which shall be sealed up and shall not be opened until the—

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

pleadings are completed and a consent signed by the respective solicitors that the Preliminary Act shall be opened is filed in the Admiralty registry and which shall contain a statement of the following particulars : . . ."

The summons was adjourned into court.

Dumas for the plaintiffs.

Holman for the defendants the owners of the *El Oso*.

Lord MERRIVALE, P.—This is an appeal from the registry in a case which I confess has caused me some difficulty, and which is of some importance because it deals with the practice of the Division in respect of the filing of preliminary acts. The action was, in the old Admiralty sense, a damage action arising out of a collision between the plaintiffs' vessel and a vessel other than that of the defendants. What is alleged in the statement of claim is a very common allegation—that the plaintiffs' claim is for damages sustained by their steamship, the *Glenshane*, as a result of a collision between the *Glenshane* and the steamship *Corcove* in consequence of the negligent navigation of the steamship *El Oso*. The action is brought against the *El Oso*, and is a form of action which constantly arises in this jurisdiction.

The difficulty which has arisen here is a difficulty which has not often arisen. The question was brought to me upon appeal with a view to obtaining, so far as it might be obtained in this case, some guidance in respect of the application of Order XIX., r. 28, of the Rules of the Supreme Court, the rule which at the present time provides for the filing of the preliminary acts. It is material to bear in mind that it is not the rule under which preliminary acts came into being or under which the practice of this Division in respect of them was shaped.

What happened here was that the plaintiffs, whose vessel was involved in the collision, were ready to file a preliminary act in accordance with the *primâ facie* requirements of Order XIX., r. 28, but the defendants were not. The plaintiffs thereupon issued a summons asking for an order that the defendants should file a preliminary act. The defendants retorted with a summons calling upon the plaintiffs to deliver their statement of claim within a time to be fixed. When the matter came on in the registry the defendants' application succeeded and the plaintiffs' application for the filing of a preliminary act was dismissed with costs. If that had happened in 1855, when the rule which established preliminary acts was introduced into Admiralty practice, or at the time of the Judicature Acts, when Order XIX., r. 28, was originally introduced into the practice of the Supreme Court, I do not know that it would have raised any great question. But Mr. Dumas for the plaintiffs in the action was able to bring to my notice the fact that during a long period of time judges in this Division, including my predecessor, Sir Charles Butt, Bucknill, J., Deane, J., and my colleague, Hill, J., have regarded it as in many cases necessary that in what I may call cases of third-party collisions preliminary acts should be filed wherever possible.

As to the importance of the matter, nobody who has had experience of the practice of the court can doubt that any diminution of the obligation of parties in respect of the filing of preliminary acts is an impediment to the administration of justice in this Division. It is of the highest consequence that the salutary provision which Dr. Lushington introduced when the Admiralty Court in its modern form was being shaped should have the fullest possible effect. Very often it aids parties materially in obtaining justice in collision cases. I can say of my own experience, extending now over several years, that it is highly important to the court and that it assists the court in many cases to determine, between closely conflicting accounts, where the truth in fact is to be found.

I have therefore considered this matter with as much care as I could. The difficulty has arisen chiefly, I think, by reason of statements in books of practice. For instance, in a note to Order XIX., r. 28, I find the well-known case of *Armstrong* v. *Gaselee* (6 Asp. Mar. Law Cas. 353 ; 1889, 59 L. T. Rep. 891 ; 22 Q. B. Div. 250) referred to in this concise and apparently conclusive way :—" An action by owners of a barge against owners of a tug for negligence in towing is not within the rule " ; and another case, *The John Boyne* (3 Asp. Mar. Law Cas. 41 ; 1877, 36 L. T. Rep. 29) is referred to :—" Nor is an action by cargo-owners against shipowners in respect of damage to the cargo sustained in a collision with another ship." The proposition for which *Armstrong* v. *Gaselee* (*sup.*) was cited to me was the broad proposition that Order XIX., r. 28, provides only for the filing of preliminary acts in cases where the parties to the action are the owners or parties interested in the two vessels which have been in collision. If that is the true view of the matter, or if that has been decided in any manner which binds this court, there has been a great deal of erroneous practice, not only since my time but before my time, in which learned and experienced judges have taken and have acted upon a view contrary to that which was acted upon in this case and which is founded upon statements in the practice books. I have referred to one practice book, but it is not limited to that. Mr. Dumas very properly pointed out to me that, with a body of authority in this Division requiring the filing of preliminary acts in what I call " third-party " collision cases, and with statements in the text-books, which might from time to time be acted upon in practice, that those cases are outside the rule, the parties are placed in a position of embarrassment. I think that is so ; and for that reason I have devoted some time to the matter.

For the understanding of the case I have found it necessary to consider the introduction of preliminary acts by Dr. Lushington in 1855. The Admiralty jurisdiction was then in the

course of establishment in the comprehensive form in which, under Dr. Lushington's administration, it came to be established. By rules framed by Dr. Lushington in 1855 and brought into operation by an Order in Council, it was provided that :—" In all cases of damage, unless the Judge shall be pleased otherwise to direct, each party or his proctor shall before libel or act on petition is given in bring in and deposit in court a sealed packet containing a statement of . . ." and then follow the numerous particulars which form the basis of the requirements of the rules with regard to preliminary acts. The rule concludes with these words, " and such statements shall be called the preliminary acts." There is the origin of preliminary acts.

How great was the importance which Dr. Lushington attached to preliminary acts it is almost impossible to overstate. The learned judge himself explained it on various occasions in reported cases. I do not know that it is necessary that I should go into the detail of these, but they are found upon easy reference to the text-books.

Experience has abundantly justified the prevision which Dr. Lushington showed. The rule, in the form in which it was introduced in 1855, was framed with regard to the existing Admiralty practice ; and it dealt with it in the technical manner of the Court of Admiralty of that time. For instance, what was required was the filing of preliminary acts in " damage " actions. There are cases of Dr. Lushington's in which, not so very long after the making of the rules, that learned judge thought it necessary to point out that the words " cases of damage " have a technical meaning and that collisions between ships were dealt with only in the Court of Admiralty. No doubt, if the present jurisdiction of the court were limited by the Rules of 1855, difficult questions might arise as to when an action brought into court having in it ingredients of a claim at common law can be correctly and technically described as a damage action. By the Judicature Acts the jurisdiction of this Division of the court was extended beyond the damage actions which were tried under the old procedure, and was made to extend to the whole range of litigation in which questions arising in the Admiralty jurisdiction come to be considered : was extended, for example, to claims arising out of contractual duty in respect of towage and to claims arising out of other contractual obligations.

The rule now in question, Order XIX., r. 28, was no doubt framed, by those who were responsible for framing the rules under the Judicature Act, with a view to maintaining the requirements of the Admiralty practice under Dr. Lushington's most salutary practice, and to extend them to those cases of mixed common law and Admiralty jurisdiction which are triable in this Division but may also come to be tried in the King's Bench Division. As is pointed out in another footnote to the rule, damage, on the construction which has been put on Order XIX., r. 28, includes damage to persons and loss of life ; and the rule applies to an action under Lord Campbell's Act.

The difficulty is to see how exactly the practice of the Division stands or ought to stand, in view of the element of uncertainty introduced by the extended jurisdiction conferred by the Judicature Acts and by the extended operation of the rule under the Rules of the Supreme Court. I have had to consider whether, if it had been laid down in a Divisional Court in the King's Bench Division that the practice in an action in that Division to which the rule applies must be directed upon a certain view of the rule, that is a view of the rule which is mandatory in this Division. Certainly my predecessor, Sir Charles Butt, thought that was not the case. But it is a matter which would require serious attention if the Divisional Court of the King's Bench Division—Queen's Bench Division, as it was at the time in question—had laid down a principle of that kind. I may say in passing that my view of the matter in its strict sense is that the practice of this Division is settled in the Division, subject to the control exercised over all the Divisions of the High Court by the Court of Appeal. But, upon careful consideration of the main authority which was relied upon to justify the order dismissing this application with costs without cause shown, I think the view which has been taken of it as a prohibition of the filing of preliminary acts in cases of " third-party " collisions is a view not warranted by the decisions. It is true that the headnote in the report (*Armstrong* v. *Gaselee*, *sup.*) says this : " An action was brought by the owner of a barge and her cargo against the owners of a tug for negligence in towing, in consequence of which, as the plaintiff alleged, the barge came into collision with another vessel, and was lost with her cargo. Held, that the action was not one ' for damage by collision between vessels,' within the meaning of Order XIX., r. 28, and that the parties were not required to file preliminary acts as prescribed by the rule." But that statement of the judgment to my mind goes beyond what was decided in the case. If the judgment of Wills, J., who was one of the two judges who decided the case, is considered with care, it will be seen that the learned judge took the view that in the case of an action by the owner of a ship in tow against the owner of a tug for negligence in consequence of which a collision has taken place between the ship and the tug, an order for preliminary acts would be within what he conceived to be the general scope of the rule, though the value of the order might in the circumstances be doubtful. Then the learned judge considered other cases. Dealing with the application then before the court, he came to the conclusion that in that case the refusal of the master to order the filing of the preliminary acts was a sound exercise of discretion.

Parts of the language in the judgment of Huddleston, B., who was the other member

of the court, contained expressions which appear on the face of them to justify the headnote of the report, but the learned Baron referred to a case in which he, sitting alone, by consent, to exercise the authority of the Divisional Court, had taken a view of the scope of the rule which is inconsistent with the alleged effect of it as stated in the headnote to *Armstrong* v. *Gaselee* (*sup.*). The learned judge referred to the case of the *Secretary of State for India* v. *Hewitt and Co.* (1888. 6 Asp. Mar. Law Cas. 384; 60 L. T. Rep. 334), a case where the owner of goods sunk in collision between the defendant's vessel and a barge in which those goods were being carried, was held entitled to the delivery of a preliminary act which was held to be within the scope of the rule. What had happened in that case was that Charles, J., in chambers had held that that case, which was a case of what I call "third-party" collision, was within the scope of the rule. In December 1888 Huddleston B. upheld that order, although in January 1889 he delivered the leading judgment in *Armstrong* v. *Gaselee* (*sup.*).

Now I have referred to what has been said by Sir Charles Butt: that appears in the footnote to *Secretary of State for India* v. *Hewitt and Co.* (*sup.*): "In the subsequent case of *The Alexandra* (not reported) which was an action *in personam* in the Admiralty Division, by a barge-owner against a tug-owner, for towing his barge into collision with another vessel, the parties refrained from filing preliminary acts. On the action coming on for trial, Butt, J., complained in strong terms of the absence of preliminary acts, and intimated that in future it was desirable they should be filed in such cases." After that followed from time to time the very numerous cases to which I was referred by Mr. Dumas. I have to consider what is the true solution of what seems to be a contradictory view, upon the authorities, of the effect of Order XIX., r. 28. I think the true solution is this: that in all cases the learned judges or the courts *in banco* which dealt with this matter were dealing with matters of discretion. In the rule framed by Dr. Lushington the delivery of preliminary acts was subject to be dispensed with by the court. Under the rule as it now stands (the rule applying to the High Court as a whole) preliminary acts are to be delivered "unless the court or a judge shall otherwise order"; but it is to be noted that they are to be delivered "in actions in any division for damage by collision between vessels," and that it has been laid down as observed by Wills, J., in *Armstrong* v. *Gaselee* (*sup.*) that the rule extends not only to damage cases in the old Admiralty sense, not only to actions between the parties to collisions, but to so broad a scheme of actions as to include actions under Lord Campbell's Act for loss of life owing to collisions between vessels.

As I say, the view which I have arrived at is that undue stress has been attached in the reports of the various cases to the refusal of an order for preliminary acts in certain cases and the making of an order in other cases. Each of the rules, the old rule and the modern rule, is a rule to be exercised according to the discretion of the court: but it seems to me that once it is seen, as it was seen by the learned judges in *Armstrong* v. *Gaselee* (*sup.*) that the rule extends to so wide a scheme of litigation as to include actions under Lord Campbell's Act, it is impossible to say that actions for damages in "third-party" collisions, as I have called them, are not within the scope of the rule.

The fact of the matter is, as I think, that the truer view is to be found in the case of *The John Boyne* (*sup.*), which came before Sir Robert Phillimore. I suppose if any judge other than Dr. Lushington could speak with authority about the scope of the rule with regard to preliminary acts it was Sir Robert Phillimore. It is unnecessary for me to consider how long Sir Robert Phillimore's association was with the administration of the Admiralty jurisdiction both at the Bar, under the old state of things, and on the Bench when he became a judge of the High Court in the Admiralty Division. Sir Robert Phillimore was dealing with a case of an action for damage to cargo in a collision between ships, the action being brought by the cargo-owners against the ship carrying the cargo. There was an application for a preliminary act—it being said to be a case of collision. It was objected to by a practitioner in the Admiralty Division, in those days Mr. Phillimore, who is happily still with us in another sphere, and he asked, "What preliminary act are plaintiffs to file? Not one in relation to the defendant's ship. They cannot make statements as to the other ship, because they can have no knowledge of the circumstances: there is consequently no mutuality." Then Sir Robert Phillimore said: "I think the objection taken by Mr. Phillimore—that, even if the defendant did deliver a preliminary act, the plaintiff, from the nature of the action, could not do so, so that it being impossible to apply Order XIX., r. 30, to both parties in the action, there could be no mutuality—is an objection which cannot be got over"; and then he said: "I think there should be no preliminary acts delivered in this action." That was an exercise of discretion upon the facts of the case.

The conclusion at which I have arrived is that the true view, at any rate so far as this Division is concerned, is that the practice as to requiring preliminary acts, outside of the cases in which parties to the collision by their vessels are parties to the litigation, is a matter for the discretion of the court. There is no difficulty with regard to the normal damage case. That is the case where vessels have been in collision and the owners of one vessel bring their suit against the owners of the other in the Admiralty jurisdiction to determine the liabilities. The rule undoubtedly applies in its full force in those cases. The difficulty

arises with regard to what I call "third party" collisions. It seems to me that the mode in which it ought to be dealt with is that, where both parties in a damage case, a case of collision, are not the parties to the collision, *i.e.*, where one of them sues in respect of negligence of those in charge of a vessel which is not a party to the collision, the proper course is that there should be the communication between the solicitors which commonly takes place in Admiralty cases, and that the solicitors should ascertain whether, on the one side or the other, the parties are ready to take advantage of Order XIX., r. 28. In nine cases out of ten I cannot doubt, from my own experience of the matter, that the solicitors would be quite well aware whether Order XIX., r. 28, could be applied to the case without any necessary resort either to the registrar or to the judge. If both parties are not ready to deliver preliminary acts, or one of them declares himself unable or unwilling, then the matter should be raised by summons in the registry. It has been raised by summons in the registry in numerous cases to which I have been referred. I had a case under my consideration while I had these papers before me, a case known to many of the counsel here in court, the case of *The Eclipse.* (*a*)

That was a "third party" collision where there were cross-actions and where preliminary acts were delivered without difficulty and without protest by all the parties.

In this case I do not know what the particular facts are. It may be that the defendants here who are sued, not having been parties to the collision, may be unable to deliver a preliminary act. If they are able to deliver a preliminary act, in my judgment they ought to deliver it. In my view the court has jurisdiction to order them to deliver a preliminary act if in the opinion of the court it shall appear that there is mutuality in the exchange of preliminary acts or that there may be.

What I propose to do in this case is to make no order upon the appeal except that the costs of the appeal, being the costs of the summons adjourned into court, be costs in the cause. I recommend to the parties to exchange the communications which commonly are exchanged between solicitors in cases where there is doubt whether a preliminary act can or cannot properly be called for. If those communications have no satisfactory effect, I reserve to the parties liberty to apply to me in respect of the matter of the preliminary acts, and I will endeavour to give them a decision which, if it does not reconcile the decisions which have been put in conflict in respect of this matter, shall be a decision at any rate capable of putting the practice upon a footing on which the advantages of preliminary acts can be fully secured to the parties. These advantges are not only advantages to the parties, but to the court and to the administration of justice. I recommend to the parties in this case to see whether they cannot by agreement determine whether the case is one in which preliminary acts can usefully be filed.

I will add this one further observation. I had recently before me a case where parties had gone to the registry and an order for preliminary acts had been obtained, but one of them in fact delivered a blank document. That of course is in the nature of an affront to the order of the court. I should myself, if I had made the order for the preliminary act, have required that it should be complied with in a different manner. I am quite sure that, among those accustomed to practice in this court, there will be a disposition and a desire to maintain for the purpose of the administration of justice in this Division the enormous advantage which is derived by the filing of preliminary acts whenever it is possible, with due observance of the mutual rights and obligations of the parties, that such acts should be filed.

(*a*) In *The Eclipse*, the owners of the steamship *Ville de Nantes* sued the owners of the tug *Eclipse* to recover damage sustained in a collision between the dumb barge *Kingsley* (in tow of the *Eclipse*) and the *Ville de Nantes*. In another action the owners of the *Kingsley* sued the owners of the *Ville de Nantes*. Judgment was given by Lord Merrivale on the 27th March 1925.

Solicitors for the plaintiffs, *Lawrence, Jones, and Co.*

Solicitors for the defendants, *Holman Fenwick, and Willan.*

June 12 *and* 15, 1925.

(Before BATESON, J.)

THE ST. NICOLAI. (*a*)

Vessel going aground owing to negligent navigation — Collision with pier — Vessel subsequently grounding and breaking up—Abandonment by master and crew—Damage caused by pieces of wreckage drifting against the pier—Failure to take reasonable care to prevent vessel from doing damage to the pier.

Owing to negligent navigation the defendants' vessel went ashore in bad weather in a position about half a mile from the plaintiffs' pier. It was held at the trial that the master could and ought to have been aware of the position of the pier. Subsequently she was got off, but she drove against the pier, doing damage, and finally went ashore again in the vicinity of the pier, where she was abandoned by her master and crew, and subsequently broke up. Pieces of the wreckage drifted against the pier doing further damage.

Held, that the damage caused on the first contact was a consequence of the failure of the master to take reasonable care to prevent his vessel from doing injury to the pier ; and that the defendants were also liable for the damage done on the

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

second occasion, since the weather conditions prevailing after the second grounding were not abnormal, but were such as were likely to be encountered in the locality.

DAMAGE ACTION.

The plaintiffs were the owners of the Middlesbrough Estate Limited, owners of Saltburn Pier, and claimed against the defendants, W. Tyzzer and all others, the owners of the sailing ship or vessel *St. Nicolai*, in respect of damage done to their pier by the *St. Nicolai* on the 7th May 1924, when the *St. Nicolai* owing, as the plaintiffs alleged, to negligent navigation and (or) management, struck the pier doing damage. The *St. Nicolai* afterwards went aground, where she broke up, large portions of the wreck drifting against the pier doing further considerable damage, in respect of which the plaintiffs also claimed. The facts fully appear from the judgment.

Dunlop, K.C. and *Digby* for the plaintiffs.

Dumas for the defendants.—The defendants, even assuming that there was negligent navigation, are at least not responsible for the damage done by the drifting pieces of the wreck, which was not a reasonable and probable consequence of the negligence.

Reference was made to :

The Douglas, 5 Asp. Mar. Law Cas. 15; 47 L. T. Rep. 502; 7 Prob. Div. 151;
River Wear Commissioners v. *Adamson*, 3 Asp. Mar. Law Cas. 521; 37 L. T. Rep. 543; 2 App. Cas. 743;
Romney Marsh (Bailiffs) v. *Trinity House*, L. Rep. 5 Ex. 204; affirmed L. Rep. 7 Ex. 247.

June 15.—BATESON, J.—In this case my judgment is for the plaintiffs. I have no hesitation in accepting the evidence of the fishermen in the matter; and I do not need to recapitulate the facts at any great length.

The *St. Nicolai* was a sailing ship, barquentine-rigged, of 256 tons register and 135ft. length, on a voyage to Leith with china clay, manned by a crew of five hands all told. She was short-handed by one man. She was making, she says, for the Tees for the purpose of effecting repairs, but I am not at all sure that that is not given as an excuse for getting into the difficulty she did. She was in the neighbourhood of this pier at the material time. She says the weather was misty and rainy and that she was coasting along, feeling her way and taking soundings, and that at some period or another, feeling uncertain of his position, the master ported his helm for the purpose of going out to sea. That is what he ought to have done, but he did not do it. He goes on to say that he had apparently been sailing out to sea for about an hour at a speed of two or three knots. That is what he ought to have been doing, but he did not do it; and I am satsified that the fishermen are right when they say they saw him first of all about 1.45 on the 7th May, about half a mile from the pier. Seeing he was heading into land, the *Remembrance* made an offer to assist him; and he declined, still going towards shore. At 3.30 a second offer was made and that again was declined; and at that time I have no doubt the *Remembrance* and the *Sceptre* could have got him out of all his difficulties if he had only taken their assistance. He could have got out of his difficulties himself if he had taken proper measures, which he said he did take, but which I find he did not. At 4.30 he struck the pier. Previous to that he had been warned by the fishermen that he would be into the pier if he did not take steps. He was told he would wash into the pier as the tide flowed; and he was told he would drive into the pier if he kept on as he was going. If he had taken assistance from the fishermen there is no doubt he would have been able to keep out of trouble, because, when he did take assistance when it was too late, somewhere about between five and seven, he himself says in evidence that the two fishermen got him clear of the pier. If he had taken that assistance earlier it would have been much more valuable, because he was in shallower water and driving in. The next morning about 4 a.m. his mast went over the side; and at about 3 p.m. in the afternoon the vessel broke up into several pieces and the pieces washed into the pier and did the damage complained of—the second damage so to speak, the first having occurred when he struck the pier about 4.30.

The facts disclose as bad navigation as well could be. The courses seem to have been steered without regard for safety. The vessel was put on a course headed for land; and though warnings were given the master still proceeded on his way and got ashore. Soundings, if he took them at all, were quite inadequate. He ought to have taken many more soundings; and they would have warned him in plenty of time to keep off the coast. He never used his anchors as he ought to have done. He refused assistance when it was offered to him, and he neglected doing several things which were suggested to him by the local people. He ought to have known where he was going; there was nothing in the weather at all that could possibly account for getting into the position he did if he had been using any care at all. He says it was misty and raining. All the more ought he to have kept out from the coast. His duty, I think, is quite clear as set out in *River Wear Commissioners* v. *Adamson* (37 L. T. Rep. 543; 2 App. Cas. 743, at p. 767). Lord Blackburn there says, speaking of the plaintiff: "But he does establish such a liability against any person who either wilfully did the damage or neglected that duty which the law casts upon those in charge of a carriage on land and a ship or a float of timber on water, to take reasonable care and use reasonable skill to prevent it from doing injury, and that this wilfulness or neglect caused the damage." Here, the master of the *St. Nicolai* knew or ought to have known of the position of this pier. It is marked

on the chart. It is shown to have no light; and he was standing straight into the pier, having got close into land through very careless navigation. Reasonable care would have told him exactly where he was going and the danger of getting into collision with this pier on the course he was steering and the way he was managing his ship. I have no doubt he neglected to take any reasonable care to prevent his ship doing the injury complained of.

Mr. Dumas takes the point that negligence in the air, as he puts it, does not make him liable, but I do not think it was negligence in the air. He knew or ought to have known the position of this pier and ought to have kept clear of it.

Then comes the question of whether, after having got into the position he did, he is responsible for the subsequent breaking up and for the pieces going into the pier. I think it is all one history. I put to the Elder Brethren the question whether the increase of wind on the 8th, as shown in the Flamborough Lighthouse report, from force 4 at three in the afternoon and six in the afternoon up to force 7 at nine o'clock, was such a wind as would be likely to be encountered in the locality; and they say, "Yes, undoubtedly," and there is nothing abnormal in it. I agree that that is the sort of weather you might expect to experience. There is nothing abnormal, and it is the sort of thing you might expect to happen, as did happen in this case, if a master takes his vessel into the position he did. I think I am following the authority of the cases which have been quoted.

For these reasons my judgment is as I have said.

Solicitors: *Downing, Middleton*, and *Lewis*, agents for *Middleton* and *Co.*, West Hartlepool; *J. A.* and *H. E. Farnfield*, agents for *Stephens, Graham*, and *Wright*, St. Austell.

June 18, 19, 23, 24, *and July* 15, 1925.

(Before HILL, J.)

THE LORD STRATHCONA. (a)

Mortgage—Charter-party made prior to mortgage—Notice of charter-party to mortgagee—Action by mortgagee—Order for sale—Intervention by charterers—Performance of charter-party impossible owing to financial position of owners—Sale of vessel by mortgagee not interfering with the performance of the charter-party—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *s.* 34, 35.

A vessel was chartered for ten consecutive St. Lawrence seasons with an option to the charterers for a further three or five seasons. During the currency of the charter-party the owners mortgaged the vessel to the plaintiffs, who had notice of the charter-party. Ultimately the mortgagees commenced an action in rem and obtained judgment and an order for sale. The charterers intervened, claiming that the charter-party was subsisting and that the plaintiffs were not entitled to deal with the vessel save in accordance therewith. It appeared that at the time of the commencement of the action the owners were not in a financial position to provide the sums required to enable the vessel to go to sea and make the necessary voyage to Montreal to perform the charter-party.

Held, that in these circumstances the owners were incapable of any further performance of the charter-party, and that the arrest by the mortgagees and a sale at their instance had not, and would not, do anything to interfere with the performance of the charter-party.

De Mattos *v.* Gibson (4 *De. G. & J.* 276) *considered.*

MORTGAGE ACTION.

The plaintiffs, the Old Colony Trust Company, by a writ *in rem* issued the 31st Dec. 1924 claimed, under registered mortgages on the steamship *Lord Strathcona*, dated respectively the 19th Dec. 1919 and the 10th May 1922, repayment of the unpaid principal and interest thereon under each mortgage against the said steamship and her freight.

By their statement of claim the plaintiffs alleged that on the 19th Dec. 1919 the Lord Strathcona Steamship Company Limited, the registered owners of the steamship *Lord Strathcona*, then of the Port of Liverpool, mortgaged the said steamship to the British Steamship Investment Trust Limited to secure payment of the sum of 70,000*l.*, with interest thereon at 6½ per cent. The said mortgage was in the form prescribed by the Merchant Shipping Acts, and was duly registered on the 24th Dec. 1919. In 1920 the port of registry of the *Lord Strathcona* was changed from Liverpool to Montreal. On the 19th June 1922 the mortgage was duly transferred to the plaintiffs, and the transfer registered at Montreal on the 13th July 1922. It was alleged that default in payment of principal and interest had been made, and that there was due to the plaintiffs the sum of 28,800*l.* by way of principal together with interest thereon at 6½ per cent. from the 19th June 1922. The plaintiffs further claimed that on the 10th May 1922 the Lord Strathcona Steamship Company Limited, the registered owners of the steamship *Lord Strathcona*, mortgaged the said steamship to the plaintiffs to secure moneys due or to be due to the plaintiffs under an account current between the said owners and the plaintiffs, and arising under the circumstances set out in the said mortgage. The mortgage was duly registered at Montreal on the 10th May 1922. It was alleged that the defendants had made default in repayment of principal and interest and that there was due and owing to the plaintiffs the sum of 40,109.38 dollars, with interest thereon at 8 per cent. The plaintiffs claimed judgment pronouncing for the validity of both mortgages and for the validity of the

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

transfer of the first mortgage to the plaintiffs, judgment against the *Lord Strathcona* and her freight for the amount due to the plaintiffs under each mortgage by way of principal and interest; if necessary, a reference to the registrar to assess the amount due to the plaintiffs under each mortgage; and the sale of the ship. No appearance was entered on behalf of the defendants, and on the 26th Jan. 1925 Lord Merrivale, P. pronounced for the validity of both mortgages and the transfer, and condemned the *Lord Strathcona* in the amount of principal and interest due on the said mortgage, and in costs, charges, and expenses, but without prejudice to priorities, and ordered a reference and appraisement and sale of the *Lord Strathcona.*

On the 11th Feb. 1925 an appearance was entered for the Dominion Coal Company as interveners, and on the 3rd March leave was given to the interveners to counterclaim. Accordingly the interveners on the 13th March 1925 delivered a defence putting in issue the statement of claim, and a counterclaim, to which the Lord Curzon Steamship Company Limited, the Lord Strathcona Steamship Company Limited (No. 1), and the Lord Strathcona Steamship Company Limited (No. 2) were joined with the plaintiffs as defendants.

By their counterclaim the interveners alleged that by a charter-party dated the 20th April 1914 the said steamship was chartered by her then owners, the Lord Curzon Steamship Company, to the interveners for ten consecutive St. Lawrence seasons commencing with the year 1915 with the option to the interveners of continuing the charter for further periods of five and three more St. Lawrence seasons. The *Lord Strathcona* was delivered to the interveners after her release from requisition by the British Government on the 10th July 1916, and remained in their service during the St. Lawrence season. It was further alleged that the *Lord Strathcona* was subsequently sold or transferred to the Century Shipping Company, the Lord Lathom Steamship Company, the Lord Strathcona Steamship Company (No. 1), and the Lord Strathcona Steamship Company (No. 2) successively.

On the 19th Dec. 1919 the Lord Strathcona Steamship Company (No. 1), the then owners of the *Lord Strathcona*, purported to mortgage the *Lord Strathcona* to the British Steamship Investment Trust Limited to secure the sum of 70,000*l.* and interest. By letter dated the 24th April 1922 from the interveners to the plaintiffs the plaintiffs were reminded of the fact that the *Lord Strathcona* was under charter for a great number of years at 4*s.* 6*d.* per ton for the summer months, and were notified that the charter must be fulfilled by the ship either by her then owners or any future owners or if acquired by purchase or foreclosure of mortgages that might have been placed upon her at any time after she first entered into the charter-party. On the 10th May 1922 the Lord Strathcona Company (No. 2), the then owners of the steamship *Lord Strathcona*, purported to mortgage the vessel to the interveners to secure sums payable by the company on current account, which mortgage was duly registered on the 10th May 1922 at Montreal. On the 19th June 1922 the British Steamship Investment Trust Limited purported to transfer the first mortgage to the interveners. On the 2nd July 1919, having been released from requisition, the *Lord Strathcona* was delivered to the interveners and remained in their service until the close of the St. Lawrence season. On the 9th July 1920 the *Lord Strathcona* was again delivered to the interveners and was in their service for the St. Lawrence seasons of 1921, 1922, 1923, 1924. The interveners duly exercised their option to continue the charter for the further period of five seasons. The interveners claimed a declaration that the charter-party was at all material times contractually binding between the interveners and the Lord Strathcona Steamship Company Limited, and an order that the sale of the *Lord Strathcona* by the marshal should be made subject to the condition that the purchaser should not use or deal with the vessel in any way inconsistent with the service of the interveners under the charter-party. An injunction was claimed restraining the defendants to the counterclaim from using, mortgaging, selling or otherwise dealing with the steamship *Lord Strathcona* in any way inconsistent with her employment in the service of the interveners under the charter-party. (Declarations that various transactions relating to the *Lord Strathcona*, including both the mortgages above referred to, were invalid upon the ground of failure of the Lord Strathcona Steamship Company (No. 1) to comply with certain provisions of the Canadian Companies Acts are not material to the matters reported.)

The plaintiffs, by their reply and defence to counterclaim alleged that, in breach of the express provision of the indenture of the 19th Dec. 1919, collateral to the statutory mortgage, to keep the *Lord Strathcona* classed A1 at Lloyds, and in breach of a similar term implied in the mortgage of the 10th May 1922, and of implied terms in both indentures that the owners would keep the vessel seaworthy and fit for trade, the owners had failed to perform necessary repairs estimated to cost 2200*l.*, and were without funds to put the said repairs in hand. Further, it was an implied term in both indentures that the owners would not create maritime liens or rights *in rem* upon the vessel which they had not the necessary funds to discharge, and should not by failing to make or keep the steamship seaworthy or fit to trade in any way impair the value of the steamship as security to the plaintiffs, and that the owners were without the requisite or any funds to enable the said steamship to trade or to repair her or to keep her laid up without creating maritime liens or rights *in rem* upon her which they were unable to discharge. In particular, the repairs required to enable the vessel to keep her class exceed 2200*l.*, the expense of taking her from

Newport (Wales) to Sydney, C.B., so as to be at the disposal of the interveners would exceed 1580*l*. The wages bill for the crew would exceed 550*l*. per month, the wages of the master and some of the crew were already in arrears, and sums for necessaries amounting to 88,125 francs had already been incurred at Antwerp and remained unpaid. The plaintiffs alleged that the mortgagors had no funds and no credit, and were unable to perform the charter-party, and (or) had repudiated the same, and that by reason of the said facts, and by reason of the nature of the charter-party, the charter-party impaired the security of the plaintiffs in the said ship. [The arguments of counsel on the counterclaim only are reported.]

Sir *Leslie Scott*, K.C., *Balloch*, and *F. Hinde*, for the interveners.—The charter-party is beneficial, and therefore the mortgagor has no power to interfere with it. But if, alternatively, the charter-party is not beneficial, the mortgagees had notice of it, and it is therefore binding upon them: see dicta of Lord Chelmsford, and Knight-Bruce, L.J., in *De Mattos* v. *Gibson*, 4 De G. & J., p. 276.

Greene, K.C., *Alfred Bucknill*, *Buckmaster*, and *Sinclair Johnstone*.—As to the counterclaim the plaintiffs formulate their contentions as follows: (1) Notice or no notice, no charter-party (not a demise) if made before the mortgage, binds the mortgagee; (2) in any event the charter-party in this case is of such a nature (viz.—as to length, rate, &c.), as to impair the security, *e.g.*, by hampering the sale, and upon that ground is not binding upon the mortgagees; (3) but if the mortgagee is bound, the mortgagor is, in any case, not financially in a position to perform the charter-party, and a sale of the vessel free from the charter obligations does not interfere with its performance; (4) further, if the owner attempts to perform the charter-party his action in so doing will be such as to impair the mortgagees' security. It is submitted that the question is: Has the mortgagee put the charterer in any worse position than that in which he would have been had the mortgagee never intervened? The answer is that nothing which the mortgagee is doing interferes with the performance of the charter-party by the owners.

As to *De Mattos* v. *Gibson* (*sup.*) and the argument based upon the dicta in that case by the interveners, the general proposition of law is clear that a contract between the owner of a chattel and another person does not affect a person who subsequently buys the chattel from the owner: the doctrine of covenants running does not affect chattels, but is confined to land. It is submitted that the dicta relied upon are insufficient to make a maritime mortgage an exception to the general rule. As a matter of procedure the charterer has merely a right to proceed *in rem*; if the vessel is sold, the seller fails to perform the charter, and the rights of the charterer, assuming that the charter is binding, are against him. Sale by the marshal vests a perfect title in the purchaser (see Williams and Bruce, 3rd edit., p. 318), and the charterer cannot insist on a sale subject to conditions, and cannot stand in a better position than any other person with a right *in rem*, where rights like his are merely contractual: (See *The Aneroid*, 3 Asp. Mar. Law Cas. 418; 1877, 36 L.T. Rep. 448; L.R. 2 Prob. Div. 189). There is no contractual obligation upon the mortgagee: (See Merchant Shipping Act 1894, s. 34); the mortgagee is not the owner, and sect. 34 merely means that he is to be taken to acquiesce in whatever is done by the mortgagor: (*Johnson* v. *Royal Mail Steam Packet Company*, 1867, 17 L. T. Rep. 445; L. Rep. 3 C. P. 38; *The Heather Bell*, 9 Asp. Mar. Law Cas. 192; 84 L. T. Rep. 794; (1901) P. 272; where the charter-party was made after the mortgage; and also see *Law Guarantee and Trust Society* v. *Russian Bank for Foreign Trade*, 10 Asp. Mar. Law Cas. 41; 92 L. T. Rep. 435; (1905) 1 K. B. 815). Finally it is submitted that upon the facts the charter-party in this case prejudices the mortgagees' security. Reference was made to *The Celtic King* (7 Asp. Mar. Law Cas. 440; 70 L. T. Rep. 562; (1894) P. 175)

Carpmael for the Lord Curzon Steamship Company.

Sir *Leslie Scott*, K.C. replied.—A rule has been recognised to exist since the case of *De Mattos* v. *Gibson* (*sup.*) that a mortgagee is bound by a charter-party of which he has notice, and will be restrained in equity from dealing with the vessel otherwise than in the service of the charterer. When such a rule has been in daily mercantile use for a long period it has been repeatedly laid down that it should not be disturbed, notwithstanding that it may not be in harmony with the general principles of law. The rule which this court is asked to act upon though based upon dicta only should nevertheless not be disturbed.

Cur. adv. vult.

July 15.—HILL, J.—This case involves the relative rights of the plaintiffs as mortgagees of the *Lord Strathcona* and the interveners as charterers of the *Lord Strathcona* under a charter-party made in 1914 for seasonal employment of the ship over a period of years.

Before the completion of the ship the charter-party in question was entered into between the interveners and the building owners, the Lord Curzon Steamship Company. The charter-party was expressed to be "of a good British registered steamship to be built" of a specified description, and the *Lord Strathcona* was the steamship.

There were several changes in ownership by transfers from the Lord Curzon Steamship Company to the Century Shipping Company, and thence to the Lord Lathom Steamship Company and thence to the Lord Strathcona Steamship Company (No. 1) and thence to the Lord Strathcona Steamship Company (No. 2). The Lord Strathcona Steamship Company (No. 1) became owners by transfer on the 18th Dec. 1919, and the Lord Strathcona Steamship

Company (No. 2) by transfer on the 22nd June 1920. All these successive owners knew of the charter-party.

With intervals of requisition the charter-party was performed down to and including the season of 1924, subject to this, that a question arose after the war as to whether the charter-party had ceased to be subsisting, and from season to season agreements were made whereby that question was kept open. That question was litigated in Canada and is under appeal to the Judicial Committee. So far the charter-party has been held to be subsisting.

In order to raise money for the purchase the Lord Strathcona Steamship Company (No. 1) borrowed 70,000*l.* of the British Steamship Investment Company upon the security of a first mortgage dated the 19th Nov. 1919. In June 1922 the plaintiffs became transferees of that first mortgage. Earlier in the same year—1922—the plaintiffs made advances to the then owners, the Lord Strathcona Steamship Company (No. 2). The money was required for repairs and other disbursements. It was a dollar advance and was secured by a second mortgage dated the 10th May 1922, which was an account current mortgage. The first mortgeag carried interest at 6½ per cent., and the second mortgage at 8 per cent.

At the time of the granting of the first mortgage the British Steamship Investment Company knew of the charter-party and its terms. Before the execution of the second mortgage, and therefore also before the transfer to them of the first mortgage (if that fact be material), the plaintiffs had received from the interveners a letter dated the 24th April 1922. I hold that that letter was notice to the plaintiffs of the charter-party and its terms.

The ship came off service under the charter-party on the 20th Nov. 1924 and was loaded with grain for Antwerp, where she arrived on the 13th Dec. 1924. While she was on that voyage the plaintiffs determined to exercise their rights as mortgagees. The owners were in default. On the first mortgage there was owing 28,800*l.* and interest from the 18th June 1922. There had been a failure to pay an instalment of principal moneys on that date and the whole balance had thereupon become payable. On the second mortgage the principal moneys were payable on demand. On the 4th Dec. 1924 the plaintiffs demanded payment. The amount due was 40,109 dollars 38 cents, which, at the rate of exchange on the 4th Dec. 1924, equalled 8565*l.* 16*s.* 1*d.* Interest was also due from the 31st Oct. 1924. I take these figures from the affidavit. As between the plaintiffs and the owners there may be some detail for investigation on a reference, but for the present purpose they may be taken as substantially accurate. The account H.9, and the account prepared for the plaintiffs by Mr. Baker as to the position on the 31st March 1925 are really in agreement when it is borne in mind that the first mortgage was a sterling and not a dollar mortgage. The total indebtedness for principal and interest on the 4th Dec. 1924 was therefore over 42,000*l.*, if I have worked out the figures correctly; they are approximately correct, and sufficient for the present purposes. There was due on the first mortgage on that date 28,800*l.* for principal, and 4605*l.* for interest, totalling 33,805*l.*; and on the second mortgage 8565*l.* for principal and 63*l.* for interest, totalling 8628*l.*, making a grand total of the two mortgages of 42,433*l.* Of course, interest continued to run to the amount of 1862*l.* per annum on the first mortgage, and 3208 dollars—something short of 700*l.* according to the rate of exchange per annum on the second mortgage, making a total of about 2550*l.* per annum for interest.

In these circumstances, and having regard also to the fact that the ship's No. 2 special survey was overdue, and that the necessary repairs would have to be done before the ship could again cross the Atlantic, the plaintiffs gave directions that the ship should proceed from Antwerp to the United Kingdom, and the owners complied. The plaintiffs made a further advance to the owners to enable the ship to get away from Antwerp. She arrived at Newport, Mon., towards the end of Dec. 1924.

On the 31st Dec. the plaintiffs began the present action. The ship was arrested. The owners entered no appearance. On the 26th Jan. 1925 judgment was given by default, condemning the ship and ordering a reference and appraisement and sale. On the 11th Feb. 1925 the Dominion Coal Company Limited, the charterers, intervened. By an order of the 3rd March 1925 the sale was directed to stand over until further order, and other directions were given in pursuance of which the interveners delivered a defence and also a counter-claim to which they made the Strathcona Companies and the plaintiffs defendants. The Strathcona Companies have not appeared. The issue for trial is between the plaintiffs and the interveners. The interveners have put forward two contentions: (1) That all transactions with and by the Strathcona Companies are invalid because neither company was formed according to the laws of Canada; and (2) that the charter-party is binding on the plaintiffs as mortgagees, and that the plaintiffs can only exercise their rights subject to the charter-party.

As to the first contention, I asked and received no satisfactory answer to the question. What right have the interveners to raise this contention at all in this action? The interveners have a contractual right and nothing more. I cannot see what *locus standi* they have to dispute the validity of the plaintiffs' mortgages. But I need not further consider this, for the interveners took the benefit of the performance of the charter-party by the Lord Strathcona Steamship Company (No. 2) as owners for several seasons, and cannot now be heard to say that the Strathcona Company never were owners. As to the second contention, while it is clear that the interveners cannot, as against the plaintiffs, dispute the judgment which pronounced for the validity of the mortgages and condemned the ship,

they are entitled to be heard when they allege that, by reason of their contractual right the plaintiffs ought to be restrained from exercising their own rights as mortgagees in such a way as to interfere with the contractual right of the interveners, and the question is whether the interveners are entitled at all, or on the facts of this case to limit the plaintiffs' right to procure a sale by the court. They cannot question the judgment *in rem*. Can they interfere with the plaintiffs' right to obtain execution of that judgment by appraisement and sale? A similar question would be involved if, instead of proceeding *in rem*, the plaintiffs had taken possession and proposed to sell or to use the ship without regard to the charter-party.

The charter-party made in 1914 was for ten consecutive St. Lawrence seasons commencing with 1915, with an option for five more seasons and a further option for three more seasons. The option for five more seasons was duly exercised by notice to the Strathcona Company on the 24th Oct. 1922. The time for the exercise of the further option has not yet arrived. The interveners, therefore, have a subsisting contract with the Strathcona Company whereby the Stratchona Company have undertaken to put the ship at the interveners' disposal for the St. Lawrence seasons of 1925–29 inclusive, with a further option as to 1930, 1931, and 1932.

While I am on the charter-party it will be convenient to state that it provides a cancelling date of the 15th May in each year, and adds, "but if cancelled any season said cancellation to apply to that one season only." The St. Lawrence season lasts about seven months, and the charter-party leaves the owners free as to the disposal of the ship during the rest of the year.

The matter at issue is of importance both to the interveners and the plaintiffs. The interveners say that the ship is peculiarly fitted to their trade and are anxious to retain it. The plaintiffs, if they must sell with the benefit of the charter-party, are very unlikely to realise enough to pay the debt, interest, and expenses. For the plaintiffs the ship was valued in the open market and free of engagements at 53,000*l*. in February last, and 50,000*l*. at the end of June. This is for a ship in good condition, and the necessary repairs will cost some 3000*l*. But the plaintiffs' evidence is that if offered for sale subject to the charter-party the ship will be unsaleable or will realise a very small sum. The charter-party requires the ship to be British registered and as the interveners' trade is a Canadian coasting trade they must have a British ship, and no foreign owner could buy and perform the charter-party. He would have to transfer to British owners. The interveners gave evidence of an offer of 45,000*l*. for the vessel with her survey passed (that is, with some 3000*l*. spent on her) and with a guarantee of freight at 4*s*. 6*d*. (the charter-party rate) for seven seasons. But the offerer was Scandinavian and he could not himself become the owner and fulfil the charter-party. Further, as affecting the price, the charter-party engagement is of a peculiar kind, apart from the number of years. A buyer would have to consider not merely whether the charter-party will be profitable, but what he should do with the ship during the five months of each year and whether the year's working would show a profit. He would also have to consider that the interveners had an option for a further three years after 1929. It seems to me that these considerations must depress the selling value, and I accept the plaintiffs' evidence that the charter-party would probably prevent a sale altogether. Even if sold free of all engagements, in her present condition it is doubtful whether, after deduction of the marshal's expenses and costs of the action, the proceeds would do more than satisfy the present claims against the ship.

Such being the interests involved, the interveners say that the law is clear. They say, first, that the charter-party does not impair the security, and, secondly, if it does, the plaintiffs had notice and cannot deal with the ship without regard to the charter-party. The plaintiffs contentions are, first, they say that notice or no notice a mortgagee is not bound by a charter-party made before the mortgage; secondly, that this charter-party is one which impairs the security; and, thirdly, that the owners were in December, and are, unable to perform the charter-party, being without funds and without credit, and that a sale will do nothing to prevent the performance of the charter-party which the owners were already incapable of performing.

From what I have already said, it is apparent that the charter-party is such as to impair the security. It must always have greatly hampered the mortgagees' power of sale. It seems to me to be even more hampering than the agreement in *The Celtic King* (7 Asp. Mar. Law Cas. 440; 70 L. T. Rep. 562; (1894) P. 175). But the mortgagees had notice. This raises the important question which was the main subject of argument. For the purposes of this argument it makes no difference whether the charter-party is such as impairs the security or not. Does a charter-party with the owner of a ship bind a subsequent mortgagee with notice? The dictum of Knight-Bruce, L.J. in *De Mattos* v. *Gibson* (reported in 4 De G. & J., 276) has been shown by later cases to be unsound. As said by Buckley, L.J. in the *London County Council* v. *Allen* (111 L. T. Rep. 610, at p. 614; (1914) 3 K. B. 642, at p. 658): "Notwithstanding what was said by Knight-Bruce, L.J., in *De Mattos* v. *Gibson* (*sup.*), it is not true as a general proposition that a purchaser of property with notice of a restrictive covenant affecting the property is bound by the covenant"; and by Scrutton, L.J. in *Barker* v. *Stickney* (120 L. T. Rep. 172, at p. 176; (1919) 1 K. B. 121, at p. 131): "As to personal property it was found that the general rule of Lord Justice Knight-Bruce was quite impracticable and *Taddy* v. *Sterious* (89

L.T. Rep. 628; (1904) 1 Ch. 354), *McGruther* v. *Pitcher* (91 L. T. Rep. 678; (1904) 2 Ch. 306) and *Dunlop* v. *Selfridge* (113 L. T. Rep 386; (1915) A. C. 847) have settled the law that the purchaser of a chattel is not bound by mere notice of stipulations made by his vendor unless he was himself a party to the contract in which the stipulations were made." Notwithstanding this, in the more limited dictum of Lord Chelmsford in *De Mattos* v. *Gibson* (*sup.*) still law as regards ships, where he says on p. 299 of the 4 De Gex and Jones: "It is true that he took his mortgage with a full knowledge of the charter-party, and that he must, therefore, abstain from any act which would have the immediate effect of preventing its performance."

Several cases were referred to. In *Messageries* v. *Baines* (7 L. T. Rep. 763) Wood V.-C. held a purchaser with notice bound by the charter-party made before purchase, but expressly founded his decision on *De Mattos* v. *Gibson* and said: "It is not competent for me to fall back on any opinion I may have entertained before that case." In *Cory* v. *Stewart* (2 Times L. Rep. 508), in the Court of Appeal, it does not appear from the report that the mortgage was before the charter-party. In *Herne Bay Steamboat Company Limited* v. *Hutton* (9 Asp. Mar. Law Cas. 472; 89 L. T. Rep. 422; (1903) 2 K. B. 692) the injunction referred to in the judgment of Stirling, L.J. would be an injunction against the owner, and the dictum does not help. *The Celtic King* (7 Asp. Mar. Law Cas. 440; 70 L. T. 562; (1894) P. 175) has a more direct bearing though not a direct authority for, firstly, the arguments and the judgment all proceed on the assumption that notice makes all the difference, and, secondly Barnes, J. keeps it open whether even without notice, ordinary engagements of the ship may not bind a subsequent mortgagee (Asp. Mar. Law Cas., p. 444; 70 L. T. Rep., p. 567; (1894) P., p. 187). As to contracts which do not impair the security made during the mortgage there is abundant authority that they bind the mortgagee, though all that the statute, the Merchant Shipping Act 1894, s. 32, provides is that "except so far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not, by reason of the mortgage, be deemed the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be owner thereof;" and all that the mortgagor not in possession does is to leave the owner in possession and in a position to enter into contracts for the employment of the ship which are contracts to which the mortgagee is not a party.

Some day this difficult question will have to be decided. But in the present case I have come to the conclusion that the interveners fail for another reason. In my judgment the plaintiffs have established their third contention. The owners are incapable of further performing the charter-party, beyond all hope of recovery. I take the position of the owners in December last at the end of the Antwerp voyage. To enable the ship to leave Antwerp they had to borrow of the plaintiffs a further 3500 dollars—say about 720*l.* They owed, and still owe, the Antwerp agents—Ruys and Co.—88,732 francs and this claim Ruys and Co. can enforce against the ship—something over 900*l.* The ship was bound to undergo repairs and overhaul before she could again cross the Atlantic or indeed be employed at all. No. 2 special survey was due in May 1923; an extension was granted until May 1924, and a further extension over the 1924 St. Lawrence season. It could not further be postponed. Moreover, the ship had not been dry docked since March 1924. If the necessary repairs and overhaul to enable the ship to pass her survey and be made again fit for sea are carried out the cost will be over 3000*l.* It is anticipated by the owners that 1500*l.* of that will be recovered from the underwriters—but, of course, the recovery will not be immediate. I say "over 3000*l.*" for the owners' account, H. 9, estimates 3500*l.* and Mr. Flannery, for the plaintiffs, estimated 3529*l.*, or without repair to some plates amidships, as to which there was some question, 3279*l.* These figures are confirmed by estimates of the Cardiff Channel Dry Dock Company amounting to 2279*l.*, which do not include the following items: Dock rent and dues, shifting to dry dock, painting, repairs to crew accommodation and engine repairs. I take this figure at about 3000*l.* less the 1500*l.* stated to be recoverable ultimately; and in addition there must be some wages during repairs which would have to be added. I have not put a figure against that. There remains the cost of getting the ship from the United Kingdom to Montreal for the 1925 season. Mr. Oliver, for the plaintiffs, estimated this at 1137*l.* 10*s.* Capt. Clibborn estimated it at 1300*l.* plus insurance and commissions, say, at least, 1200*l.* This gives a total of 5820*l.* cash or, deducting the 1500*l.*, 4320*l.* Mr. Harling, in his evidence given on the 1st June 1925, said that to bring the ship out required at least 30,000 dollars—say, 6200*l.* —which confirms the above figures.

Before the owners could begin to earn the charter-party freights they had to find over 4300*l.*, or in immediate cash nearly 6000*l.* They could not possibly do it. They had no cash and no credit. They had the ship, and nothing else. The ship was subject to the plaintiffs' mortgages on which over 42,000*l.* was owing and interest running at the rate of 2550*l.* per annum. Nothing could prevent the plaintiffs recovering a judgment *in rem*, and the ship being subject to it. Ruys and Co. were in a position to sue *in rem* for their disbursements. It is idle to suppose that the owners could have raised any money on the security of the ship. Nor does it affect the position that, as appears from the evidence, the charter-party freight would have shown a substantial profit on the 1925 St. Lawrence season. The owners were

powerless to get the ship away from the United Kingdom. It was contended for the interveners that for the winter months 1924-1925 the owners suggested, and could have secured, a profitable voyage to the Plate and back with coal and grain. Mr. Harling suggests in his evidence that there would have been a profit. Mr. Angier, called for the interveners, gave evidence and figures which show that there would have been a heavy loss. Mr. Glover, for the plaintiffs, gave evidence and figures which showed a loss, though not so heavy a loss as that which would result from Mr. Angier's evidence. It is to my mind clear that there would have been a loss, and that at the end of such a voyage the owners' position would have been worse than if they had laid the ship up until the time came for the 1925 charty-party season. And, before such a voyage could be undertaken, there would still be the necessity of the owners having to find the money for repairs.

I am satisfied that the mortgagees' interference did nothing to prevent the owners fulfilling the 1925 season. Then what as to the future? The owners are still bound by the charter-party. But in succeeding years the owners will be in a still worse position. Having no funds to get the ship away, they cannot employ her even if any profitable freight should offer; and it is notorious that freights are worse now than in December last. While the ship is idle lay-up expenses will be running on, and probably the ship will become subject to possessory liens or rights of some harbour or dock authority to detain and sell and to maritime liens for wages, for someone must be kept on board. In the meantime the mortgage interest will be accumulating, and the plaintiffs, if they choose to do so, can sue the owners *in personam* in Canada and recover judgment for principal and interest and force the Strathcona Company into liquidation.

Moreover, Ruys and Co.'s claim (for which they have entered a caveat) will remain unsatisfied, and nothing but payment could prevent them from issuing a writ *in rem* and recovering judgment and an order for sale.

In my judgment the Strathcona Company was in December last, and is now, incapable of any further performance of the charter-party, and the arrest by the plaintiffs has not done, and a sale at their instance will not do, anything to interfere with the performance of the charter-party. The owners are incapable of performing it beyond all hope of recovery. The principle upon which *De Mattos* v. *Gibson* (*sup.*) was actually decided by Lord Chelmsford applies, and as to that principle there is not, and never has been, any question. I, therefore, am of opinion that the judgment for the plaintiffs will stand, and the costs of and occasioned by the intervention will be the plaintiffs' costs against the interveners. Their original costs they have got against the ship.

Solicitors: Messrs. *Ince, Colt, Ince,* and *Roscoe*; Messrs. *William Crump* and *Son*; Messrs. *Charles Lightbound* and Co.

House of Lords.

June 18 and July 17, 1925.

(Before Lords CAVE, L.C., DUNEDIN, ATKINSON, SUMNER, and BUCKMASTER.)

UNION-CASTLE MAIL STEAMSHIP COMPANY LIMITED *v.* SENA SUGAR ESTATES LIMITED. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Cargo—Agreement between shippers and shipowners — Construction — "All the sugar the shippers shall have for shipment from Beira"—Cargo brought to Beira by lighters and there transshipped into ocean steamers—Through bills of lading—Effect.

By an agreement made between the respondents, as owners of sugar estates, and the appellants, a shipping company, the respondents bound themselves to ship by the steamship company's steamships, at a certain rate specified in the agreement, "all the sugar which the shippers shall have for shipment from Beira" to certain European ports, and the appellants undertook to provide tonnage for the shipment from Beira of a minimum quantity per month.

Held, that having regard to the course of dealing which obtained before and at the date of the agreement and was well known to both parties, the sugar which the respondents desired to have carried by lighters or coasters from Chinde, a port at which ocean steamers could not load, to Beira, and thence by ocean steamers to any of the European ports mentioned in the agreement, was, within the meaning of that agreement, "sugar which the shippers shall have for shipment from Beira," even although it was carried under a through bill of lading issued at Chinde.

Decision of Court of Appeal reversed.

BY an agreement entered into in June 1922 between the respondents and the appellants on behalf of the British steamship lines (known as the "Conference Lines"), by which the respondents (therein called "the shippers") bound themselves to ship and the Conference Lines (therein called "the owners") agreed to carry, *force majeure* excepted, "all the sugar which the shippers shall have for shipment from Beira to" certain European ports, and the owners undertook to provide tonnage for the shipment from Beira of a minimum quantity of 3000 tons per month if required to do so. Shortly after the conclusion of this agreement the respondents asked the appellants to quote a through rate for carriage of sugar from Chinde to London, and on their declining to do so, proceeded to send the sugar by a German line to some of the European ports covered by the agreement of June 1922. The sugar was loaded at Chinde on lighters, which were towed to Beira and the sugar was there transshipped into the ocean steamers of the German line, through

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

bills of lading being issued by the German line for the carriage of the sugar from Chinde to the European port. The appellants objected to these shipments as being contrary to the agreement of June 1922, and ultimately commenced an action against the respondents for damages for breach of that agreement. The Court of Appeal (Bankes, Atkin, and Sargant, L.JJ.) held, reversing the decision of Bailhache, J., that the expression "sugar which the shippers shall have for shipment from Beira" did not include sugar shipped from Chinde, although it was intended by all parties to be carried to Beira and there loaded on ocean steamers.

The owners appealed.

Porter, K.C. and *D. Davies* for the appellants.

Langton, K.C. and Sir *Robert Aske* for the respondents.

The House took time for consideration.

Lord CAVE, L.C.—This appeal relates to the construction of an agreement entered into in the month of June 1922 between the respondents, the Sena Sugar Estates Limited, and the appellants on behalf of the British steamship lines (known as the "Conference Lines") which carry cargo from Beira to Europe; and in order to explain the meaning of the agreement it is necessary to have in mind the circumstances in which it was made.

The respondents are possessed of three sugar estates on the River Zambesi. From one of these estates (called Caia) the sugar is sent by rail to Beira, and there shipped by ocean-going steamers to Europe. The second estate (called Marromeu) is lower down the river and at a distance from the railway; and the respondents' practice has been to send the sugar from this estate in barges down the Zambesi to the small port of Chinde near the mouth of the river. Owing to a bar, no ocean-going steamer can load at Chinde; and accordingly the sugar was sent from that port by lighters or small coasting vessels to Beira, where it was transshipped into ocean-going steamers for carriage to Europe. The coasters used in this service were sometimes vessels belonging to the respondents, and sometimes vessels belonging to the Conference Lines or to other owners; but in every case the loading on ocean steamers took place at Beira and a bill of lading was issued for the carriage of the sugar from that port to Europe. The sugar from the respondents' third estate (called Mopea) is not shipped to Europe, and it need not be further mentioned.

On the 19th April 1921 an agreement was entered into between the respondents and the appellants on behalf of the Conference Lines by which the respondents (therein called "the shippers") bound themselves to ship and the Conference Lines agreed to carry all the sugar which the shippers should have for shipment from Delagoa Bay or Beira to Europe during 1921 (except that quantity which the Portuguese Government insisted on having shipped by Portuguese steamers to Lisbon) at a certain rate therein mentioned. This agreement was faithfully carried out, but after it had expired, namely, in the month of April 1922 the respondents entered into an agreement with a German Line, the Deutsche Ost-Afrika Linie, whereby the respondents agreed to ship all their sugar from Chinde and (or) Beira destined for Lisbon (with the exception of sugar which they were obliged to ship in Portuguese steamers) up to a certain tonnage by the vessels of the German Line at the rate of 35*s.* per ton f.o.b Chinde, and 26*s.* 6*d.* per ton f.o.b. Beira, both to Lisbon. This agreement became known to the appellants, and on the 9th June 1922 the agreement was entered into which is the foundation of these proceedings. By that agreement the respondents (therein called "the shippers") bound themselves to ship and the Conference Lines (therein called "the owners") agreed to carry, *force majeure* excepted, "all the sugar which the shippers shall have for shipment from Beira to" certain European ports (not including Lisbon) from the date of the agreement to the 30th June 1923 at the rate of 27*s.* 6*d.* per ton, and the owners undertook to provide tonnage for the shipment from Beira of a minimum quantity of 3000 tons per month if required to do so. Shortly after the conclusion of this agreement, the respondents asked the appellants to quote a through rate for the carriage of sugar from Chinde to London, and on their declining to do so, proceeded to send sugar from the Marromeu estate by the German line, not only to Lisbon, but to some of the European ports covered by the agreement of the 9th June 1922. This sugar was sent in precisely the same manner as the sugar formerly sent from Chinde for carriage by the Conference Lines, that is to say, it was loaded at Chinde on lighters which were towed to Beira, and the sugar was there transshipped into the ocean steamers of the German line; the only difference was that through bills of lading were issued by the German line for the carriage of the sugar from Chinde to the European port.

The appellants in vain objected to these shipments as being contrary to the agreement of the 9th June 1922, and ultimately commenced this action against the respondents for damages for breach of that agreement. The action was heard by the late Bailhache, J., who held that, having regard to the course of dealing which obtained when the agreement was entered into, shipments from Beira meant shipments which came down to Beira either by rail or river, and were there put on board ocean steamers, and that the issue by the German line of through bills of lading from Chinde did not prevent such shipments from being covered by the agreement. He accordingly made an order declaring (*a*) that sugar lightered or shipped from Chinde for transshipment at Beira was sugar which the defendants had for shipment from Beira within the meaning of the agreement of the 9th June 1922, and (*b*) that shipments definitely intended for Lisbon and not elsewhere at the time of shipment were not within the agreement. The respondents having appealed to the Court of Appeal, that court

(consisting of Bankes, Atkin, and Sargant, L.JJ.) came to a different conclusion. They were of opinion that the expression "sugar which the shippers shall have for shipment from Beira" meant sugar which they should have for shipment by themselves from that port, and did not include sugar shipped from Chinde, although it was intended by all parties to be carried to Beira and there loaded on ocean steamers; and stress was laid on the fact that the German company issued through bills of lading from Chinde to the European ports. The court accordingly allowed the appeal and substituted for the declaration made by Bailhache, J. a declaration "that sugar entrusted at Chinde to a line other than one of the Conference Lines for shipment to European ports and shipped at Chinde by such other line whether in lighter or coasting steamer belonging to such other line under through bill of lading is not sugar which the defendants had for shipment from Beira within the meaning of the agreement of the 9th June 1922, notwithstanding that the sugar may have been transshipped at Beira into the ocean steamer of such line." It is against this order that the appellants have appealed to your Lordships' House.

The only question to be determined is whether sugar which the respondents desired to have carried by lighters or coasters from Chinde to Beira, and thence by ocean steamers to any of the European ports mentioned in the agreement of the 9th June 1922 was within the meaning of that agreement "sugar which the shippers had for shipment from Beira"; and having regard to the course of dealing which obtained before and at the date of the agreement, and which was well known to both parties, I think that such sugar fell within that description. It is true that, owing to the course adopted by the German line of issuing a through bill of lading from Chinde to Europe, the duty of effecting a transshipment of the sugar at Beira fell upon the servants of that line, and not upon the servants of the respondents; but nevertheless the sugar was intended both by the shippers and by the ship-owners to be carried to Beira and there loaded on ocean steamers for Europe, or, in other words, it was sugar destined for shipment at Beira. If the German company had contracted to carry the sugar to Europe at two separate rate of freight, one from Chinde to Beira, and the other from Beira to the European port, the case would hardly have been arguable; and I do not think that the circumstance that a through rate was specified made any difference in the result. The form of contract was altered, but the course of transit remained the same. I am satisfied that both parties to the contract of June 1922 intended that all sugar sent *viâ* Beira should be covered by the agreement, and it appears to me that they have expressed their meaning with reasonable clearness.

For these reasons, I am of opinion that the appeal should be allowed, and the order of Bailhache, J. restored, with costs here and below, and I move your Lordships accordingly.

Lord DUNEDIN.—The plaintiffs bind themselves not only to keep a line of steamers available for the transport of the respondents' sugar, but they bind themselves to provide accommodation for at least a certain number of tons. As a counterpart, the respondents bind themselves to send by the plaintiffs' line "all the sugar which they have for shipment at Beira." Now I think the meaning of these words "sugar which they have for shipment at Beira" is not, as the majority of the learned judges of the Court of Appeal have held, sugar which at Beira is still under the control of the respondents for shipment to ship as they please, but is sugar which they can and do arrange shall be shipped at Beira. I think, further, that if they arrange with another company to take sugar on lighters or barges at Chinde and then transship it at Beira on to ocean-going steamers, that is just arranging for shipment at Beira. The mere alteration from the old practice of having two bills of lading, one for the coasting service from Chinde to Beira and the other from Beira to Europe, to having one bill of lading covering the whole transit seems to me to be merely a change in the form of the contract of carriage, and not a change in the course of transit as was thought by Sargant, L.J., which view formed the foundation of his judgment. It would be quite different if there could be started a line of steamers going direct from Chinde to Europe. In the condition of the port at Chinde that is impossible, as, owing to the bar, ocean-going steamers cannot get into the port. But, as it is, I think the argument of the respondents is tantamount to holding that a transshipment is not a shipment.

I think the appeal succeeds.

Lord ATKINSON concurred.

Lord SUMNER.—In the sentence, the true meaning of which is the question for decision on this appeal, the object of the mutual stipulations to ship and to carry is sugar, and grammatically, the dependent relative words "which the shippers shall have for shipment from Beira to the undermentioned ports" descriptive of it. The shippers do not bind themselves to ship sugar at and from Beira, and it may be doubted if they themselves ever do ship anything at Beira. In the ordinary course they send their sugar by one route or another to Beira, there to be transshipped, probably by the carriers, into the ocean steamer. Accordingly the question is, "Can it be predicated of the sugar, at the time when the respondents had it in their hands and put it out of their power to give the appellants the benefit of conveying it by placing it in those of the German line under through bills of lading, that it was sugar which the respondents had for shipment from Beira to the named ports?" It seems to me that this can and must be so predicated of the sugar. As it could not be shipped at Chinde for Europe direct, a fact

with reference to which the parties made their contract, but could only be shipped there for some port where ocean steamers can load, of which Beira was the most obvious if not the only one, the sugar was in the respondents' hands as sugar for shipment from Beira. The Court of Appeal thought that, as it was shipped from Chinde under through bills of lading given by agents of the German line, the sugar was in fact for shipment from Chinde, not from Beira. With all respect I cannot agree. The through bill of lading is a matter of the contractual machinery and not of the route. It does not constitute a quality of the cargo. The sugar was some of the respondents' *viâ* Beira sugar and was destined for Europe, and this equally whether it was carried to Beira by rail or barge or coaster, whether under a separate contract or under through bills of lading. It is not as though the words had been "which the shippers shall ship from Beira," though even those words might not have made out the respondents' case. The words in question only identify the sugar, which the appellants are to have the right to carry. Accordingly I think that the appeal should be allowed.

Lord BUCKMASTER concurred.

Appeal allowed.

Solicitors for the appellants, *Parker*, *Garrett*, and *Co.*

Solicitors for the respondents, *Holman*, *Fenwick*, and *Willan*.

June 16 *and July* 24, 1925.

(Before Lords CAVE, L.C., DUNEDIN, ATKINSON, SUMNER, and BUCKMASTER.)

BUNGE Y BORN LIMITADA SOCIEDAD ANONIMA COMMERCIAL FINANCIERA Y INDUSTRIAL OF BUENOS AIRES *v.* H. A. BRIGHTMAN AND CO. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party — Demurrage — Obstruction on railways—Delay due to labour troubles—Government prohibition of export—Charterers' option as to cargo—Charterers' duty to ship alternative cargo.

A ship was chartered to proceed to the River Plate and there to receive a full and complete cargo of wheat and (or) maize and (or) rye. The ship was to be loaded at a certain rate, otherwise demurrage to be paid by the charterers. And it was further provided by clause 30 that if the cargo could not be loaded "by reason of obstructions . . . beyond the control of the charterers on the railways or in the docks or other loading places" no claim for demurrage should be made by the owners. The ship began to load wheat, but owing to labour troubles in connection with one of the railways running to the port delay was caused in bringing the cargo to the ship's side, and before the loading was completed the Government prohibited the export of wheat. Thereupon the charterers began loading maize and completed the cargo therewith. The owners then claimed demurrage and the matter went to arbitration.

On an appeal by the charterers,

Held, that the charterers had failed to show that such obstruction as might have existed on the railway caused by the strike amounted, while the strike lasted, to an obstruction within the meaning of clause 30 of the charter-party and that the charterers were not entitled under that clause to the exemption they claimed.

Held, further, by Lord Atkinson, that when the export of wheat was prohibited and the charterers had to make up their minds what was to be done in this altered condition of things they were entitled to a reasonable time to determine how to deal with those altered conditions and that a reasonable time for this had not elapsed before they proceeded to substitute maize for wheat in loading the vessel.

Decision of the Court of Appeal (ante, *p.* 423, sub nom. H. A. Brightman and Co. *v.* Bunge y Born Limitada Sociedad; 132 *L. T. Rep.* 188; (1924) 2 *K. B.* 619) *affirmed.*

APPEAL by the charterers from the decision of the Court of Appeal (Bankes, Scrutton, and Atkin, L.JJ.) (reported *ante*, p. 423, *sub nom. H. A. Brightman and Co.* v. *Bunge y Born Limitada Sociedad;* 132 L. T. Rep. 188; (1924) 2 K. B. 619), varying a decision of Bailhache, J.

The facts which are sufficiently summarised in the headnote appear fully from their Lordships' judgments.

The action arose out of an award made in the form of a special case upon a dispute as to the demurrage payable by the appellants, the charterers of the respondents' steamship *Castlemoor.*

The Court of Appeal held, affirming the decision of Bailhache, J., that the charterers were not protected by the exception clause: per Bankes, L.J. upon the ground that they could not rely on the "ca' canny" movement since the refusal by the men to work to their full did not prove an obstruction on the railway within the meaning of clause 30; and per Scrutton and Atkin, L.JJ. upon the ground that the "ca' canny" movement and the obstruction it caused to the loading did not come within the exceptions which referred to the railways in the port of loading directly connected with the actual loading which were obstructed. And they held further, varying the decision of Bailhache, J., that the charterers were entitled to a reasonable interval of time in order to enable them to deal with the altered conditions.

The charterers appealed to the House of Lords.

Jowitt, K.C. and *van Breda* for the appellants.

Le Quesne, K.C., Sir *Robert Aske*, and *McNair*, for the respondents, were not called upon.

The House took time for consideration.

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

Lord DUNEDIN.—By a charter-party dated the 14th April 1920, the steamship *Castlemoor* was chartered by the respondents to the appellants upon the terms and conditions therein set out. The steamer was to proceed to one of certain ports in the River Parana where it was to receive from the charterers a cargo of wheat and (or) maize and (or) rye. The steamer was to be loaded at the rate of 500 tons per day, and demurrage was payable at the rate of 250*l.* per day. Provision was made as to the commencement of the lay days.

The charter contained the following clause :

Clause 30. If the cargo cannot be loaded by reason of riots, civil commotion, or of a strike or lockout of any class of workmen essential to the loading of the cargo, or by reason of obstruction or stoppages beyond the control of the charterers on the railways or in the docks or other loading places . . . the time for loading . . . shall not count during the continuance of such causes. . . . In case of any delay by reason of the before mentioned causes, no claim for damage or demurrage shall be made by . . . the owners of the steamer. . . .

The *Castlemoor* was duly ordered to Rosario to load. She arrived in the roads on the 17th May 1920. Notice of readiness was duly given at 9 a.m. on the 19th May, and it was agreed that her lay time began to run at midnight on the 19th–20th May. The cargo eventually loaded consisted of 5830 tons, and it was agreed that this gave her as lay days eleven days sixteen hours. Loading began on the 20th May and finished on the 15th June at 11 a.m. The respondents contended that the lay time expired at 4 p.m. on the 4th June, and they claimed demurrage from thence to the completion of the loading as aforesaid—viz., ten days nineteen hours at 250*l.* per day—2698*l.* The appellants contended that no demurrage was due, on the ground that the delay complained of by the claimants was due to causes beyond their control, expressly excepted by clause 30 of the said charter-party.

Specification of various causes was made by the appellants for the delay, none of which need be now mentioned, except two. These were : (1) A labour disturbance on one of the railways supplying Rosario, which was the port to which the steamer was sent ; and (2) a prohibition by the Government of all exportation of wheat during the period the 4th to the 11th June.

The parties went to arbitration before Mr. Raeburn, K.C. He issued an award in the form of a special case. In his award he dealt with the alleged causes of delay said to fall within the exceptions as follows :

He found as a matter of fact that none of the alleged causes existed save the two above especially mentioned. As regards (1) he described the port of Rosario in the following terms :

The port of Rosario is situated on the River Parana and has a river frontage of about eight miles. The port is divided into two sections, viz., the Old or Cliff section and the New or Port section. In the Old section there are no wharves, but ships come alongside the natural cliff and the grain is loaded by chutes and pipes direct into the hold out of the grain warehouses which are situated along the top of the cliff, or out of railway wagons on the sidings running along the top of the cliff. In the New section there are wharves along the entire river front which are served by railway lines running to the store sheds on the quay. Loading is carried out by means of travelling belts and chutes, either from the sheds or from railway wagons direct.

And he then found as follows :

On the 15th May 1920 there broke out on the Central Argentine Railway a movement on the part of the men, which was described as a "go slow" or a "ca' canny" movement, and lasted till the 6th June. It was a concerted scheme on the part of the employees of the company, designed to force the company to withdraw certain regulations which the Government had compelled them to impose, and which were obnoxious to the men. The method adopted by the men was to continue at work during proper working hours, but by means of extravagantly strict adherence to the various rules of the company in regard to the working of traffic and the performance of their ordinary duties so to delay the working of the traffic as to reduce it to a minimum, without at the same time giving to the railway company any specific ground for dismissal. I hold that this was an "obstruction" on the railway, and I find that it caused in all a loss of six days. It caused delay, however, only in bringing cargo to the port of Rosario, and in no way affected the actual process of loading.

As regards (2) he found as follows :

I find as a fact that the charterers desired to load wheat and not maize, and I hold that they were not bound to load maize. In any event, however, I hold that the charterers were entitled to wait for a reasonable time in order to see whether the wheat prohibition was removed, before beginning to load maize, and I find that a reasonable time had not expired by the 10th June, when in fact they began to load maize. From the 10th June onwards the charterers loaded maize and I find therefore that the delay due to the wheat prohibition was six days only, viz., from the 4th to the 9th June inclusive.

On these findings his judgment was that, subject to the opinion of the court, he held "that the claimants are entitled to recover demurrage from the period from 4 p.m. on the 10th June to 11 a.m. on the 15th June—viz., four days nineteen hours"—and he accordingly awarded "that the appellants do pay to the respondents the sum of one thousand one hundred and ninety-eight pounds (1198*l.*), together with the respondents' cost of the arbitration, and do bear and pay the cost of the award."

The special case came before the late Bailhache, J. He confirmed the judgment of the arbitrator as to the "ca' canny" strike, but differed as to the wheat prohibition, and allowed demurrage for the six days disallowed by the arbitrator.

Appeal was taken to the Court of Appeal, who restored the judgment of the arbitrator.

It will thus be seen that there were two separate questions which arose on the charter-party.

The charterers excused their delay on two separate grounds, both of which they said fell within the exceptions allowed in the charter-party for the duty of loading within the stipulated time. There was the "ca' canny" strike and the prohibition of exportation of wheat. Now, the "ca' canny" strike did not in any way affect the actual operation of the loading of the cargo; it only affected the provision of the cargo to be loaded. To make it a cause of justification it must fall within the following words: "If the cargo cannot be loaded . . . by reason of obstruction or stoppages beyond the control of the charterers on the railways or in the docks or other loading places . . . the time for loading shall not count during the continuance of these causes." On this point I am entirely in agreement with the judgment of Scrutton, L.J., and I am only repeating what he has very clearly explained when I say that the general rule is absolutely authoritative to the effect that if you wish to make an exception apply to the providing of cargo as distinguished from the loading proper, you must do so in words so clear as to admit of no ambiguity.

In my opinion that has not been done here. The word "railways" is in concatenation with the word "docks," and points, I think, to the use of a railway as one of the instruments of loading, a use which in the actual case before us is amply justified by the existence of the port railway and the rails along the cliff. It is, I think, most expedient that the general rule should not be infringed or whittled down.

Scrutton, L.J. quoted with approval some expressions of mine used in a case decided in the Court of Session. I should like to say that I was laying down no new law of my own pronouncement, but was only stating what I thought was the clear result of the decisions of this House.

As regard the prohibition of wheat excuse, what happened was this: Bailhache, J. had held that it was no answer to say that the exportation of wheat had been prohibited, because there was an alternative in the charter-party to load maize or rye, and if the charterers could not get wheat they must have a cargo of maize or rye ready, and that consequently no allowance was due in respect of the prohibition. The learned judges of the Court of Appeal took a different view. They held that as to providing a cargo the charterers must provide maize or rye if they could not get wheat, but that, having made their arrangements for wheat, when the prohibition against exportation came like a bolt from the blue after these arrangements were made they ought to be allowed a reasonable time, which the court fixed at six days, to make other arrangements, and they accordingly allowed six days' excuse in the calculation of the demurrage due. Against that judgment the respondents did not cross-appeal, and no arguments, on a question on which much argument was possible, were presented to your Lordships; but I wish it to be distinctly understood that I have not formed and do not express any opinion on the question as to whether the judgment of the late Bailhache, J. on this head or the judgment of the Court of Appeal in its variation was right or wrong.

I move that the appeal be dismissed with costs. I am authorised by my noble and learned friend the Lord Chancellor to say that he concurs in this judgment.

Lord ATKINSON.—The thirtieth clause of the charter-party in this case, upon the true construction of which this appeal mainly turns, deals with the prevention of the loading of a cargo on board the ship *Castlemoor* by any one or more of the several things enumerated in the charter-party. The cargo which she was bound to take on board was a cargo of wheat and (or) maize and (or) rye and (or) linseed and (or) rapeseed in bags and (or) in bulk. The charterers, the appellants, bound themselves on their side to ship such a cargo on the *Castlemoor* not exceeding what she could reasonably stow and carry over and above her tackle, apparel, provisions and furniture. The provisions of clause 30 which are material have been already read.

The charter-party bears date the 14th April 1920, and by it she was bound to load as much of her cargo at one or more safe loading ports on the River Parana not higher up the river than Lorenzo as the master should consider safe, and the balance of the cargo at Buenos Ayres or La Plata, at the charterers' option. By clause 12 of this charter-party it is stipulated that lay days shall not commence before the 10th May 1920 unless the charterers begin loading sooner, and should the steamer not be ready to load at 6 p.m. on the 31st May 1920 the charterers were given the option of cancelling the charter-party.

Clause 13 of this same document providing for the times of loading has also been read.

The arbitrator in the third paragraph of the special case which he has stated finds that the *Castlemoor* was duly ordered to Rosario to load, that she arrived there on the 17th May 1920, that notice of her readiness to receive cargo was duly given at 9 a.m. on the 19th May, that it was agreed that her lay time began to run at midnight on the 19th-20th May, that she had as lay days eleven days sixteen hours, and that loading began on the 20th May and finished on the 13th June at 11 a.m. The shipowners, he states, contended that the lay days expired on the 4th June, and claimed demurrage from thence to the completion of the loading, *i.e.*, for ten days nineteen hours, amounting at the stipulated rate to 2698*l*. The charterers, on the other hand, he states, contended that no demurrage was due, on the ground that the delay complained of was due to those causes beyond their control specially excepted by the aforesaid thirtieth clause of the charter-party. The contour and physical features of the harbour of Rosario demand consideration, as well as the methods by which the business of the port was carried on.

In the case stated the arbitrator describes the system under which cereals are collected for shipment at the port of Rosario and are there shipped. He says that the cereals are purchased by the exporters from the growers living in the interior; that it is the duty of the latter to deliver the grain at the railway station or stations specified in the sale note, and also to apply to the appropriate railway company for the wagons necessary to load this grain thereon, and convey it to the port of shipment. The loading of the wagons at the up-country stations is done by labourers employed by the seller, and when so loaded these wagons are hauled to the port of Rosario. It was not proved or found that there were any depots, or loading places, as they have been styled, in any instance up-country where vast quantities of cereal were collected, and a buyer could readily obtain his needed supply. Nor was there any evidence given or any finding arrived at that any particular portion of the wheat brought to Rosario by the procurement of the charterers was by them specifically appropriated to the purpose of providing a cargo for the *Castlemoor* in whole or in part. The port of Rosario, the arbitrator finds, is divided into two sections—the old or cliff section, and the new or port section. In the former of these there are no wharves, so that ships seeking to be loaded there are simply brought alongside and the grain is loaded by chutes and pipes direct into the hold of the ship out of the grain warehouses, which are situate along the top of the cliff, or out of the railway wagons standing on the sidings running along the top of the cliff. Certain of the railway companies connecting Rosario with the up-country, of which the Central Argentine Railway Company is the most important, have lines running direct to this cliff and the sheds there. In the new or port section the condition of things is entirely different. The Rosario Port Company owns practically all the warehouse accommodation and all the railways within that section. These latter railways are connected with five different lines serving the port, of which, as in the other section, the Central Argentine is the most important. The loaded wagons brought by these five railways are upon their arrival at the boundary of the port zone, where the port railway begins, taken over by the employees of the Port Company, and thereafter hauled and worked by locomotives and machinery belonging to the Port Company and ultimately distributed to the various exporters to whom the grain is consigned. On the 15th May 1920, two days before the *Castlemoor* arrived at Rosario, a "ca' canny" movement, or strike as it has been styled, broke out on the Central Argentine Railway and lasted till the 6th June following.

The arbitrator held that this so-called strike amounted to an "obstruction" on the railway within the meaning, as I understand his award, of the thirtieth clause of the charter-party, that it caused in all a loss of six days, but that the delay only affected the bringing of the cargo to the port of Rosario, and in no way affected the actual process of loading. It is not found, nor even pretended, that this so-called "ca' canny" strike extended to or in any way affected any other of the four remaining railways which run up the country from the port of Rosario. There is no evidence whatever that the charterers endeavoured to tap sources of supply in the interior from which wheat might be carried to Rosario by one or more of these four railways unaffected by the "ca' canny" strike. That strike might no doubt obstruct the business and impede the transport of grain by the particular railway which it affected, but that obstruction is not the particular kind of obstruction to which the thirtieth clause of the charter particularly relates. The words of that clause are "If the cargo cannot be loaded by reason . . . of obstructions . . . on the railways." It certainly would appear to me that an obstruction which only affects one of these five railway lines and, for all that appears, leaves the remaining four lines free from obstruction, able and willing to effect the needed transport of wheat from the up-country to the port does not satisfy the words of clause 30.

I think that the authorities establish that this is so. The case of *Grant and Co.* v. *Coverdale, Todd, and Co.* (5 Asp. Mar. Law Cas. 353; 51 L. T. Rep. 472; 9 App. Cas. 470) distinguishes the essential difference between the duty of having a cargo at a place from which it can be loaded on a particular ship, and the actual physical act of loading that cargo on that ship, and decides that when provisions are introduced into a charter-party exempting either the charterers or the shipowner from liability in certain events or under certain conditions it is essential to determine to which of those two operations these provisions apply. *Primâ facie* it is the absolute duty of the charterers to provide the cargo and bring it to the place of loading, and it is equally the absolute duty of the shipowner to load the cargo when so brought. No doubt provisions may be introduced into a charter-party which relieve these respective parties from some of the duties and obligations *primâ facie* imposed upon them respectively; but to have these effects these provisions must be clearly and distinctly expressed.

The cases of *Hudson* v. *Ede* (111 Mar. Law Cas. (O.S.) 114; 18 L. T. Rep. 764; L. Rep. 3 Q. B. 412) and *The Rookwood* (10 Times L. Rep. 314) have a distinct bearing upon this case. They are referred to in par. 257*b* of the fourth edition of Carver on Carriage by Sea, and are treated as establishing the proposition that where, as in this case, the places from which a cargo is to come are not specified, the general rule is that the charterer is not excused unless all practical modes of loading have been prevented. *Hudson* v. *Ede* (*sup.*) is a case of great authority, it was decided in the Exchequer Chamber by Kelly, C.B., Willes, Keating, and Montague Smith, JJ.,

and Bramwell and Channell, BB. There, according to the headnote, the charter-party provided that the ship chartered should proceed to Sulina or outside in sufficient depth of water to load, and there load from the agents of the merchants named a complete cargo of grain, the cargo to be brought and taken from alongside the ship at the ports of loading and discharge at the charterers' expense and risk; thirty running days to be allowed (if the ship be not sooner dispatched) for loading and unloading, and ten days in demurrage over and above the laying days at 6*l.* per day; detention by ice and quarantine not to be reckoned in laying days.

There were no storehouses at the port of Sulina itself; the grain shipped was kept in places higher up the Danube, and brought by steam lighters down the river and loaded directly into ships waiting there to take their cargo. The ship in this case, *Tria* by name, being ready to load gave notice to the charterers of that fact; but after six days and before any cargo had been supplied the river immediately above Sulina became frozen over, and so continued to be for two months, the port of Sulina itself remaining open. It was held that this amounted to be " detention by ice " within the meaning of the charter-party. Kelly, C.B., in delivering the judgment of the court, after stating the facts, said: " Under these circumstances, we are of opinion that this was a detention by ice within the meaning of the charter-party. The conveyance by the river between Galatz and the ship at Sulina may be considered as part of the act of loading, as there were no storehouses for grain at Sulina; the case seems to be the same as if the ice lay between the shore, from which, of necessity, the grain must be brought, and the vessel in which it was to be loaded, so that the parties must have contemplated that portion of the river as part of the waters through which the cargo was to be conveyed between the shore and the ship, and in which detention by ice was to be provided against." In the last paragraph of his judgment the learned Chief Baron said: " My brother Willes has observed, and we agree with him in opinion, that whenever there was no access to the ship by reason of ice from any of the storing places from which merchandise was conveyed direct to the ship, the exception in the charter-party would apply." In the present case the sources of supply were up the country where the growers lived. If all communication between those places and the port of Rosario, where the ship lay, was absolutely and entirely cut off, that case would be applicable to the present case, but as things were it is rather an authority to the effect that where communication is not cut off at all, the obstruction cannot be taken as an obstruction within the meaning of clause 30 worded as that is, and that where communication is only to some extent obstructed or impeded on one of the lines of railway connecting the port with the interior of the country where the cereal is produced and sold, it is an authority to the effect that the charterers who are not found to have availed themselves of any of the alternative routes are not entitled to contend that the " cargo cannot " be loaded within the meaning of clause 30 by reason of the " ca' canny " obstruction on one of the five railway lines.

In *Stephens* v. *Harris and Co.* (6 Asp. Mar. Law Cas. 192; 57 L. J. Q. B. 203) Bowen, L.J., as he then was, at p. 209 of the report in referring to *Hudson* v. *Ede* (*sup.*) said: " It is catching at a phrase used by Kelly, C.B. in delivering a judgment in the Exchequer Chamber to say that the loading can commence 100 miles away from the ship. The decision rested upon the fact that there was only one mode of loading grain cargoes at Sulina, namely, by lighters bringing the grain down the river from Galatz." In my view the appellants have failed to show that such obstruction as may have existed on the Central Argentine Railway caused by the strike amounted, while the strike lasted, to an obstruction within the meaning of clause 30 of the charter-party, and that the charterers were not entitled under that clause to the exemption which they claimed.

On the other point I think that when the export of wheat was prohibited and the charterers had to make up their minds what was to be done in this altered condition of things, they were entitled to a reasonable time to determine how to deal with those altered conditions, and that a reasonable time for this had not elapsed before they proceeded to substitute maize for wheat in loading the *Castlemoor*. I am, therefore, of opinion that the appeal fails and should be dismissed.

Lord SUMNER.—This is a voyage charter, in which the lay days became fixed by reason of the combined effect, in the events which happened, of the undertaking to load a full cargo and of the provision for a daily loading rate per running day, Sundays and holidays excepted. The lay days so fixed were in fact exceeded. The question is whether the charterers—now appellants—can relieve themselves from the consequent obligation to pay demurrage by any of the exceptions mentioned in clause 30. The charter form is one arranged and agreed with the Centro de Cereales of Buenos Ayres and is the Chamber of Shipping River Plate Charterparty 1914, known by its code name of " Centrocon." The answer to the question turns on the construction of clause 30 of that form as applied to the circumstances of this case.

The material facts are that the charterers elected to load at one port, Rosario, under the option given in clause 3 to load at " one or two safe loading ports or places in the River Parana but not more than the steamer can safely carry over the Martin Garcia Bar (without lightening) and the balance of the cargo in the port of Buenos Aires or La Plata," and the excepted hindrances to loading, which are now relied on, are (*a*) " strike or lock-out of any class of workmen essential to the loading of

the cargo," and (b) " obstructions beyond the control of the charterers on the railways or in the docks or other loading places." The vessel was not loaded in a dock, but lay alongside a wharf and received the cargo from railway trucks in which the wheat, bought by the appellants up-country and appropriated by them to the *Castlemoor* on arrival of the trucks in the port of Rosario, was brought alongside on the railway lines and was thence transferred to the ship's hold. To whom these railway lines belonged is not certain. In one part of the port the lines belong to the Central Argentine Railway Company ; in another to a separate company which owns and operates a railway within the limits of the port. In which part of the port the *Castlemoor* loaded the case stated does not show. The charterers had not provided any cargo ready in the port of Rosario for the *Castlemoor*, though the port contains ample warehouse accommodation and loading ex warehouse is an accustomed mode of loading. The charter gave the charterers the option to load " wheat and (or) maize and (or) rye," but they had for their own reasons decided to load wheat only, and did not in fact change their plans till after the expiry of the lay days unless extended by the operation of the exceptions clause. Wheat is bought at country railway stations on any of the five lines which serve Rosario, and thence is sent to the port by the buyers and shippers. The appellants had made purchases so as to provide themselves with a general supply, if the wheat arrived in due time at Rosario, but for the provision of cargo for any particular ship they relied on the regular flow of wheat by the railways to the port. During the *Castlemoor's* lay days the employees of the Central Argentine Railway up-country, which is the principal grain transporter of the five companies, carried out a "ca' canny" or "stop-in" strike, working pedantically and even preposterously to the extreme letter of their rules in order to produce, as they did produce, delays to regular traffic on the railways without incurring the consequences of a strike or losing the emoluments of regular work or making themselves individually liable to summary dismissal for failing to do their duty. Although this general retardation of traffic undoubtedly affected the supply of wheat to Rosario, and in particular seriously affected the business arrangements of Messrs. Bunge y Born, there was not shown to have been any particular hindrance of the wheat which they had bought or, so far as concerned them, anything but a general dislocation of their arrangements. In the result they had not sufficient wheat forthcoming by railway to enable them to load the ship within the lay days unless they got relief under clause 30.

The established rule, that in charter-parties the charterers' obligation to provide cargo and have it ready for loading at the place of loading is *primâ facie* an absolute one and is not affected by clauses of exception as to lay days unless by express language or necessary implication, is not artificial or arbitrary. It is correlative to the shipowner's obligation to provide a seaworthy ship before an exception of marine perils in a bill of lading can apply to relieve him. It arises out of the nature of the contract and is necessary to the practical distribution of the risks involved in its performance. Most charters are so framed that their structure furnishes a sufficient basis for the rule, and that now in question is a good example. By clause 2 the shipowners engage that the steamer shall proceed to the loading port and there receive from the charterers a full cargo, which they bind themselves to ship. Clause 12 fixes the commencement of the time for such delivery and receipt, and clause 13 fixes the time within which the charterers engage to load the full cargo. Clause 4 engages the shipowners to carry it to its port of discharge and there deliver it. These (apart from payment of freight and minor matters) are reciprocal and absolute obligations, to load on the one hand and carry on the other, and it is upon these obligations that exceptions are introduced by clause 29 in favour of the shipowner and by clause 30 in that of the charterer. Clause 30 provides that if the cargo (that is, the full and complete cargo which the charterer has already engaged to ship) cannot be loaded owing to certain causes, the time for loading is not to count during the continuance of such causes. It appears to be quite plain, even if there were no authorities upon the subject, that the exceptions for which clause 30 provides would not extend to anything but interference with loading a cargo ready to be loaded, unless something in the clause itself shows that exceptions preventing the charterers from providing a ready cargo are included, as well as exceptions preventing them from loading it when ready. My Lords, it seems clear that nothing of the kind is to be found in this clause, which could apply to the hindrances out of which the charterers' difficulties arose. There was no "stoppage" on the railways—that was just what the strikers ingeniously avoided. Whether their inaction could be said to amount to an "obstruction" or not we need not consider, though the workmen did not cause any physical obstruction, but in any case, the words "on the railways" are satisfied by referring them to the railways in the port, which were regularly used as part of the machinery of loading a ready cargo. The case is not within the well-known principle of *Hudson* v. *Ede* (1 Mar. Law Cas. (O.S.) 114; 18 L. T. Rep. 764 ; L. Rep. 3 Q. B. 412), so often explained in later cases and most recently by your Lordships in the *Owners of the steamship Matheos* v. *Louis Dreyfus and Co.* (*ante*, p. 486; 133 L. T. Rep. 146 ; (1925) A. C. 654). It is not one of those cases where a specific cause is mentioned, which has to be referred to something extraneous to the place and operation of loading, because nothing bearing that designation is found in that place and operation at all. Such were the railways mentioned in *Furness and others* v. *Forwood Brothers and Co.* (8 Asp. Mar. Law Cas. 330;

77 L. T. Rep. 95; and *Re an Arbitration between Messrs. Richardson and Samuel and Co.* (8 Asp. Mar. Law Cas. 298; 57 L. T. Rep. 479; (1898) 1 Q. B. 261); such, too, is a mention of collieries or mines in an ordinary coal charter. It follows that the charterers fail to excuse themselves from the consequences of not having completed the loading before the day now in question arrived, and that the appeal fails.

My Lords, I would add this. Although the words of such a clause, if clear, must prevail whatever the business consequences may be, I am glad that the construction of the words in question does not constrain us to adopt the charterers' contentions. It was in their option to load at two ports, and all the ports to which their option extends are served by railways, whose systems cover an enormous aggregate mileage in the interior of Argentina. It was in their power to purchase the cargo at any points, however numerous, on those systems, and, on their contention they could then throw on the ship the risk of delay in loading if any obstacle on any of these railways hindered performance of the obligation to load. For the merchant to exercise in the amplest sense the right to buy where he wills and then to leave so much of the hazard of it to fall on the shipowner, who had no voice in the matter and no means of fore-knowledge which would enable him even to measure his risk, is an arrangement which I cannot believe any merchant would venture to propose or any shipowner would consent to adopt.

I am authorised by my noble and learned friend Lord Buckmaster to say that he concurs in the motion proposed. *Appeal dismissed.*

Solicitors for the appellants, *Richards* and *Butler*.

Solicitors for the respondents, *Botterell* and *Roche*, agents for *Botterell, Roche*, and *Temperley*, Newcastle-upon-Tyne.

Supreme Court of Judicature.

COURT OF APPEAL.

July 24 and 27, 1925.

(Before BANKES, SCRUTTON, and ATKIN, L.JJ.)

THE SUSQUEHANNA. (a)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Collision — Damage — Oil tanker owned by the Admiralty—Detention during repairs—Vessel which could have been chartered for commercial purposes—No intention on part of the Admiralty to charter—Market rate—Measure of damage.

The damage sustained in respect of loss of use of a vessel belonging to non-trading owners, e.g., the Admiralty Commissioners, is not necessarily measured by the market rate for similar vessels or the rate at which such vessel could have been chartered if her owners had desired to employ her in that fashion.

Where an oil tanker belonging to the Admiralty Commissioners was withdrawn from the service of the Admiralty for a period during which collision repairs were being performed, her place during such period being taken by another vessel belonging to the Admiralty, which might otherwise have been idle,

Held, affirming a decision of Lord Merrivale, P., referring back the report of the registrar, that the damage sustained by the Admiralty owing to the detention of their vessel was not measured by the market rate of hire for such vessels prevailing during the period of repair, since the Admiralty Commissioners would not in any case have chartered the vessel.

APPEAL from a decision of Lord Merrivale, P., on the defendants' objection to the registrar's report, referring the report back to the registrar for re-assessment of the damages sustained by the plaintiffs by reason of the loss of the use of their oil tanker *Prestol*.

The plaintiffs were the Admiralty Commissioners, owners of the oil tanker *Prestol*, and the defendants were the United States Shipping Board, owners of the steamship *Susquehanna*. On the 20th Nov. 1920 the *Prestol*, a steel screw oiler of 2626 tons gross and 939 tons net register 319ft. in length and 4ft. beam fitted with engines of 246 horse power nominal, was lying moored with her port side to the wharf on the East side of the Neufahrwasser at Danzig. The French destroyer *Somme* was moored to the *Prestol's* starboard side. In these circumstances the steamship *Susquehanna*, which was bound up river, struck the stern of the *Prestol* carrying away her after-moorings and cutting in between the *Prestol* and the wharf, so that the *Prestol* sustained considerable damage. The plaintiffs, amongst other items, claimed 7200*l*. for loss of use of the *Prestol* from the 17th Dec. 1920 to the 17th Jan. 1921. The registrar allowed 6400*l*. in respect of this item.

The registrar gave the following reasons for his report.

". . . . The only question at the reference in issue was the amount to be allowed as damages for the detention of the *Prestol* for thirty-two days which time was admitted by the defendants to have been lost through the collision.

"The plaintiffs claimed what may be termed the mercantile value of the *Prestol* and evidence was called by them to prove that the loss over and above out-of-pocket expenses was 225*l*. per day. After the evidence on behalf of the plaintiffs had been put forward it was admitted by the defendants that it could not be displaced. It should, however, be pointed out that according to the evidence of Mr. Bates, the plaintiffs' principal witness, 74*s*. per ton could have been obtained on time charter on the *Prestol*. This

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

is 1*s*. less than the rate claimed by the Admiralty, and an allowance must also be made for the fact that the vessel was in dock for thirty-two days and running no risks, which is important in the case of oil tankers. A sum of 6400*l*. has, therefore, been allowed as damages for detention which on the evidence before us appears to be a reasonable compensation for the time lost.

"It was contended by the defendants, however, that the damages should be based on the loss of interest on the capital value of the vessel, on depreciation and standing charges and not on her commercial value, and that *The Marpessa* (10 Asp. Mar. Law Cas. 464; 97 L. T. Rep. 1; (1907) A. C. 241) applied to this case. Each case of a claim for damages must be considered in regard to its special facts. In *The Marpessa* Lord Loreburn said 'the damages depend on the facts and upon the actual loss sustained by the owner, which will vary in different cases.' It has further to be borne in mind that in *The Marpessa* and the group of cases of which it formed one, the only question was whether the plaintiffs could claim for loss of use of their vessel and on a loss of interest basis. In the present case there is clear evidence that such a vessel as the *Prestol* has a commercial value and that she could be profitably chartered, if not in use by the Admiralty, who in fact from time to time do charter some of their oilers. Again, instead of hiring a vessel for the supply and carriage of oil, the Admiralty have their own fleet, and the commercial value of any one of them appears to be a sound basis on which to base an award of damages for loss of time. The fact that no actual loss of freight to the plaintiffs is proved is not now material, having regard to the law as laid down in *The Marpessa* and other cases, and the question is reduced to one as to whether there is evidence on which a sum for damages for loss of time can be awarded. The proof of capital value from which an assumed loss of interest for a particular time follows is not a legal rule but a method of proof only, and in the circumstances of the present case, as in others, in which a claim for damages has been assessed in this manner, the commercial value of the vessel appears to be reasonable evidence on which to make an award of the damages."

The defendants appealed.

Dunlop, K.C. and *Stenham* for the appellants.

Bateson, K.C. and *Balloch* for the respondents.

Cur. adv. vult.

Feb. 13, 1925.—Lord MERRIVALE, P.—This appeal is from an assessment of collision damages in the registry. The vessel of the appellants, the *Susquehanna*, collided at Danzig with the *Prestol*, a steamship of the Lords Commissioners of the Admiralty, described as an Admiralty oiler, by which is meant, as I understand, a vessel fitted for and engaged in the supply of oil-fuel to vessel of His Majesty's Navy. Liability for the collision is admitted by the appellants. One item only of the award of the registrar and merchants is in dispute, namely, a sum of 6400*l*. assessed as damages for loss of use of the *Prestol* by the Admiralty during the period of thirty-two days during which she was detained in dock for repair of the damage caused by the collision.

The particulars of claim filed in the action on behalf of the Lords Commissioners specified a claim of 7200*l*. under the heading of "loss of use." In consequence of the collision the *Prestol* had been brought from Danzig to Rosyth for the purpose of repair, and replaced in the Baltic by another vessel of the same class, the *Belgol*, whose regular place of service at the time was the Clyde. The capital value of the *Prestol* was shown to be 160,000*l*., her yearly cost of maintenance and repair was at the rate of 4500*l*., and the estimated cost of insurance at the current rates 12,000*l*. per annum. Upon the reference, evidence was given of a demand in the mercantile marine before, at, and after the collision, for the use on hire of vessels such as the *Prestol* and the *Belgol* at very high rates. Counsel for the Admiralty claimed an award of damages at the current rates of hire, which they showed to be 235*l*. per diem for a vessel like the *Prestol*. Upon the appeal it was not seriously disputed that the Lords Commissioners could before, at, and after the time of the collision have hired out the *Prestol* or the *Belgol* for commercial purposes at rates which justify a finding that over and above all proper allowances she would have produced a clear rental of 200*l*. per day. It was also proved that if the collision had not occurred neither the *Prestol* nor the *Belgol* would have been let on hire. Both would have continued their services to vessels of His Majesty's Navy. Counsel for the appellants contended that upon the facts so proved loss of hire was not only not established, but was disproved, and that the report ought, therefore, not to be confirmed.

It is to be observed that in the particulars of claim no allegation is made of a specific pecuniary loss. The claim is for general damages. The question of principle which is raised by the appeal is whether in respect of a vessel withdrawn by reason of a collision from a particular service, to which service she is at the time in question dedicated by the owner, and in which pecuniary profit is not earned, damages may be assessed against a wrongdoer upon the footing of the profit which the owner might have derived if he had been employing her upon a service productive of pecuniary profit. The question here is whether an effective determination of an owner not to employ his vessel in a particular line of profitable service must be held to preclude him, while the vessel is otherwise employed, from a claim for damages for loss of hire.

In the case of *The Argentino* (6 Asp. Mar. Law Cas. 433; 61 L. T. Rep. 706; 14 App. Cas. 519) the Court of Appeal, by a judgment of Bowen, L.J. laid down, and the House of Lords confirmed, as the measure of damages

recoverable in cases of collision at sea, the common law measure, that is to say (quoting the words of Bowen, L.J.), "such damages as are produced immediately and naturally by the act complained of." The litigation there related, however, to a claim for deprivation of the use of a freight-earning ship; and the learned Lord Justice used also these words: "the only questions seem to be what use the owner would but for the accident have had of his ship and what but for the accident he would have earned by the use of her." The form of the question so propounded is, of course, inapplicable in the case of vessels not employed for commercial use.

In later cases, and especially the cases of *The Greta Holme* (8 Asp. Mar. Law Cas. 317; 77 L. T. Rep. 231; (1897) A. C. 596) and *The Mediana* (82 L. T. Rep. 95; (1900) A. C. 113; 9 Asp. Mar. Law Cas. 41), the House of Lords upon successive occasions has plainly laid down that the common law rule as to damages is of general application, and has explained the mode of its operation in cases such as that now under consideration. The *Greta Holme*, a dredger belonging to the Mersey Docks and Harbour Board, was disabled for a period of upwards of fifteen weeks by collision due to negligence. Her owners could have let her on hire for 100*l.* a week, but they required her for the performance of their duties in maintaining the waterway under their care and would not have let her for any part of the time during which she was disabled. Nevertheless, they were held by the House of Lords to be entitled to recover damages for their loss of her use. Lord Halsbury, L.C. applied the principle of the common law in these terms: "This public body has to pay money like other people for the conduct of its operations, and if it is deprived of the use of part of its machinery, which deprivation delays or impairs the progress of their works, I know no reason why they are not entitled to the ordinary rights, which other people possess, of obtaining damages for the loss occasioned by the negligence of the wrongdoer." Lord Herschell pointed out, too, that the money invested in the dredger was out of the pockets of her owners and that they were deprived of the use of the dredger to obtain which they had sacrificed the interest on the money spent in its purchase. A sum equivalent to this, he said, they must surely be entitled to; and he concurred in the opinions of the Lord Chancellor and of Lord Watson that the Board might also recover general damages in respect of delay and prejudice caused to them in carrying out the works entrusted to them.

It is to be observed that in the case of *The Greta Holme* (*sup.*), the House of Lords at the request of the parties assessed the damages proper to be paid to the owners in respect of their loss of the use of the dredger. The assessment was not made at the sum which could (but would not) have been earned by letting the dredger for hire, but a round figure of quite different amount. Hire at 100*l.* a week for the time during which the use of the dredger was lost would have produced to the owners a sum of at least 1500*l.* The round figure at which the House of Lords assessed their damage sustained by loss of her use was 500*l.*

The Mediana (*sup.*) was the case of a lightship of the Mersey Docks and Harbour Board damaged by collision, and during the period required for repairs—she being one of a fleet of five regularly on service—replaced for seventy-five days by a sixth vessel of the same owners which they kept for emergencies at a cost of 1000*l.* a year. The plaintiffs claimed and recovered damages at the rate of four guineas a day. It is, I think, worth while to observe that Lord Halsbury, L.C., who moved the judgment of the House of Lords, dwelt upon the distinction between special and general damages, and pointed out that, while owners who are temporarily deprived wrongfully of a ship have a right in case they have thereby suffered a specific loss to recover the amount of such loss, if they can establish no specific loss their right is to recover "whatever is thought, by the tribunal assessing their damages, to be the proper equivalent for the withdrawal of the subject-matter in question." Lord Shand concurred, and said that if the Board had hired a ship they must have recovered the sum paid as hire, and on analogous grounds they ought to recover the proper proportion of the expense of the ship they kept ready for emergencies. All their Lordships were of opinion that the amount of the damages to be paid must be assessed upon consideration of the loss or deprivation which was actually suffered.

In the more recent case of *The Valeria* (*No.* 2) (16 Asp. Mar. Law Cas. 25; 128 L. T. Rep. 97; (1922) 2 A. C. 242) the judgments I have instanced were applied and their dependence upon the principle enunciated in the case of *The Argentino* (*sup.*) was affirmed. This case was one of collision, whereby the Lords Commissioners of the Admiralty were temporarily deprived of the services of a trading steamer which they had on hire during the War. The cost of the vessel to the Admiralty under her terms of hire for the period of the disablement was 2562*l.* The Lords Commissioners were, however, employing her at the time of the collision as a trading vessel to carry cargoes for which freight was paid by shippers of goods, and the freight which would have been derived from her trading—the sum the Lords Commissioners in fact lost by reason of the ship's detention—was 1168*l.* It was this lesser sum which, affirming the judgment of the Court of Appeal, the House of Lords held to be the true amount of the damages for loss of use of the ship. Inasmuch as what was in question was interruption of a commercial undertaking the case of *The Valeria* (*sup.*) has only an indirect relation to the question now under consideration. Lord Dunedin, however, defined anew the rule which governs the assessment of damages in collision cases, using these words: "The true method of expression, I think, is that, in calculating damages, you are to

consider what is the pecuniary sum which will make good to the sufferer, so far as money can do so, the loss which he has suffered as the natural result of the wrong done to him." What appears on consideration of the authorities is, I think, that the damage and loss in respect of which compensation is to be recovered in a case like the present are actual damage and loss, and not such as could only be called hypothetical or suppositious. Moreover, the amount to be awarded does not depend upon a mechanical process which would give an identical measure of compensation in cases differing in their elements, but upon a fair assessment of what is, in truth and fact, the monetary equivalent of the damage which has been the direct outcome of the wrong suffered. No doubt the result must be that the amount of damage to be awarded in respect of the detention of vessels identically alike by means of causes of damage identically alike will differ according to the circumstances in which the damage is done. Interruption of the employment of the same ship for a given period of time might produce widely differing awards of damages, according to the character of her employment at the time in question. Prevention of the completion of the holiday cruise of an owner in a vessel of his own may give a very different right of compensation from that given by prevention of the continuance of a profitable employment of the same vessel, just as in an ordinary common law action for damages a highly skilled medical missionary wrongfully detained from his benevolent activities might be awarded damages on a different scale from those which would result from the wrongful detention from work of a professional man of like abilities engaged in a lucrative practice. What justice requires in the case of a money claim for pecuniary loss appears to be that the actual pecuniary loss shall be compensated.

In the present case that which the Lords Commissioners lost by the *Prestol's* disablement was thirty-two days' use of a vessel of capital value of 160,000*l.*, which they kept fit for service at a large annual cost, as a fleet oil ship. These facts form substantial elements in their claim for damages. Any services which were unperformed or were inadequately performed by reason of the *Prestol's* withdrawal must also be considered. If the substitution of the *Belgol* completely supplied the gap caused by the absence of the *Prestol*, a question necessary to be answered may be, what was the value to the Admiralty of the services of the *Belgol*, lost to them by her performance of the duties of the *Prestol?* The *Belgol*, like the *Prestol*, however, would not have been let on hire.

As to neither vessel is it possible to determine the actual loss caused to the Admiralty by ascertaining the sum which one or other could have earned if she would have been let on hire. It is worth while, perhaps, to point out further that whereas at a time of extreme activity in shipping such a letting might be highly profitable, at a time of depression it might be wholly unremunerative and that neither scale of earnings would necessarily show what was in fact lost to the Admiralty.

I purposely express no opinion as to the figure named in the award, but for the reasons I have indicated I refer back the report for a re-assessment of the damages of the plaintiffs by reason of their loss of the use of the *Prestol.*

The plaintiffs appealed.

Raeburn, K.C. and *Balloch* (Sir *D. Hogg*, K.C. (A.-G.) with them) for the appellants.

Dunlop, K.C. and *Stenham*, for the respondents, were not called upon.

Reference was made to the following cases, in additon to those referred to in the judgment of Lord Merrivale, P.:

The Mediana, 9 Asp. Mar. Law Cas. 41; 82 L. T. Rep. 95; (1900) A. C. 113;
The Bodlewell, 10 Asp. Mar. Law Cas. 479; 96 L. T. Rep. 854; (1907) P. 286;
The Chekiang, 16 Asp. Mar. Law Cas. 495; 133 L. T. Rep. 31; (1925) P. 80;
The San Gregorio, 12 Ll. L. L. Rep. 249.

Bankes, L.J.—Mr. Raeburn has more than once said what a difficulty this and similar cases of assessment must and do place the registrar in. I entirely sympathise with the registrar's difficulties, but at the same time I think that we cannot interfere with the view taken by the learned President of the reason given by the registrar for his decision.

The claim here was for damages for the detention of this Admiralty oil tanker during the time that she was incapacitated from service by reason of the defendants' negligence. The matter of the proper measure of damages under such circumstances has been much discussed, and several cases have been taken as far as the House of Lords, and to those cases, or some of them, we have been referred. The main result of the decisions is that the wrongdoer is not entitled to get off scathless merely by reason of his being able to prove that the vessel which he has injured is a Government warship, or a ship the property of some public authority, and not used in making commercial profit. But when the question comes to be discussed as to what the proper measure of damage in such cases ought to be, I do not think that any rule can be extracted from those cases, except that the ordinary rule of damages in a common law action applies, and that the wrongdoer is not entitled to say that the question, being one of a claim for general damages, those damages must be nominal, and that each case must be considered upon its own particular facts. To use Lord Halsbury's language in *The Mediana* (8 Asp. Mar. Law Cas. 317; 77 L. T. Rep. 231; (1897) A. C. 596) the registrar and merchants sitting as a jury must, as best they can, estimate what is to be the proper equivalent for the withdrawal from service of the subject-matter in question. In assessing those damages, the registrar and merchants are not in the position of a jury only. They are both judge and jury, and they must

direct themselves properly as to what the permissible measure of damages may be, before they proceed to estimate the amount. Here the learned registrar (whether he intended it or not I am not sure) certainly, in my opinion, has expressed the view that in a case of this kind, where the claim is one by the Admiralty for injury to a Government ship which would not, under any circumstances, have been let out on charter, or been made use of in order to earn a commercial profit for the time that she was incapacitated, the commercial value of such a ship, *i.e.*, what such a ship in the hands of a private owner would earn if let out on charter, is by itself, without more, a sound basis on which to award damages for the loss of time. With great respect to the learned registrar, I cannot accept that as a correct direction to himself as the basis (to use his own expression) upon which to ascertain the *quantum* in this particular case.

What the learned President has said with regard to the matter is this. He said: "It is to be observed that in the particulars of claim, no allegation is made of a specific pecuniary loss. The claim is for general damages. The question of principle which is raised by the appeal is whether, in respect of a vessel withdrawn, by reason of a collision, from a particular service, to which service she is at the time in question dedicated by the owner, and in which pecuniary profit is not earned, damages may be assessed against a wrongdoer upon the footing of the profit which the owner might have derived if he had been employing her upon a service productive of pecuniary profit. The question here is whether an effective determination of an owner not to employ his vessel in a particular line of profitable service, must be held to preclude him while the vessel is otherwise employed, from a claim from damages for loss of hire." If I understand the learned President's proposition accurately, it is this, that where evidence is given before the registrar of what a vessel of the class in question might earn upon charter in the hands of an owner who made a profit out of her by chartering, and at the same time there is evidence before the registrar that the vessel is owned, or in the hands of a person who, under no circumstances, would have consented to charter the vessel for the suggested rate of freight, or for any rate of freight, and would not have parted with possession of her for a a moment under any circumstances, it is not open to the registrar to consider that the commercial basis, as he expressed it, is any longer an indication to him of the damages which this particular owner is entitled to recover. I agree with that view, but at the same time it must not be taken that the damages must therefore be nominal, and that there are not other considerations which the registrar may properly take into account; a number of admissible considerations have been referred to in the cases to which our attention has been called, and others might be added where, as here, stand-by vessels are provided to deal with an emergency. I am not endeavouring to lay down a rule, or to suggest to the registrar that there is any universal rule; all I need say, I think, is, that I cannot differ from the view of the President that, in this particular case, it was not open to the registrar to accept as the basis upon which he measured the damages, what he calls the commercial value of a vessel of this class. For these reasons I think the appeal fails and should be dismissed with costs.

SCRUTTON, L.J.—I remain of the opinion which I expressed in *The San Gregorio* (12 Ll. L. L. Rep. 249) that this court should be very slow to interfere with a decision of the registrar and merchants, among other things for the reason that the merchants bring evidence and knowledge which is not in evidence on shorthand notes, and which is one of the grounds for the decision of the court. But there may be cases where the registrar has acted on a wrong principle. The present case is one where the Admiralty have in the Baltic an oil tanker supplying the fleet; they have also in various parts of the world, wherever a British fleet is, a large number of oil tankers, some of them merely stand by in case a ship is damaged so that she may be replaced. Under those circumstances the *Susquehanna* ran into the oil tanker in the Baltic. The *Susquehanna* was to blame and had to pay for that, and the question is, how much? The oil tanker which was damaged would very shortly come home to get a fresh cargo of oil, and then would have gone back to the Baltic. What she did, in fact, was to come home and spend a month or so in being repaired at Rosyth and then go back to the Baltic. No claim was made for the period of coming home and going back because she would have come home though for a different purpose, but a claim was made for the period during which she was being repaired at Rosyth, and that was made on this basis. The Admiralty sometimes let or charter their spare oil tankers to the commercial world, and they can do it when they so desire at a named price, and that price, they say, shows the value of the ship. They have lost that value for so many days, and they want compensation based upon that commercial value; but they do not say for a moment that they would have let this ship, in fact, it is quite clear that they would not; they would have got her home, filled her and when the time came, sent her back to the Baltic; but they replaced her by a ship that was in Glasgow.

Presumably, though the witness from the accountant's office knows nothing about it, the ship at Glasgow was replaced from somewhere else; whether the ship from somewhere else was also replaced by some other ship I do not know. The court is left in a complete fog as to that part of the case. The registrar, as I read his judgment, says the commercial value of the ship can be got at by seeing for what sum a ship could be chartered if the Admiralty were ready to charter, and that the commercial value of any one of them

appears to be a sound basis on which to base an amount for damages for loss of time; and he does not seem to have taken into account that, in fact, there was no probability of that vessel or of the vessel that substituted her at any time being let on a commercial basis. The President has treated the matter as raising a question of principle "whether in respect of a vessel withdrawn by reason of a collision from a particular service, to which service she is at the time in question dedicated by the owner, and in which pecuniary profit is not earned, damages may be assessed against a wrongdoer upon the footing of the profit which the owner might have derived if he had been employing her upon a service productive of pecuniary profit." And he has decided, as I understand, that the judgment of the registrar is based on the principle that damages may be so assessed though the owner of the damaged vessel has no intention of employing her for that purpose.

I think, though I have had some doubt about it, that the judgment of the registrar does proceed on the principle which the President states is wrong. I agree, therefore, the matter must go back to the registrar for assessment. Again, as I said in *The San Gregorio* (*sup.*), I am extremely reluctant to tie the hands of the registrar and merchants too tightly by stating principles when a new set of facts will probably arise to show we are wrong. I stated the matter in *The San Gregorio* (*sup.*) in this way: "What was the value of this ship to the Government, and what charges did the Government save by not having this ship running the sea?" That, I think, is what the plaintiffs have lost, the use of the ship for a time, and the question is on those facts, what represents the loss. You cannot test it by the sum for which they could have let the ship if it is clear on the evidence they had not the slightest intention of letting the ship, because they have not lost that. What the registrar will make of it I do not know, but being an experienced registrar he will no doubt express himself in such a way there will be no further appeal.

ATKIN, L.J.—I agree. I am not sure that it would be altogether a desirable result that the opinion of the registrar involving a large sum of money should be so expressed that there should be no appeal; this is an instance that shows that where reasons are expressed there may be, and justly so, proper grounds of appeal. This is one of those cases dealing with damages which, in my experience, I have found to be a branch of the law on which one is less guided by authority laying down definite principles than on almost any other matter that one can consider. I think the law as to damages still awaits a scientific statement which will probably be made when there is a completely satisfactory text-book upon the subject. Subject to that, all I need say is that I think that the registrar, in this case, has laid down a rule for himself which amounts to a misdirection. I need not say more about it because to my mind the President has expressed the correct criticism upon it, and in respect of the guidance that is required upon it, I, for my part, find no fault with what was said by the President on a matter which is still to be considered by the registrar and merchants when the question is finally referred back to them. For these reasons I think the present decision was correct, and I think, therefore, that this appeal should be dismissed with costs.

Solicitors: *Treasury Solicitor*: *Thomas Cooper and Co.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

April 24, *May* 27, *July* 13, 1925.

(Before Lord MERRIVALE, P.)

THE REGINA D'ITALIA. (*a*)

Prize Court—Practice—Costs—Order for costs unsatisfied—Whether enforceable in Vice-Admiralty Court—Naval Prize Act 1864 (27 *& 28 Vict. c.* 25), *ss.* 4, 9. 23—*Prize Court Act* 1915 (5 *& 6 Geo.* 5, *c.* 57), *s.* 2.

An order for costs made in the Prize Court in London, being unsatisfied, can under the provisions of the Naval Prize Act 1864 *and the Prize Courts Act* 1915, *be enforced in a Vice-Admiralty Court. Where a declaration is prayed that such an order, made more than six years previously, is enforceable in a Vice-Admiralty Court, the power to make the declaration is not discretionary. But if the power is discretionary, it must be exercised judicially, and, the order being valid and uncomplied with, the court is obliged to make the declaration prayed.*

An order for costs was made in Feb. 1919, *against foreign plaintiffs in an action in which they had unsuccessfully claimed damages for wrongful seizure and detention in prize. These costs, which exceeded the amount in respect of which the plaintiffs had been required to give security, were never paid. In July* 1925 *the defendants applied for a declaration that the order was enforceable in the Vice-Admiralty Court at Gibraltar.*

Held, (1) *that the order was so enforceable;* (2) *that the power to make the declaration prayed was not discretionary; but* (3) *if it were so discretionary, the court must exercise the discretion judicially, and was obliged to make the declaration prayed.*

The jurisdiction of the Prize Court as to costs considered.

SUMMONS adjourned into court.

The plaintiffs, the owners of the Italian steamship *Regina d'Italia*, brought an action

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

in the Vice-Admiralty Court at Gibraltar (subsequently transferred to the Prize Court in London) against "the proper officer of the Crown" and the captors claiming damages for the wrongful seizure and detention in prize of their steamship *Regina d'Italia*. Security for costs was given in the sum of 300*l*. On the 6th Feb. 1919 the President (Lord Sterndale) pronounced against the plaintiffs' claim and condemned them in the costs of the defendants. The defendants' taxed costs amount to 834*l*. 3*s*. 10*d*. The balance of the costs had not been paid. Accordingly, by this summons, the defendants asked that the decree should be declared enforceable in the Vice-Admiralty Court at Gibraltar where the plaintiffs' vessel was said to call.

Darby for the defendants.

Balloch for the plaintiffs.

Cur. adv. vult.

July 12, 1925.—Lord MERRIVALE, P.—Application is made in this case for what seems, on the face of it, an order of course, under a comparatively recent statute, which regulates the procedure of this court in its jurisdiction in prize and of Vice-Admiralty Courts sitting in prize. So far as I know, however, no such order has been heretofore made, and as what is sought is a means of enforcing payment of an unsatisfied decree for costs where the taxed bill exceeds the security, the precedent which is sought to be set may be of consequence to parties other than those immediately concerned.

The suit in which the application is made is a personal action within the jurisdiction in prize which was brought by the plaintiffs, an Italian corporation, in May 1915 in the Prize Court at Gibraltar to recover damages in respect of an alleged wrongful seizure and detention in prize of their steamship *Regina d'Italia*, in the course of a voyage in Oct. 1914, from New York to Genoa. The *Regina d'Italia* was arrested in the Straits of Gibraltar and taken into Gibraltar for examination. After examination certain consignments of copper and of rubber which formed part of her cargo were discharged and made the subject of proceedings in prize but were eventually released. I am not aware that any cause of condemnation was instituted in respect of the goods in question, and I therefore do not think it greatly affects the merits of the present proceeding that the plaintiffs proceeded by original writ in prize, as for an alleged wrong, instead of requiring the captors by monition to institute an action and in such action presenting their claim.

The action brought by the plaintiffs proceeded in the court at Gibraltar until the 5th Jan. 1917 when, upon the application of the defendants, it was transferred into this court. It came to hearing on the 5th and 6th Feb. 1919, and on the 6th Feb. Lord Sterndale, then President, pronounced against the claim of the plaintiffs and condemned them in the defendants' costs. Pending the proceedings in this court, application had been made by the defendants in due course for security for costs. On the 18th June 1918 security for 300*l*. was ordered, and on the 3rd July that sum was paid into court. On the 19th May 1924 the defendants' costs were taxed at 834*l*. 3*s*. 10*d*. The plaintiffs did not attend upon the taxation. The excess of the costs beyond the amount of the security remains unpaid.

The case comes before the court now upon application under the Prize Act 1915 for declaration that the order as to costs of the 6th Feb. 1919 is enforceable within the jurisdiction of the Prize Court of Gibraltar, where it was said at the hearing it probably could be enforced against assets of the plaintiffs. The application was resisted by counsel for the plaintiffs on grounds which bring under consideration not only the express provisions of the Act of 1915, but various important questions of principle as to the award and enforcement of costs in prize—more particularly where neutral claimants are concerned—the possibility of the extension of the liabilities of neutral claimants in prize by Order in Council, and the limits within which the statutory powers of the court ought to be exercised where subjects of foreign states are concerned. The substance of the matter so far as the plaintiffs are concerned is, I think, that having given security for costs in a proceeding in prize, some years ago, upon a supposition arising out of current knowledge that their liability as to costs would probably be limited to the security so given, they are confronted, after a considerable lapse of time, with the possibility of being required to satisfy in full the decree as to costs which was made against them at the hearing. The element of surprise—if that term can be here properly applied—led to a very full argument at the hearing before me, and induced me to consider in detail the elements of the case, the nature of a judgment in prize for costs, the means by which it is enforceable, here or elsewhere, the effect of the statute under which the application is made, and the nature of the obligation which the statute imposes on the court.

The express statutory provisions which exist with regard to costs in prize are the sections as to costs in the Naval Prize Act 1864. These require (*inter alia*) that a claimant shall give security for costs in an amount to be determined by the court. The Prize Act, Russia, 1854, which, like previous Prize Acts, was enacted for the duration of a war, had for the first time given statutory sanction to a long-established practice of requiring claimants to give security in a sum of 60*l*. The Act of 1864, among the "permanent enactments"—to use the words of the preamble—which it substitutes for "such provisions as had been usually passed at the beginning of a war," directs by sect. 23 that — "the claimant shall give security for costs in the sum of sixty pounds; but the court shall have power . . . to direct security to be given in a larger sum if the circumstances appear to require it." These statutory provisions must no doubt be considered in the light of the pre-existing practice of the court. This is concisely stated in the

celebrated letter on procedure in prize written by Sir William Scott and Sir John Nicholl in 1794 to the American Minister in London, Mr. Jay: Pratt's edition of Story's Notes on the Principles and Practice of Prize Courts' p. 7. The concise statement as to costs is contained in the following words: "Security must be given to the amount of sixty pounds to answer costs if the case should appear so grossly fraudulent on the part of the claimant as to subject him to be condemned therein." Marriott's Formulary, published in 1802 by Sir Willam Scott's predecessor in the Court of Admiralty, shows the form of bail bond which was used. The English surety bound himself to the captor in the sum of 60*l.* "to pay such expenses as should be adjudged by this Court or by His Majesty's High Court of Appeals for prizes." An erroneous impression that the obligation as to costs of a claimant in prize was satisfied by the finding of security for a prescribed sum might perhaps arise if the provision of the Act of Parliament in its limited terms is coupled with the practical immunity from any personal liability under an Admiralty decree which was enjoyed by a foreign claimant. It would be easy also to infer from some reported observations of learned judges that complete liability for costs, at the discretion of the court, did not exist before the introduction of rules which expressly declare that costs in prize are at the discretion of the court. Shortly after the enactment of the Prize Act 1854, Dr. Lushington, as judge of the High Court of Admiralty, said in the case of *The Leucade* (1855, Spinks, P. C. 217, 220), "Costs alone, independently of damages—I mean law costs in the common acceptation of the term—were very seldom, if ever, given in the Prize Court of the Admiralty to either the captors or the claimants. I hardly remember a single instance." Instances of awards of costs, though in rare cases, are found among the numerous reported judgments of Lord Stowell, and the terms of the bail bond and of the letter to Mr. Jay make it plain that the court had full power, at its discretion, to award the costs of the suit against a claimant. The Act of 1864, so far as it did not modify the existing powers of the court, confirmed them. The discretion of the court over costs, therefore, was not introduced by rule either in 1898 or in 1914. What was so introduced was an extension of the process of execution for costs. The Prize Rules 1898, provided that any decree or order other than a decree of condemnation or restitution, and not expressly provided for by the Act of 1864 or the rules, might be enforced by monition, or in the same manner as a judgment decree or order of the court in its Admiralty jurisdiction. In Vice-Admiralty Courts decrees and orders were to be enforced in like manner with decrees and orders of the Supreme Court of the Possession in the exercise of its ordinary jurisdiction.

In the High Court and in Vice-Admiralty Courts, the prescribed forms annexed to the rules of 1898 contemplate the enforcement of costs against unsuccessful parties as well as against sureties liable under bail bonds, by monition and in case of default by attachment. Monition and attachment were the ancient customary means in the Admiralty Court of enforcement of its decrees, but by sect. 17 of the Admiralty Court Act 1861, decrees and orders for payment of costs were rendered enforceable by the common law processes of execution. It is said that for some years common law process was never used in an Admiralty cause (Williams and Bruce, Admiralty Practice, 1st edit.), but various decrees of recent date have made it clear that in the instance jurisdiction in Admiralty civil process of all kinds may be employed against all parties, non-resident as well as resident, provided they have effects within the jurisdiction.

In the present case it was not contended before me that the decree for costs pronounced by the court in 1919 was other than a valid decree. Nor was it seriously argued that within this jurisdiction it could not lawfully be enforced in the manner provided for by the Prize Rules 1914, that is by the processes specified in the Rules of the Supreme Court, Order XLII., r. 17. I think, too, that the matter is one of practice and procedure and is within the provisions of the statutes which gave power to make the Prize Rules 1914. Some weight was attached in argument to the provision in Rules of the Supreme Court, Order XLII., r. 17. I think, too, that the matter is one of practice and procedure, and is within the provisions of the statutes which gave power to make the Prize Rules 1914. Some weight was attached to the provision in Order XLII., r. 23, which makes a judge's order a condition precedent to the issue of execution out of the High Court of Justice where more than six years have elapsed since the date of the judgment or order; but the main grounds of objection to the desired declaration were that the power to make it is discretionary, that to enforce costs beyond the amount of the security ordered by the court and outside the jurisdiction of the court would be a departure from the general principles on which the jurisdiction in prize is exercised, and that a case of hardship arises by reason of lapse of time.

The jurisdiction which is invoked by the Procurator-General is a statutory jurisdiction. If a discretion is to be exercised it must be exercised in conformity with the statutes which creates the power. The powers and duties of the court with regard to the matter in question do not depend only upon the Prize Courts Act 1915. They had their origin in the Naval Prize Act 1864. The Act of 1864, by sects. 4 and 9, provides that the High Court of Admiralty shall have power to enforce any order or decree of a Vice-Admiralty Prize Court, and goes on to say in unqualified terms that "Every Vice-Admiralty Prize Court shall enforce within its jurisdiction all orders and decrees of the High Court of Admiralty in Prize Causes." This is the basis upon which

the Legislature enacted in sect. 2 of the Prize Courts Act 1915, that "a Prize Court may, as respects any cause or matter within its jurisdiction, and on the application of the proper officer of the Crown, declare that any order or decree made by it . . . is enforceable within the jurisdiction of another Prize Court, and shall, on the like application, have power to enforce any decree or order which another Prize Court has declared to be enforceable within the jurisdiction of such first-mentioned court." By sect. 3 (4) of the same Act it is further enacted that the powers conferred thereby are "without prejudice to . . . the obligation imposed on Prize Courts by sect. 9 of the Naval Prize Act 1864."

Having regard to the cumulative effect of the provisions of the Act of 1864 and the Act of 1915, I am inclined to think that I have no other duty in this case than to determine judicially whether, in point of legality, the decree in question is enforceable within the jurisdiction of the Vice-Admiralty Prize Court of Gibraltar. I cannot doubt that it is. If the power to make the declaration which is sought is discretionary—and I take the view that it is not—the discretion is to be exercised judicially. Inasmuch as the decree in question is valid and subsisting, and such as in substance could have been made under the general jurisdiction of the court before the Act of 1864, and has proved unenforceable here for six years, and remains uncomplied with, I find myself obliged to declare as prayed by the defendants that the order of the court as to costs made in this cause on the 6th Feb. 1919 is enforceable within the jurisdiction of the Prize Court in Gibraltar.

Solicitors: *Pritchard* and *Sons*; *The Treasury Solicitor.*

July 15, 16, 20, *and* 28, 1925.

(Before BATESON, J.)

THE REFRIGERANT. (*a*)

Towage — Contract — Implied terms — Interruption of the service — Obligation on the part of the tug in case of accidents to do all she reasonably can to take care of the tow—Construction of written contract—Owners of the tug not liable for "damage or loss"—Tow abandoned by the tug—Liability of the owners of the tug for salvage services rendered to the tow after abandonment.

A towage contract contained the following terms: ". . . during the towage services the master and crew of the tugboat become the servants of the owners of the vessel in tow and are under the control of the master or person in charge of the vessel in tow, the company only providing the motive power. The company will not be liable for any damage or loss to . . . the vessel in tow . . . or any damage or loss to any person or property whatsoever, although any such damage or loss may be caused or contributed to by the acts or defaults of the master . . . of the tugboat. . . ."

During the towage the tow rope parted owing to bad weather, and the tug, instead of remaining by the tow, proceeded into port, ostensibly to obtain a new tow rope, leaving the steamer, which had no steam power, helpless in the English Channel in bad weather. The master of the tug did not attempt to return, though he sent out another tug, until ordered by his owners to do so. In the meanwhile, the tow was taken to port by another steamer, to whom her owners paid salvage remuneration. The tug then completed the towage service.

Held, in an action by the tug owners for the price of the towage, that it was an implied term that the services might be interrupted and that, the tug having completed the services, her owners were entitled to the remuneration for which they had contracted, and not remuneration upon a quantum meruit *basis.*

Held, further, on a counterclaim by the owners of the tow, that they were entitled to recover by way of damages the sum paid by them to the salvors, a term being implied that the tug would do her duty and do all she reasonably could for the safety of the tow.

Held, further, that the owners of the tug were not protected by the terms of the towage contract since the exceptions applied only during the performance of the towage service, and did not apply whilst the performance of the service was interrupted in the sense of the master leaving the tow altogether and proceeding into port and sending another tug to do his work. The Cap Palos (15 *Asp. Mar. Law Cas.* 403; 126 *L. T. Rep.* 82; (1921) *P.* 458) *applied.*

ACTION for towage remuneration.

The plaintiffs, Lawson-Batey Limited, owners of the tug *Joffre*, claimed the sum of 400*l.* under a contract in writing by which they agreed to tow the defendants' vessel *Refrigerant* from L'Orient to Liverpool. The *Refrigerant* had no steam power. During the towage the tow rope parted. The *Joffre* then proceeded to Falmouth, leaving the *Refrigerant* helpless off the Lizard, whence she was ultimately towed to Plymouth by the trawler *L'Etoile de l'Est*, to whom the owners of the *Refrigerant* paid 2000*l.* for salvage remuneration. The *Joffre* eventually picked up the *Refrigerant* at Plymouth and completed the towage to Liverpool.

The owners of the *Refrigerant* admitted liability for 350*l.* by way of *quantum meruit* for the services performed by the *Joffre*, and counterclaimed for 2000*l.*, less 350*l.*, as damages for breach of the towage contract by the *Joffre*.

The towage contract contained the following terms:

Notice.—The following terms apply to and are incorporated in all contracts or services entered into by the company: During the towing service the master and crew of the tugboat become the

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

servants of the owners of the vessel in tow and are under the control of the master or person in charge of the vessel in tow, the company only providing the motive power. The company will not be liable for any damage or loss to or occasioned by the vessel in tow or her cargo, or pilot, master, crew or passengers or any person on board, or any damage or loss to any person or property whatsoever, although any such damage or loss may be caused or contributed to by the acts or defaults of the master or crew of the tugboat or by any defect in or breakdown of or accident to the hull, boilers, machinery, equipment or towing gear of the tugboat or any of them. . . .

Langton, K.C. and *Carpmael* for the plaintiffs.

Dunlop, K.C. and *Balloch* for the defendants.

The facts and arguments fully appear from the judgments of the learned judge.

Cur. adv. vult.

July 28.—BATESON, J.—In this case my judgment is for the plaintiffs on the claim and for the defendants on the counterclaim. It is a claim under a towage contract dated the 27th Oct. 1924, whereby the plaintiffs agreed to tow the steamship *Refrigerant* from L'Orient to Liverpool with their tug *Joffre*. The contract included the supply by the tug of a hawser sufficient for the purpose, the vessel in tow to be in seaworthy condition and steam to be available, if possible, for steering and anchor use. "If through any cause whatever the tug is compelled to put into port the charges incidental to the *Refrigerant* to be for the account of the shipowners and those for the tug to be for the tug owners. The contract price for the service to be 400*l*., and the conditions of the contract to be 'no cure, no pay, no salvage' . . . " Then there is this notice in the contract: "The following terms apply to and are incorporated in all contracts or services entered into by the company: During the towing service the master and crew of the tugboat become the servants of the owners of the vessel in tow and are under the control of the master or person in charge of the vessel in tow, the company only providing the motive power. The company will not be liable for any damage or loss to or occasioned by the vessel in tow, or her cargo, or her pilot, master, crew or passengers or any person on board or any damage or loss to any person or property whatsoever, although any such damage or loss may be caused or contributed to by the acts or defaults of the master or crew of the tugboat, or by any defect in or breakdown of or accident to the hull, boiler, machinery, equipment, or towing gear of the tugboat, or any of them."

The facts, as I find them, are these: The *Refrigerant* was a vessel of 3421 tons gross, 331ft. long, 46.8ft. in beam and light. She had no propelling engines capable of being, or intended to be, used. She had a crew of seven or eight and two masters, a French and an English one. She could get steam for steering or anchor use, but raised none until after the events in question. The hand-steering gear, which was aft, was always used during the part of the services that have to be considered. The *Joffre* was a good ocean-going tug, belonging to Lawson-Batey Limited; she had two good tow ropes made up of a 4½in. wire, ninety fathoms long, a 15in. manilla hawser 100 fathoms long, a 5in. wire ninety fathoms long, and an 18in. coil of sixteen fathoms. No question arises as to the wire, but the manilla is attacked. Nearly all the evidence was devoted to this rope, and I will deal with it in detail later. The actual gear that was used for the towage was a combination of the three tow ropes, *i.e.*, the 4½in. wire, the 5in. wire, and the 15in. manilla, making a total length of some 280 fathoms altogether.

On the 28th Oct. 1924, about 3.30 p.m., the towage began, the wires being joined together and shackled on with a shackle to the manilla, the wires being next the ship and the manilla next the tug. Neither vessel was fitted with wireless that was of any value. The tug had wireless, but she had no operator. At the time of starting the master of the tug knew that the *Refrigerant* was not providing any steam. He and the master of the *Refrigerant* seem to have thought that the tackle was good enough to tow any ship like the *Refrigerant* with hand gear only in use. She had been lying up for some time, and no doubt the gear was stiff and required a considerable amount of oiling and greasing all through the service. The steam-steering gear on the ship was amidships, the hand-steering gear being aft. One man only was stationed at the wheel with another man standing by in case of need for help. The second man was only used when they were coming out of port, and apparently he was not wanted unless there was some excessive action required at any time. On the 29th Oct. strong winds were encountered, and the ship sheered a good deal. I am satisfied with the evidence of the mate of the tug that the man or men who were steering the *Refrigerant* could not really see properly forward, and they themselves say that they had to keep the tug a little on the starboard bow in order to see where she was going. There was no officer by the men, to see how the tug was steering, out at the side of the ship. The man who was assisting the steersman does not seem to have been watching the tug, and therefore, the man at the wheel would have great difficulty in keeping the ship aft of the tug, especially as he was steering no compass course, and in fact had not any compass to guide him. I am advised under these circumstances that the steering would very likely be slow, and that the ship would not be at all likely to follow the tug well if navigated in that way. There was somebody on the bridge, but he was a long way away for the conveyance of any order, and no order seems to have been conveyed. Everybody seems to have been quite satisfied with the gear and no exception was taken to it. On the 30th Oct. the weather got worse. It blew hard towards night, getting up to a gale, lulling down, and then breaking out again on the early morning of

the 31st, and all through this towage this rope stood very well. About 2 a.m., on the 31st, having met this bad weather, the tug master thought it advisable—and the French master agreed—that they should make for shelter. The tug therefore turned round to make for Falmouth, altering from her heading of about N.W., with the wind more or less abeam, to N.E. Putting the wind behind the ship in this way would no doubt make the ship sheer worse and take runs on either quarter, and so put a great strain on the rope, and it eventually parted about thirty fathoms from the tug's stern. This happened when the vessel was some fourteen miles from the Lizard. It may be that the tug in turning round turned a little quickly. It may be that the ship did not follow as she ought to have done, or as quickly as she might. It may be a combination of those causes, or it may just have been bad luck in the conditions that prevailed at the moment when they turned. But I am satisfied it was not any fault in the rope. The weather was still rather bad. The ship was helpless, and in those circumstances the tug went away without saying anything to the ship, and after attempting to speak the Lizard with her Morse lamp, which gave out as soon as the name of the tug had been passed to the Lizard, she went into Falmouth, arriving there about 6 a.m. In the meantime she had hove in the rope, and found it was broken at the thirty fathoms. She did not know what had happened to the wires; she did not know anything as to what the condition of things was on board the ship, but left her in a position as to which, the master said, when he got in, he asked the tug *Dandy* to go and see if she required assistance, and said he was afraid she might drift ashore at the Lizard. Apparently, therefore, knowing the ship might drift ashore on the Lizard, the master went away in the circumstances I have detailed. It is said that the weather was too bad to hear voices and too bad to pick up a wire hanging from the ship and to get it connected again. I do not know whether there was a megaphone on board the tug or not, but at any rate, I should have thought that the tug might have stayed there, and have let the ship know that she was standing by, even though they might not have been able to talk very much. If she had remained with her tow her presence, with her lights, would have been a means of showing that she was still looking after the ship, even although it was too bad to connect with her, and, of course, in daylight the international code flags could have been used and conversation maintained quite easily.

On getting into Falmouth the tug met the *Dandy* just outside the port, and the captain of the tug told the *Dandy's* captain of the position, who remarked that he would see the *Dandy's* owners and let them know. Eventually the *Dandy* went out, the master of the *Joffre* went ashore, and came back about 10 a.m. having been unable to get a rope. So far as the master's actions go—unfortunately he is dead, and I could not hear his evidence—he does not seem to have had any intention of going back to the vessel until he had got a rope. When he was ashore he wired the owners: "Tow rope parted this morning thirteen miles off Lizard. Will require new tow rope to resume connection with *Refrigerant*." The owners replied: "We are waiting to hear with interest how this occurred as your telegrams have been very vague and convey practically no information." That letter is not unimportant as to the view which the owners took of what had happened so far as the information given by the master was concerned. They go on: "In the first place you should have stated whether the ship was adrift, as it was you led us to believe that although your rope had broken, the ship was in Falmouth Harbour, and subsequently the tug *Dandy* went out in search, and after a good deal of trouble in getting through to the agents on the telephone we got them to understand we required you to go out immediately, stand by the vessel and tow her into Falmouth when the weather moderates." Clearly their view was that whatever the circumstances were he ought to have stood by the vessel in the first instance. "If the *Dandy* can go out we see no reason why you should not—you always have a hope of getting a wire from the ship and connecting it to the ship's cable, at the present time we do not know what effort you made to keep in touch with the vessel, but to us it appears a bad business to come and report vessel having broken away. Up to the present of course we have no explanation as to why you did not attempt to remain by the vessel. There was always the hope of getting connected again, and bringing her into shelter. So far as new towing hawsers are concerned the prices at Falmouth are prohibitive—further it will take three days at least to make one there. We can do much better here, and are despatching by rail to-day 80 fathoms of manilla and 120 fathoms of wire." Then they speak of what they think the way to tow should be: "We are much disappointed to hear indeed you did not stand by the ship and make an effort to reconnect, and we are anxiously waiting further reports as to the position of the vessel and what has been done. . . ."

That is a letter from people who know their business and are quite definite in their view that, whatever the circumstances were, the tug ought certainly to have stayed by the ship and not have left her, and I think they were right. At 9 a.m. the same day the *Dandy* went out, and we know that the *Dandy* found the ship and spoke her and offered her services, but as they were on a salvage basis and not on account of the owners of the *Joffre* the master of the *Refrigerant* declined them, and it was not till 1.30 p.m.—in consequence of the orders which the owners gave—that the *Joffre* put to sea, losing of course much valuable time. No doubt the *Dandy* could have held the ship and brought her in in the weather as it was.

I have also no doubt if the *Joffre* had gone out there would have been no real difficulty in getting connection again ; it might have been somewhat troublesome owing to the fact that the *Refrigerant* had no steam, but still the wire could, I think, have been got hold of by other means than a grab. They could have put a piece of wire round it and hauled it on board the *Refrigerant* (letting it run down the wire and so getting hold of it), or indeed there were other wires on board the ship, which in case of emergency could have been used, and some attempt could have been made and probably would have been successful.

The *Dandy* returned about 7.30 p.m. and the *Joffre*, having again gone out at 1.30, remained out all night, but failed to find the *Refrigerant*. The weather was rainy, and when looking for a ship that may be drifting in any direction in such weather as prevailed, it might quite easily be that the ship would be missed. About 9 or 10 a.m. on the 1st Nov. the *Joffre* came back to Falmouth. Meanwhile a trawler, *L'Etoile de l'Est*, had found the *Refrigerant* and had taken her into Plymouth, arriving there about 8 a.m., and the owners of *L'Etoile de l'Est* have been paid 2000*l*. as salvage, a sum both parties agreed was a fair and proper sum for her services. No question therefore arises about that figure. On the 2nd Nov. the *Joffre* found the *Refrigerant* again in Plymouth. On the 4th the *Joffre* got another rope—a second-hand one—and on the 6th Nov. the towage was resumed and successfully finished on the 10th Nov. in Liverpool. Thus the *Joffre* did get the vessel to her destination, and whether one views it as a performance of the contract—400*l*. being due under the contract—or whether one looks at it from the point of view of a *quantum meruit*, I think the 400*l*. is a proper sum, and was earned under the contract.

That is the history of the case. [His Lordship then dealt with the history of the rope, which he said he found was good and sufficient.] That being so, having found, as I do, that the master left the ship in the way he did, I have asked the Elder Brethren this question : " Ought the tug master, in the weather described by the weather reports, as I find them, to have left the *Refrigerant* and gone to Falmouth without communicating with the ship ? " They answer " No." They point out that, even if the weather was too bad to get real communication by hailing, the tug could have waited till daylight and signalled by flag. I have also asked, having left her, ought the tug master to have gone to Falmouth and remained there as he did without making sure of effective assistance being given in his place ? Merely to send out the *Dandy*, who might or might not come to terms, does not seem to be sufficient. The Elder Brethren answer that question in the negative also. I agree with both of these answers. Finding that no new rope was available in Falmouth the tug master certainly ought to have gone out with the *Dandy* or followed out ; he knew by 10 a.m. he could not get a rope, and he should have done his best with the wires remaining. If he had done so I cannot believe that there would have been any difficulty in preventing all the trouble that ensued. I am not really saying any more than what the owners themselves said in the letter of the 31st Oct. that I have already read.

Those being the facts, and that being the advice that I have received, what is the position under the contract ? Mr. Dunlop contends that the notice does not protect the tug owners, and Mr. Langton contends that it does. He argued that " during the towage services " means " during the performance or attempted performance of the service." The contract was to tow from L'Orient to Liverpool, and, I think, it is implied in such a contract, in the case of a vessel which has no steam for her own propelling purposes, that there may be accidents owing to bad weather and parting of the rope, or by reason of the various matters which may happen in a long heavy tow, without anybody being to blame. It is not a contract to tow without a break, as was suggested by Mr. Dunlop. In all these contracts it must be implied that the parties contemplate an interruption of the service. The price would be prohibitive if there was a guarantee that the towage would be without incident, and business could not be carried on on such terms. Equally, I think, it is implied in all these contracts that the tug will do her duty in case of accidents and do all she reasonably can to take care of and protect the ship. I think that is, putting it quite shortly, the result of Dr. Lushington's judgment in *The Minnehaha* (1861, 15 Moo. P. C. 133) and it is re-expressed in the judgment of Roche, J. in *The Prince George* (*Cohen, Sons, and Co.* v. *Standard Marine Insurance Company* (1925, 21 Ll. L. L. Rep. 30). So far as it is for me, and so far as it is for the Elder Brethren, we think that it was very wrong for the tug to go away as she did. She ought to have stood by, and she ought not to have stayed away in Falmouth. These sort of accidents happen in many salvage cases where the salving vessel invariably stands by her salved ship, and eventually, although the ropes break, they manage to get into port ; they do not abandon a ship in danger of going ashore or merely send a wire to the owners, or only go out when, in effect, they are driven to go out by receiving a wire from the owners so to do.

Did this happen during the towing service ? I think not. In my opinion the words " during the towage service " mean while the service is being conducted—not while it is being interrupted, in the sense that the master of the tug leaves the ship altogether and goes into port and sends out somebody else to do his work. I think the contract contemplates that the tug and tow shall keep together, because it says : " during the towing service the master and crew of the tug boat become the servants of the owners of the vessel in tow and are under the control of the master or person in charge of the

vessel in tow." It seems to me that if the master of the tug goes away and asks somebody else to do his work it cannot be said that those words contemplate such a doing of the work as that. Further than that, as to the words in the rest of the clause, " the company will not be liable for any damage or loss " (leaving out the unimportant words), I do not think that it is " damage or loss " to the vessel when she has been left to get salvage assistance to bring her out of her difficulties. In my opinion, that is not damage or loss to the vessel, nor do I think it is " damage to any person or property whatsoever " within the meaning of this clause. I think that the expressions used by Lord Sterndale and Atkin, L.J. in *The Cap Palos* (15 Asp. Mar. Law Cas. 403 ; 126 L. T. Rep. 82 ; (1921) P. 458) support that view. It is true that in that case the facts were different and the contract was different. But if the plaintiffs wanted to protect themselves against the sort of thing that happened in this case, I think they ought to have used clear words, and they have not done so. Lord Sterndale says : " I do not think it is necessary to say that in no case can the words ' default of the owner ' refer to a breach of contract, but I think that the whole clause points to the exceptions being confined to a time when the tug owner is doing something or omitting to do something in the actual performance of the contract, and do not apply during a period when, as in this case, he has ceased even for a time to do anything at all and has left the performance of his duties to some one else. In other words, I think the exception extends to cover a default during the actual performance of the duties of the contract, and not to an unjustified handing over of those obligations to some one else for performance." Atkin, L.J. says, quoting from the judgment of Scrutton, L.J. in *Gibaud* v. *Great Eastern Railway Company* (125 L. T. Rep. 76 ; (1921) 2 K. B. 426) " The principle is well known and perhaps *Lilley* v. *Doubleday* is the best illustration, that if you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it."

In my opinion, the way in which this towage was contracted to be done was that the tug should tow the ship with possible interruptions, no doubt, but that she should stand by in case of accident and not leave the ship in the way she did. Therefore, I think, although those expressions in *The Cap Palos* (*sup.*) were used in regard to the owner—who there was the person who had given up trying to do the work —they are equally applicable where the master has given up, as in this case, trying to perform the service in the way in which it was contemplated that it should be performed by the parties to it. For these reasons I think my judgment should be as I have stated.

What are the damages ? The damages seem to me to be 2000*l*. There was not any real contest as to that, and I think I must allow the damages at the 2000*l*. that had to be paid to *L'Etoile de l'Est*. It does not necessarily follow that the same sum would have had to be paid to the *Dandy* if she had done the work, but I was not addressed on that matter, and I think I am right in allowing the damages at the sum claimed. As regards costs, on the claim the judgment must be for the plaintiffs with costs, and on the counterclaim for the defendants with costs save as to the issue about the rope.

Solicitors : *Pritchard* and *Sons*, agents for *Wilkinson* and *Marshall*, Newcastle-on-Tyne ; *Botterell* and *Roche*.

Tuesday, Oct. 20, 1925.

(Before HILL, J.)

THE BATAVIER III. (*a*)

Damage — Moorings parted by wash from a vessel passing at excessive speed — Action against passing vessel—Inefficient moorings—Fault of both vessels—Division of loss—Maritime Conventions Act 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *s.* 1 (1).

Sect. 1 (1) *of the Maritime Conventions Act* 1911, *whereby it is provided that " where by the fault of two or more vessels damage or loss is caused to one or more of those vessels . . . the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was at fault. . . ." is not confined in its application to cases where the two vessels held to have been in fault have been in collision with each other, but applies to cases where the vessels in fault have not been in actual contact.*

Thus, where a vessel broke from her moorings and was damaged, in circumstances in which it was held that the damage was caused partly by the inefficiency of the moorings and partly by the wash raised by another vessel passing at an excessive speed,

Held, that the blame might be apportioned between the two vessels.

The Cairnbahn (12 *Asp. Mar. Law Cas.* 455 ; 110 *L. T. Rep.* 230 ; (1914) *P.* 25) *followed.*

DAMAGE ACTION.

The plaintiffs claimed damages for injuries sustained by their steamer *Bromsgrove*. The *Bromsgrove* was lying moored at buoys in the Thames when the defendants' steamship, *Batavier III.*, passed, bound up-river. The *Bromsgrove* sustained damage by parting her moorings, owing to the wash caused, as the

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

plaintiffs alleged, by the excessive speed at which the *Batavier III.* was travelling. According to the defendants' case the moorings of the *Bromsgrove* were so placed that they were inefficient, and their inefficiency was further accentuated by another vessel being permitted to moor alongside the *Bromsgrove*.

Sect. 1 of the Maritime Conventions Act 1911 provides as follows:

(1) Where by the fault of two or more vessels damage or loss is caused to one or more of those vessels, to their cargoes or freight, or any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault. . . .

Hayward for the plaintiffs.

Digby for the defendants.

HILL, J.—In this case I have got to consider altogether three ships: the *Bromsgrove* and the *Batavier III.*, which are the two ships actually involved in the litigation, and a third ship, the *Camberwell*. The *Bromsgrove* is a steamship of 1445 tons gross, 240ft. long and 36ft. beam. She was laden and drawing 17ft. The *Camberwell* was somewhat larger and was also laden. These two ships were lying at the Deptford Buoys on the south side of the river at the time the *Batavier III.* passed up. The *Camberwell* parted some of her ropes; the *Bromsgrove* parted all her head ropes, her head swung in, she stranded forward and had to take tug assistance. She complains that the breaking adrift was caused by the excessive speed of the *Batavier III.* causing an excessive wash. The defendants deny excessive speed and say that no properly moored vessel could have been affected by any wash made by the *Batavier III.*

The *Batavier III.* is a steel screw steamship of 1333 tons gross, 261ft. long; she had a part general cargo on board and was drawing 12ft. 6in. and 14ft. 7in. She was in charge of a pilot; she was bound up for her berth at Custom House Quay. The time was 11.45 on the 4th Jan., which was a Sunday. There was some dispute as to the wind, but at the place in question it was not of importance. The tide was ebb. High water at London Bridge 9.30 and about an hour earlier at Gravesend. At the time and place in question it was running about three knots, and there was a set of about one and a half points towards the south shore. The *Bromsgrove* moored on the morning of the 3rd. Forward she had out two 2½in. wires and one 3¼in. wire. Aft she had two 2½in. wires and one 3¼in. wire. She was moored head up. Ahead she was moored close up to the upper buoy, which was a little abaft and on the port side of her stem. The two 2½in. wires lead from the foc'sle head and were straight up and down; the 3¼in. lead from the well deck on the port side. There were similar moorings aft. The length of the tier is 315ft. On the morning of the 4th the *Camberwell* moored outside the *Bromsgrove* to the same buoys. She moored head down. Her moorings were similar to those of the *Bromsgrove*, except that aft (that is, to the upper buoy) she had in addition one 7in. manilla. She had two small wires as breast ropes to the *Bromsgrove*. The upper buoy continued to be on the port side of the *Bromsgrove's* stern. It was not between the two ships. On the ebb the *Bromsgrove* bore part of the weight of the *Camberwell*. I find as a fact that while the *Batavier III.* was passing some of the ropes of both the *Bromsgrove* and the *Camberwell* parted. On the *Camberwell* one of the 2½in. wires forward (that is, to the lower buoy) parted first, and then one of the 2½in. wires and the 7in. manilla aft. On the *Bromsgrove* both the 2½in. wires forward (that is, to the upper buoy) parted and then the 3¼in. forward, and immediately afterwards the two 2½in. aft. This left her free forward and she swung into the south shore and grounded forward.

The questions in controversy, on the one side and the other, are (1) the moorings of the *Bromsgrove*, and (2) the speed of the *Batavier III.* No complaint is made of the number or quality of the moorings. The complaint is that they were so placed in relation to the upper buoy that they were inefficient, and still more inefficient after the *Camberwell* made fast, and added some of her weight to the *Bromsgrove* on the ebb tide. I am advised that they were inefficient. The two 2½in. wires leading straight up and down were of no real value; it was the 3¼in. from the well deck which alone had to take the strain. It is true that the *Bromsgrove* had been to the same moorings from the morning of the 3rd, and on that day (Saturday) many ships must have passed up and down. But on the 4th the *Camberwell* was a new factor, and I do not know what traffic there was between the mooring of the *Camberwell* and the passing of the *Batavier III.* On the other hand, I find in fact that the *Batavier III.* passed at a speed which I am advised was excessive and did cause a wash which was excessive, and that such wash was the immediate cause of the parting of the moorings. The plaintiffs' evidence puts the speed at ten to twelve knots; the defendants admit seven. But it is clear that it was more than seven. According to times proved by the plaintiffs the *Batavier III.* took two hours thirty-four minutes from Gravesend Railway Pier to Tower Bridge; according to times given in evidence by the defendants two hours forty-five minutes. The distance is, I am advised, twenty-two sea miles. This gives an average of eight without any allowance for tide, and the tide was at the end three knots and substantial all the way. The pilot said that for the first hour he was going full speed, which was twelve knots, with perhaps occasional easings. Assume it was twelve knots (at sea it was eleven and a half), and set off the easings against the tide, the *Batavier III.* covered twelve sea miles in the first hour; that leaves ten miles in the remaining one hour forty-five minutes or one hour thirty-four minutes, with a three-knot ebb tide. Take it at one hour forty-five minutes and you get an average of 5.7 + 3 of tide = 8.7, and there

were times during that hour and three-quarters when the *Batavier III.* slowed down. I incline to think that in fact the full speed was eleven and a half and not twelve, and that the plaintiffs' times should be accepted rather than the defendants, but it is sufficient to condemn the defendants to take their full speed and their times. There was every reason why the *Batavier III.* should be pressing. She only reached her berth just in time, and on arrival had only 14.6 on the berth. As the log records, she berthed "on the mud." I cannot accept the defendants' evidence of speed in passing the *Bromsgrove.* I find that the speed was at least eight and a half, and probably substantially more. I am advised that in the locality in question that was excessive, and such as might endanger the safety of ships lying at the buoys. It is significant that the first mooring to part was a mooring of the *Camberwell* to the lower buoy, as to which no complaint can be made. Whether if the *Bromsgrove* had been efficiently moored the wash was such that she would have broken adrift is a matter of speculation. It cannot be said with certainty that the moorings would or would not have withstood the strain. What I can and do say is that the speed was improper, the wash excessive, and the moorings, in point of position, inefficient. And, as it actually happened, two causes contributed to the breaking adrift, the wash and the position of the moorings, and, in my opinion, the proper finding of fact is that the damage to the *Bromsgrove* and the loss to her owners were caused by the fault of those in charge of the *Batavier III.* and of the *Bromsgrove.* If so, the Maritime Conventions Act applies. The section, as pointed out by Lord Parker and Warrington, J. in *The Cairnbahn* (12 Asp. Mar. Law Cas. 455 ; 110 L. T. Rep. 230 ; (1914) P. 25), is not confined to cases of collision.

I hold both to blame. Should I apportion the loss otherwise than equally ? I think the excessive speed in a river like the Thames is the graver fault—two-fifths to the *Bromsgrove* and three-fifths to the *Batavier III.*

Solicitors for the plaintiffs, *Botterell* and *Roche*, agents for *Botterell, Roche,* and *Temperley*, Newcastle-on-Tyne.

Solicitors for the defendants, *R. H. Behrend* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, Nov. 6, 1925.

(Before BANKES, SCRUTTON, and ATKIN, L.JJ.)

REDERI AKTIEBOLAGET ACOLUS v. W. N. HILLAS AND CO. LIMITED. (a)

Charter-party — Timber cargo — Cargo to be loaded and discharged with customary steamship dispatch—Custom of the port—Charterer's risk and expense as customary—"Alongside" the steamer—Liability of Charterer.

The plaintiffs, the owners of the steamship O., chartered that steamship to the defendants to carry a cargo of timber from the Baltic to Hull or West Hartlepool as ordered. By clause 3 of the charter-party it was agreed that "The cargo to be loaded and discharged with customary steamship dispatch as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports . . . the cargo to be brought to and taken from alongside the steamer at the charterer's risk and expense as customary." The steamer duly arrived at Hull and was backed alongside a quay in the dock, and one of the usual methods of discharging a timber cargo at Hull at that spot was that a platform should be erected covering the space between the ship's side and a line of rails upon which bogies ran upon which the timber discharged from the ship was placed and run into the timber merchant's yard. The distance from the edge of the quay to the nearest rail on which the bogies ran was about 18ft. Some expense was incurred in building the platform, which consisted of some portion of the cargo, and some expense was also necessarily incurred in conveying the timber from the ship's rail, across the platform, and placing it on the bogies, and the dispute was as to who should pay the expenses of building the platform and of conveying the timber from the ship's rail, across the platform, and placing it on the bogies. The charterers contended that those expenses ought to be borne by the shipowners under a long-standing custom at Hull, which, so long ago as 1899, was reduced into writing and published, and that, by that custom, those expenses were payable by the shipowners. The shipowners contended that, in spite of that custom, by the language of the charter-party, those expenses were thrown on the charterers. Greer, J. held that the defendants were liable for such proportionate part of the stevedore's charges as were attributable to the work of taking the timber beyond the steamer's rail. The custom of the port was only binding in so far as it was consistent with the terms of the charter-party and could not impose on the steamship a binding obligation to take the goods beyond a place which could properly be described as alongside

(a) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

the steamship, and that there was no evidence that the word "alongside" had acquired a customary meaning at the port of Hull. On appeal,

Held, that having regard to the language of the charter-party, evidence of the custom of the port of Hull was not admissible in order to decide upon whom the expenses in question should rest. The custom was inconsistent with the express terms of the charter-party and the shipowners were entitled to recover.

Palgrave, Brown, and Son Limited *v.* Owners of the steamship Turid (15 *Asp. Mar. Law Cas.* 155, 184, 538; 127 *L. T. Rep.* 42; (1922) 1 *A. C.* 397) *and* Holman *v.* Wade (The Times *Newspaper, May* 11, 1877) *followed.*

Decision of Greer, J. (infrà) *affirmed.*

Appeal from a decision of Greer, J. in an action in the Commercial List.

The facts and arguments sufficiently appear in the headnote and judgments.

W. Norman Raeburn, K.C. and Sir *Robert Aske* for the plaintiffs.

C. T. Le Quesne, K.C. and *Clement Davies* for the defendants.

Cur. adv. vult.

May 29, 1925.—Greer, J. read the following judgment: The plaintiffs, the owners of the steamship *Oresund* chartered to the defendants, claim from the defendants 127*l.* 3*s.* 9*d.*, which they allege is the cost incurred by them in doing work which the defendants had undertaken to do by the terms of the charter-party and had refused to do. It has been agreed that if I hold that the defendants are liable, the question of amount shall be otherwise dealt with.

Though the amount involved in this litigation is small, the question for decision is of general importance to all shipowners and merchants interested in the importation and delivery in Hull Docks of timber carried upon the terms of the Scanfin charter-party.

By a charter-party dated the 24th May 1924 between the plaintiffs, as owners of the steamship *Oresund*, and the defendants, as charterers, it was agreed that the steamer should proceed to Karlesborg and there load a full and complete cargo of deals, and (or) battens, and (or) boards and (or) scantlings, including a dock load at full freight, and therewith proceed to Hull (Victoria Docks) or West Hartlepool, as ordered, and there deliver the same always afloat on being paid freight as thereunder mentioned.

Clause 3 of the charter-party reads as follows:

The cargo to be loaded and discharged with customary steamship dispatch, as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, Sundays, general or local holidays (unless used) in both loading and discharging excepted. Should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at thirty pounds per day, and *pro rata* for any part thereof. The cargo to be brought to and taken from alongside the steamer at charterer's risk and expense as customary. The master has liberty to bring iron or other dead weight as ballast from the loading or any other port.

It will be seen that the clause contains three references to custom: (1) The discharge to be "with customary steamship dispatch," (2) as fast as the steamer can receive and deliver during ordinary working hours of the respective ports, but "according to the custom of the respective ports," (3) the cargo is to be brought to and taken from alongside the steamer at charterer's risk and expense as customary. It is obvious that the references to customary dispatch and delivery according to the custom of the port can only apply as far as they are consistent with the express obligation of the charterers to take the cargo from alongside at their risk and expense.

At the Victoria Dock, Hull, there are three different ways in which wood cargoes are dealt with on arrival. They are sometimes delivered into lighters which come alongside the ships; sometimes handed over the ship's rail, carried across a platform which is, in the first instance, built up out of the dock cargo, and placed in bogies on rails along the quay; and sometimes carried from the ship's rail to a place on the quay at a distance from the ship which may be as much as 60 feet. In the case of the *Oresund*, the charterers required the goods in bogies, and the second method of dealing with the cargo was adopted.

The plaintiffs contended that when they handed the goods over the ship's rail or, at any rate, when they had put them over the rail as far as the ship's tackle would reach, they had performed their duties as to delivery. The goods were then alongside, and it was for the charterers to incur the expense of carrying them to and loading and securing them in the bogies.

The defendants contended that the shipowner had to discharge the ship according to the custom of the port of Hull; that the custom put upon him the obligation of erecting the staging, carrying the timber across the staging, and piling and securing it in the bogies; and that their obligation to receive the cargo did not begin until all this work was done. They alleged and proved a threefold custom which, according to the evidence, had been established for many years before the Scanfin charter-party was settled by representatives of the shipowners and merchants engaged in the wood trade in this country.

To prevent disputes as to the existence and extent of the custom it was put into writing in June 1899. It was proved to my satisfaction that the custom as stated in the written record, and explained by the witnesses for the defence, had been followed in the port of Hull before and since 1899 until about a year ago, when, in consequence of reported litigation about similar customs at other ports, shipowners began to dispute the claim of the charterers or receivers to put upon the ship the expense of taking the

goods to the bogies, or to the places on the quay opposite the ship indicated by the receiver.

The plaintiffs contended that the custom as proved was (1) uncertain, (2) unreasonable, and (3) inconsistent with the express words of the charter-party. The custom as stated in the written record is as follows: "Mode of discharge. It is the duty of the owner of a steamer discharging a wood cargo as abovementioned"—that is, including the Victoria Dock—" to remove the cargo from the steamer and to place it upon the quay space opposite the steamer, or upon carriages on rails (termed 'bogies'), or to lower the cargo into open lighters supplied and brought alongside by the receivers, and to pay for the labour necessary to perform the above work. It is the duty of the receivers of such cargo to supply and have ready a clear quay space the full length of the steamer and (or) a sufficient continuous supply of bogies and (or) suitable open lighters alongside. Quay space means the piece of ground opposite the side of the steamer which lies immediately alongside or beyond the rails on which the bogies run, alongside and parallel with the steamer, and which piece of ground extends away from the steamer up to the next road or line of rails which runs roughly speaking, parallel with the steamer."

In my judgment the custom so far as it affects delivery to bogies, is neither uncertain nor unreasonable. Its meaning and effect on the duties of the shipowner could easily be definitely determined by inquiry at the port of Hull; it would not be difficult to estimate the probable expense, and the shipowner could therefore easily indemnify himself against such additional expense as the custom imposed on him by fixing a rate of freight sufficient to remunerate him not only for the ordinary services of a carrier by sea, but also for the additional services required of him by the custom.

The only question it is necessary to consider at length is the remaining one: Is the custom consistent with the express words of the charter-party? The defendants put their case, so far as this point is concerned, in two ways (*a*) They say that in the timber and shipping trade of the port of Hull, "alongside" has acquired a special trade meaning, and in this charter-party it is used in its special trade meaning and not in its ordinary meaning, (*b*) They say that, in any case, the custom is not inconsistent with the words of the charter-party; it relates only to the method of discharge alongside; the timber was still alongside when it was put into the bogies, just as it was when put into the lighters in the London dock in the case of *Aktieselskab Helios* v. *Ekman and Co.* (8 Asp. Mar. Law Cas. 244; 76 L. T. Rep. 537; (1897) 2 Q. B. 83) and *Glasgow Navigation Company* v. *Howard Brothers and Co.* (9 Asp. Mar. Law Cas. 376; 102 L. T. Rep. 172).

As to (*a*), in my judgment the defendants entirely failed to prove that the word "alongside" had acquired a special trade meaning in the Hull timber importing trade. It is plain in the written statement of the custom that "alongside" is used in its ordinary sense when applied to the position of the lighters, and the definition of quay space seems to me to mean not that "alongside" has a wider meaning than it ordinarily has, but that the quay space to which the custom applies means not only the quay space which is alongside the steamer, but also further space, which can only be accurately described as parallel with the steamer.

Further, none of the witnesses who were asked to define the customary meaning of the word could give any definite or intelligible definition of the special trade meaning of the word. In my opinion, the evidence failed to bring this case within such authorities as *Smith* v. *Wilson* (1832, 3 B. & Ad. 728), or the various cases referred to in the judgment of Coleridge, J., in *Brown* v. *Byrne* (1854, 3 Ell. & Bl. 703; 18 Jurist. 700).

In my judgment, a custom of the kind proved in this case which is not expressly directed to establish a customary meaning of a word, cannot be said to have this effect indirectly, merely because the custom cannot be given effect to without giving a special meaning to the word. To so decide would in my judgment be contrary to the decision in the case of *Palgrave Brown and Son Limited* v. *Owners of the Steamship Turid* (15 Asp. Mar. Law Cas. 155, 184, 358; 127 L. T. Rep. 42; (1922) 1 A. C. 397).

As to (*b*), the general rule with regard to discharge is stated by Lord Esher, M.R., in *Peterson* v. *Freebody and Co.* (8 Asp. Mar. Law Cas. 55; 73 L. T. Rep. 163; (1895) 2 Q. B. 294, at p. 297): "One party is to give, and the other is to take, delivery at one and the same time, and by one and the same operation. It follows that both must be present to take their part in that operation. . . . The shipowner acts from the dock or some part of his own ship, but always on board his ship. The consignee's place is alongside the ship, where the thing is to be delivered to him. . . . The shipowner . . . must put the goods in such a position that the consignee can take delivery of them. He must put them so far over the side as that the consignee can begin to act upon them; but the moment the goods are put within the reach of the consignee he must take his part in the operation. At one moment of time the shipowner and the consignee are both acting—the one in giving and the other in taking delivery; at another moment the joint act is finished."

To put the goods over the rail is thus the *primâ facie* limit of the obligation of the ship to discharge and deliver the cargo. If there be nothing in the charter-party about the consignee taking from alongside, it may well be that a custom such as is alleged in this case might impose the further duty of delivery into bogies 18½ft. from the ship's side. It has been decided that the ship's obligations, even

where there is an alongside clause, may be extended and the receiver's duties diminished by an established custom of the port (see *Aktieselskab Helios* v. *Ekman and Co.* (*sup.*), and *Glasgow Navigation Company* v. *Howard Brothers and Co.* (*sup.*), so long as the added duties of the ship are being performed while the goods are still alongside. But if the added duties of the ship imposed by the custom extend to taking goods beyond a place that can properly be described as alongside, the custom is inconsistent with the contract made by the express words of the charter-party, and is not binding on the parties to the contract.

In this case, the custom involved the building of a stage for a distance of 18½ft. from the ship's side, the placing of some of the cargo a further distance equal to the width of the bogie, and fastening it with ropes before it was moved off by men acting for the receiver.

If I apply the test suggested by Lord Campbell in *Humfrey* v. *Dale* (7 E. & B. 266, 273, 279), and applied by Lord Birkenhead in the case of *The Turid* (15 Asp. Mar. Law Cas., at p. 541 ; 127 L. T. Rep. 42 ; (1922) 1 A. C., at p. 407), I find that the charter-party would read : " The cargo to be taken from alongside the steamer at charterer's risk and expense as customary ; that is to say, a sufficient part of the deck cargo shall, at the shipowner's risk and expense be carried from the rail of the vessel on to the quay, and then used to form a stage from the ship's side to the bogies 18½ft. away, to the height of the bogies, and the rest of the cargo shall, at the risk and expense of the shipowner, be carried over the staging and loaded into the said bogies, and there securely roped."

So read, it appears to me clear that the added words are inconsistent with those taken from the charter-party. As Lord Birkenhead points out : " The word 'alongside,' if it does not suggest actual contact, does at all events, suggest close contiguity." The words of Lord Sumner are as appropriate to the facts of the present case as to those proved in the case then under consideration : " Though the ship was in a position in which she was entitled to require the process of delivery to begin, the merchants say that they were only taking the cargo from alongside the steamer, though they could not reach the steamer from their selected spot, nor could the ship's stevedores reach it from the steamer without the interposition of a temporary structure, and of a new form of transport by man-handling the timber. I am unable to reconcile this with being alongside the steamer, the steamer being where she was entitled to be at the commencement of the process of delivery. The fact is the steamer is the starting point. It is from her side that the extension is to be measured, which ultimately reaches the customary spot, and when that extension involves 13ft. of water, bridged by a staging and, at least, 10ft. of quay traversed by porters—I think the spot is too far away."

An attempt was made to distinguish this case from *The Turid* (*sup.*), and *Holman* v. *Wade* (*The Times* newspaper, May 11, 1877) approved in *The Turid* (*sup.*) on the ground that in both those cases part of the distance between the ship's side and the customary place of delivery was covered by water, whereas in the present case it was entirely quay space. I think this is a distinction without a difference, and that in all material respects the present case is indistinguishable from the case of *The Turid* (*sup.*), and should be similarly decided.

In my judgment, the defendants are liable for such proportionate part of the stevedores' charges as is attributable to the work of taking the timber from the ship's rail, and there must be judgment for the plaintiffs, with costs, for a sum to be ascertained by agreement. Or, in default, by a special referee to be appointed by the parties, or, in default of appointment, by the parties then to be appointed by the court.

Judgment for the plaintiffs.

The defendants appealed.

Le Quesne, K.C. and *Clement Davies* for the appellants.

Raeburn, K.C. and *Sir Robert Aske* for the respondents.

BANKES, L.J.—The dispute in this case is between shipowners and charterers as to which of the two should pay part of the expenses of discharging a cargo of timber from the vessel at the Victoria Dock, Hull, and the evidence shows that the vessel was backed alongside a quay in the dock, and that one of the usual methods of discharging a timber cargo at that spot is to erect a platform covering the space between the ship's side and a line of rails upon which bogies run, upon which the timber discharged from the vessel is placed and run into the timber merchant's yard. The distance from the edge of the quay to the nearest rail on which the bogies run, I understand, is about eighteen feet. Some expense is necessarily incurred in building this platform, which consists of some portion of the vessel's cargo, and some expense is also necessarily incurred in conveying the timber from the ship's rail across this platform and placing it on the bogies, and the dispute is as to who shall pay the expense of this operation—building the platform and conveying the timber from the ship's rail and placing it on the bogies.

The charterers contend that that expense ought to be borne by the shipowners, and they say that it should be so borne because of a long-standing custom at Hull, which, as long ago as 1899, was reduced into writing and published, and that by that custom these expenses are payable by the shipowners. The shipowners contend that in spite of that custom, by the language of the charter-party the expense is thrown on the charterers.

The question of the construction of the particular clause in question—clause 3—has been considered on two occasions, once in the

case of *Palgrave, Brown, and Son Limited* v. *Steamship Turid (owners)* (15 Asp. Mar. Law Cas. 538; 127 L. T. Rep. 42; (1922) 1 A. C. 397) in the House of Lords, and once in the case of *Holman* v. *Wade* (*The Times* newspaper, May 11, 1877) in the Court of Appeal, and, in my opinion, it is impossible to distinguish this case from those two cases. It is quite true that there is a distinction in fact, because in both of those cases the vessel could not lie up against the quay, and a bridge had to be constructed between the vessel and the quayside, but, in my opinion, it is not possible to draw a distinction between those cases and this case on that distinction in fact.

I come to the conclusion, therefore, that what is really the main question in this case—namely, whether, having regard to the language of the charter-party, the custom is admissible in order to decide upon whom this expense shall rest—that main question is decided against the appellants by the two cases to which I have referred, and we are bound by them.

Mr. Le Quesne, counsel for the appellants has taken two other points. One, that even assuming that that be the case, the word "alongside" at Hull has obtained by long practice, or long usage, a customary or conventional meaning, and that that customary or conventional meaning means delivery on to these bogies. Well, personally, I think that that point also is covered by the decision of the House of Lords in the *The Turid* case (*sup.*), but apart from that, it does not seem to me that such an argument is open to a party against whom a decision has been given that the language of the charter-party cuts through the custom, because, after all, a customary or conventional meaning only implies a meaning arrived at by custom, and if the custom is by the language of the charter-party excluded, it does not seem to me that it is possible to turn round and say that, apart from proof of the custom, I am entitled to prove a customary or conventional meaning.

His other point was that, apart altogether from this consideration, the ordinary meaning of "alongside" would include the side of the quay up to and including the rails on which the bogies run. Apart from any customary or conventional meaning of the word "alongside," it does not seem to me possible to include that space, and again I say, apart from that it seems to me that that point must have been covered by *The Turid* case (*sup.*), otherwise the decision would not have been given in the language in which it was given.

For these reasons I think the appeal fails.

Scrutton, L.J.—I am in the melancholy and unsatisfactory position of feeling quite sure that I should have gone wrong but for the guidance I have got from superior authority. If I had been left to myself, without the aid of the co-ordinating decisions of the Court of Appeal—*Holman* v. *Wade* (*sup.*), and the House of Lords—*The Turid* case (*sup.*), I should have felt no difficulty in this case. I should have interpreted the word "alongside"—an extremely vague word, in my idea—by the custom of the particular port. I should have interpreted "discharge" by the custom of the particular port. If I found that the custom of the port required the shipowner to do something outside the ship after the goods had left his tackle, as, for instance, to stow in a barge after the things were taken from his tackle, I should have bound him to do it, although it was said that he was to put them "alongside," and that the charterer was to take the goods from "alongside" at charter's risk and expense.

I gather that Lord Sumner would have felt no difficulty, because, in the case of *Glasgow Navigation Company* v. *Howard Brothers and Co.* (9 Asp. Mar. Law Cas. 376; 102 L. T. Rep. 172), he required the ship to do something after the goods had left the ship's tackle—that is, stow the barge—and I myself should have found no difficulty in interpreting "alongside" by the custom of the particular port. I gather that Lord Sumner would take "alongside," at any rate, as far as the ship's tackle would swing; he would not limit it to touching the ship, but so far as the ship's tackle would swing he would treat as "alongside the ship."

If, as is the case of many ports, it is not permissible to leave the goods within the limit of a certain number of feet from the edge of the quay, or not permitted to leave the goods on the quay at all, but only to put them on railway wagons within reach of the ship's tackle, I should have found no difficulty, on the custom being proved, in treating that as "alongside." I should not have felt embarrassed by Lord Campbell's rule in *Humfrey* v. *Dale* (7 E. & B., at p. 273) which, although very excellent, cannot sometimes be applied, because I should know that the courts allow you to prove that twelve means thirteen, and I am quite sure that a custom of twelve meaning thirteen is contradictory of the original words, also that a custom that 100 means 120 is a custom contradictory of the original words, and yet there is no doubt that the courts allow you to prove a custom that when you have the plain words 100, it means 120. I should not have felt any difficulty over Lord Campbell's rule.

But all these matters have been before the House of Lords, in my view. I said in my judgment in *The Turid* case (*sup.*) that I should, if I had been left to myself, have treated the custom as explaining what delivery to the consignee "alongside" means. I should have given "alongside" the customary meaning, different from its ordinary meaning, and Lord Sumner deals with that, and says that where it is wrong is that I have overlooked the extra expense imposed on the shipowner in working after the goods had left the ship's tackle. I did not know that I did overlook it, because I thought that Hamilton, J. had allowed extra expense in loading the barge after the goods had left the ship's tackle.

But it appears to me that all the arguments that would have led me wrong were considered by the House of Lords in the case of *The Turid* (*sup.*). They have explained to me what is the right view, and if any alteration is to be made in their judgment, counsel for the appellants, having had a preliminary run here, will present an improved version of his argument to the House of Lords, and the House of Lords must say whether the custom at Hull is to be disturbed or not.

ATKIN, L.J.—I agree. I also have been prevented from going wrong in this case by the decision of the House of Lords in *The Turid* (*sup.*). I should, on reading that the cargo was to be discharged according to the custom of the port, have examined what the custom of the port was. These words, according to the authority of *Castlegate Steamship Company* v. *Dempsey* (7 Asp. Mar. Law Cas. 108, 186; 66 L. T. Rep. 742; (1892) 1 Q. B. 854) apply to the mode of discharge, and not merely to the time of discharge, and affect both the ship and the consignee, and if I found that the custom was that the ship should, at its expense, deposit the goods at a particular place, I should have seen no reason why that should not be given effect to. Then if one comes to consider the other clause, "Cargo to be brought to and taken alongside the ship at charterer's risk and expense as customary," I think I should have thought that, if the goods had already been discharged by the custom of the port at a place which was not "alongside," then the charterer's duty to take from alongside did not arise. His duty is to take it from the place where the ship by custom of the port has to put it, and in any case I should have had less difficulty in coming to that conclusion, because these are general words relating to the obligations of the charterers, not only at the port of discharge, but at the port of loading.

But quite apart from that, I myself should have seen no reason why "alongside" should not be construed by custom. It certainly is a word which has not a very strict meaning, and as it has been conceded that "alongside" might include a space not less than four feet from the edge of the quay, I see no reason why, by custom, that should not be extended to a space not less than 20ft., or even 70ft., from the edge of the quay.

Nevertheless, all these points seem to me quite plainly to have arisen in the case of *The Turid* (*sup.*), and it is a decision of the Court of Appeal affirmed by the House of Lords, and it seems to me that it would be the worst example for us to try and make narrow distinctions in a case of great commercial importance.

Therefore, I agree that the appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors: for the appellants, *Pritchard* and *Sons*, agents for *Andrew M. Jackson* and *Co.*, Hull; for the respondents, *Botterell* and *Roche*, agents for *Sanderson* and *Co.*, Hull.

Nov. 23 *and* 24, 1925.

(Before BANKES, WARRINGTON, and SCRUTTON, L.JJ).

THE CLARA CAMUS. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Collision — Both to blame — Appeal — Omission by judge at trial to take into consideration an important matter—Variation of the degrees of blame—Maritime Conventions Act 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *s.* 1—*Fog—Steam vessel "hearing apparently forward of her beam the fog signal of a vessel the position of which is not ascertained"—Duty to stop engines and navigate with caution—Regulations for Preventing Collisions at Sea, art.* 16.

Where a judge sitting in Admiralty has apportioned the blame between two wrongdoing vessels in accordance with the provisions of sect. 1 *of the Maritime Conventions Act* 1911, *the Court of Appeal, if it finds that he has not taken into consideration at all an obviously important matter, is bound to review his decision as to the apportionment of blame in the same way as it would if it had differed with with him on the facts and had found that one of the vessels was more blameworthy as regards matters in respect of which she was not held to blame in the court below.*

The rule laid down in The Karamea (15 *Asp. Mar. Law Cas.* 318; 124 *L. T. Rep.* 653; (1921) *P.* 76; *affirmed,* 15 *Asp. Mar. Law Cas.* 318; 126 *L. T. Rep.* 417; (1922) 1 *A. C.* 68) *applied.*

The plaintiffs' vessel came into collision with the defendant's vessel in fog at a point eleven and three-quarter miles off Cape R. Both vessels were travelling at excessive speed in the fog. Very shortly before the collision those on board the plaintiffs' vessel heard a fog signal on their starboard bow which they took for the fog signal at Cape R. Accordingly they starboarded and continued without stopping their engines. The sound proved to be the signal of the defendant's vessel. Art. 16 *of the Regulations for Preventing Collisions at Sea provides that "A steam vessel hearing apparently forward of her beam the fog signal of a vessel the position of which is not ascertained shall . . . stop her engines and then navigate with caution until danger of collision is over." Had those on board the plaintiffs' vessel recognised the signal as coming from the defendants' vessel it would have been their duty to have stopped their engines in accordance with the above article.*

Lord Merrivale, P. held that both vessels were to blame in equal degrees for excessive speed, but did not consider in apportioning blame the effect of the failure on the part of the plaintiffs' vessel to stop her engines in accordance with the above article.

Held, that the failure of the plaintiffs' vessel to stop her engines upon hearing the signal of the defendants' vessel forward of her beam having

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

contributed to the collision, and such failure not being excused by the fact that the signal was mistaken for a signal from Cape R., the decision of the court below should be varied by pronouncing the plaintiffs' vessel two-thirds, and the defendants' vessel one-third to blame.

Appeal from a decision of Lord Merrivale, P. in an action and counterclaim for damage by collision.

The plaintiffs were the owners of the steamship *Metagama*, 12,420 tons gross, 520ft. long 64ft. beam fitted with triple expansion engines 1492 h.p. nominal. The defendants were the owners of the Italian steamship *Clara Camus*, 7048 tons gross, 4416 tons net register, 453ft. in length, fitted with triple expansion engines of 529 h.p. nominal.

The collision took place in fog on the 19th June 1924 at a point some eleven and three-quarter miles east of Cape Race. Both vessels were sounding their whistles for fog in accordance with the regulations. Each vessel complained of the speed of the other, failure to sound signals, and other matters. According to the plaintiffs' case, shortly before the collision a faint whistle was heard on the starboard bow of the *Metagama*, which was taken for a shore signal from Cape Race. The *Metagama* thereupon starboarded, but she continued to proceed without stopping her engines. The signal proved to be from the *Clara Camus*.

Art. 16 of the Regulations for Preventing Collisions at Sea provides as follows:

A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until the danger of collision is over.

Lord Merrivale, P. found that both vessels were to blame for excessive speed in fog.

In dealing with the plaintiffs' case Lord Merrivale said, in the course of his judgment: "I believe the evidence of the *Metagama* that the fog described by the *Clara Camus*—the thick fog between 8.10 a.m. and 8.27 a.m.—did not extend to the position in which the *Metagama* was at that time, but that at 8.27 a.m. the *Metagama* had fog. The look-out man speaks of it as a fog which was not very thick at first, and from 8.27 a.m. until 8.43 the *Metagama* kept on with the precautions I have mentioned, proceeding at her then full speed. At 8.43 there was heard a signal which has been a good deal debated as to whether the master and officers of the *Metagama* heard the steam whistle signal of a vessel or heard the fog signal of a lighthouse. The master of the *Metagama* and officer of the watch, say: 'Well, we thought it was the signal of a lighthouse and we did certain things.' It is said, on the other hand: There is no one of you—when he comes to be cross-examined here as to whether it was or not the signal of a steamship or a signal from the lighthouse—who is able to say it was the signal of the lighthouse.' My own belief about the matter is—I have discussed it with the Elder Brethren—that it no doubt was a whistle signal of the *Clara Camus*. But Mr. Stephens (for the plaintiffs) has fairly recognised that, however excellent a navigator the captain of his vessel is, and however excellent his intentions were, in a condition where fog was rapidly getting worse if he takes time to consider whether a sound signal which he hears and thinks to be the signal of a lighthouse is the signal of a lighthouse, and if he proves to be wrong and it is the signal of an approaching vessel, the burden cast upon him is as great as though he had guessed right, and it is a burden which must be faced. What took place at 8.43 was that there being a signal which is ultimately located in the course of the evidence on the starboard bow, and somewhere on the starboard bow at three or four points (the bearing upon which the *Clara Camus* is presently seen) what was done was to take helm action which would bring the vessel on a course of ten degrees further south and give her a greater clearance of Cape Race. Then that helm action having been taken the vessel steadied and proceeded. I am satisfied that that was done, and I am satisfied with the variety of witnesses who gave evidence on that matter of fact; but as to whether it was a proper thing to do I must say something further on the advice I have received. It is said that it was coming up steadily thicker. There are no minute intervals accurately recorded. The record which purports to record the time by the clock was the engine-room record, and that was a record for engine-room purposes to the nearest minute. Presently, after a very faint whistle was heard, the weather became thicker and a loud whistle was heard on the vessel's starboard bow at about three or four points. It was the whistle of the *Clara Camus*. Thereupon the ship's engines are stopped, and they are stopped when the vessel's speed is not less, upon her own showing, than fourteen knots, and that is a period defined as being very close before the collision. I think it was put at a minute. [The learned President then considered the evidence relating to the distance at which the *Clara Camus* was first seen, and the length of time in which that distance would be covered at the relative speeds of the two vessels, and continued:] These measurements of periods of time are not measurements with a stop-watch. They are to some extent estimates, and the substantial period of time in this case is the period of time which begins at 8.27, when the *Metagama* takes precautions; the risk becomes very acute at 8.43, when a faint signal is heard and starboard helm action is taken, and still more acute at 8.44, when it is said the engines are stopped, because by that time these vessels were in the position when the collision cannot be avoided. Those are the respective stories of the two vessels. [The learned President then found both vessels to blame for travelling at excessive speed in dense fog, and proceeded to consider whether he

could discriminate. Having dealt with the case against the *Clara Camus*, the learned President then proceeded to deal with the case against the *Metagama* and said :] And with regard to, the *Metagama* she had been travelling at full speed, and when she took precautions for fog with the fog ahead of her, worse than it was about her at 8.27, her only precautions were to stand by and sound the whistle. When she heard a signal at 8.43—which I find to have been the whistle signal of the *Clara Camus*—she merely starboarded her helm in a mistaken belief that it was probably Cape Race. At 8.44, when she heard the loud whistle, she stopped only, having a speed of fourteen knots, and the responsibility of her speed is upon her in the state of fog. It was a dense fog at that time such as the various witnesses have described, and she did not take any other action to reduce her speed until a point of time which is the better part of a minute after that —perhaps a full minute. In that state of the case it is not necessary to determine at what speed the *Metagama* was travelling. It is a matter of calculation and you have got to know the factors. But the substance of the matter is that the *Metagama* was travelling at a speed which at 8.44, according to her account of the matter, had been a speed of fourteen knots, and had not been reduced for a minute or more. It was reduced by stopping her engines, but was only effectually reduced by putting her engines full speed astern, or by putting one of them eventually full speed astern and the other one full speed ahead immediately practically before the collision. There is ground, I think, for the doubt which Mr. Cramps expressed as to whether the speed of the *Metagama* was not more than the speed of the *Clara Camus*, but neither of those vessels attended to the regulations, and they both of them did what they thought was making the best of difficulties as they arose, and they both of them contributed in that way, by their excessive speeds in dense fog, to the collision which occurred. Mr. Bateson pressed it upon me that the helm action of the *Metagama* is a serious factor in this case, and that paying the attention to it which I ought to pay, I ought to come to the conclusion that the result of the helm action was to present the side of the *Metagama* at a broader angle to the stem of the *Clara Camus* than it would otherwise have been presented. I have discussed that matter as carefully as I could with the Elder Brethren, and the Elder Brethren advise me that, having regard to the respective actions of the two vessels, they do not see any ground upon which I could attribute an increase of damage in this case, or upon which I should attribute a relatively larger balance of culpability to those in charge of the *Metagama* by reason of that fact."

The defendants appealed.

Butler Aspinall, K.C. and *Digby* for the appellants.

Stephens, K.C. and *Langton*, K.C. for the respondents.

BANKES, L.J.—This is an appeal from the judgment of the President, and the question which the President ultimately had to decide was the apportionment of the damages as between two vessels which were admittedly to blame for a collision which occurred between them on the 19th June 1924.

It is not necessary to go into the facts in any great detail. They were both large vessels. The *Metagama* was a liner of some 12,000 tons and 520ft. long, and she was outward bound on a voyage from Glasgow to Quebec. The other vessel, the *Clara Camus*, was also a large vessel, an Italian vessel, and she was bound on a voyage from Quebec to Havre. The collision took place about 12 miles S.E. of Cape Race in a fog. Each vessel blamed the other, and the learned President has found, and I think the parties admitted, that each vessel was to blame for proceeding at an excessive speed under the conditions then prevailing, that is to say, under fog conditions each vessel was proceeding at an excessive speed. The only question, therefore, which the President was asked to decide was the apportionment of damage. In considering that matter there are first of all the provisions of the Maritime Conventions Act to be considered, and, secondly, there are the provisions of art. 16 of the rules regarding collisions at sea. I will deal first of all with the Maritime Conventions Act. That provides (sect. 1 (1) : "Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault : Provided that (*a*) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally." The question which the President had to consider, and which we have to consider, is whether it is in this case possible to establish different degrees of fault, and, if it is, in what proportion the fault shall be attributed. Now, we are not without guidance as as to the course which this court should take in an appeal of this class. It has been pointed out, and rightly pointed out, that this court would not lightly interfere with the discretion of a learned judge who had had all the evidence before him. And in *The Karamea*, which is reported 15 Asp. Mar. Law Cas. 318 ; 124 L. T. Rep. 653 ; (1921) P. 76, and which was affirmed by the House of Lords in 15 Asp. Mar. Law Cas. 318 ; 126 L. T. Rep. 417 ; (1922) 1 A. C. 68, the rule was laid down in these terms : "When a judge sitting in Admiralty has apportioned the blame between two wrongdoing vessels in accordance with the provisions of sect. 1 of the Maritime Conventions Act 1911, the Court of Appeal, if it agrees with him on the facts, will not lightly interfere with his discretion as to the apportionment of blame ; but if the appellate tribunal differs with him on the facts, and finds that one of the vessels was more blameworthy as regards matters in respect of

which she was not held to blame in the court below, it is bound to review the decision as to the apportionment of blame." I would add also that if this court finds that the learned judge has not taken into consideration at all an obviously important matter in determining the questions which were before him, again it would be the duty of this court to interfere. Of course it must examine the learned judge's judgment and scrutinise it carefully, and ought not to interfere unless it is quite satisfied that some matter has escaped his observation which is a matter of importance, and which in their view if it had not escaped his observation must have affected his judgment and the result of his decision. There is another case to which I should like to call attention, because that was a case in which this court, and again the House of Lords, dealt with the construction to be put upon the Maritime Conventions Act, and that is the case of *The Peter Benoit*, which is reported in the Court of Appeal in 84 L. Jour., p. 87. The court was composed of Buckley, L.J., Pickford, L.J., although he is called in this court Pickford, J., and myself, and I will read what Pickford, L.J. said. He said: "I come now to the question of apportionment of blame, under sect. 1 of the Maritime Conventions Act 1911. It is a difficult question to decide, and it is for that reason, no doubt, that even in countries where this rule of apportionment has prevailed for many years, the division is often half and half." I refer also to something I said which seems to me to have a bearing upon this case. I said: "The only other point upon which I desire to say a word is with reference to the Maritime Conventions Act 1911, which provides that 'Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels . . . the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault.' The expression 'in fault' must, in my opinion, mean in fault causing or contributing to the collision." I have also just to refer to the exact provisions of Art. 16, which deals with the speed of ships, to be moderate in fog, and it provides: "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

The material facts of the case are these. Each vessel accused the other of a breach of the regulation by going at excessive speed; that is admitted. Other allegations were made against the Italian vessel which do not seem to be formulated, at any rate, in the President's judgment. I shall deal with that in a moment, but in my opinion a fair reading of the President's judgment is that he finds the Italian vessel, the *Clara Camus*, to blame only in respect of her speed. Now the case against the *Metagama* was threefold—excessive speed—one might almost say, very excessive speed—a failure to stop upon hearing a signal apparently forward of her beam, and starboarding her helm as much as 10 degrees. The difficulty in this case arises from the fact that the President does not in terms appear to have dealt with one of those three points. He dealt with the speed, and he finds the *Metagama* to blame for excessive speed. He goes into the question of starboarding, and I understand him to say that on the advice of the Elder Brethren they did not think, and he did not think, that the starboarding contributed to an increase of the damage or constituted any ground why he should apportion a relatively larger measure of culpability to those in charge of the *Metagama*. This question of starboarding is, of course, a matter of seamanship, and the case for the *Metagama*, as I understand it, was: "Well, it may have been an error of judgment, but it does not amount to negligence or a failure to show good seamanship because when we heard this faint whistle we thought it was Cape Race, and we therefore starboarded to secure a safer position." But, of course, there is another way of looking at the action, and it is said in argument, assuming they were wrong in that view yet it was not an act of negligence because they might fairly assume, on the footing that it was a vessel that they heard, that the vessels were on parallel courses, and therefore it would be safer to starboard than to remain on their then course. We have asked those who advise us on this matter, and their view is that it was an error of judgment but it was not an act of negligence, and under those circumstances, although perhaps it is for a different reason than the one given by those who advised the President, we could not interfere with the conclusion at which the learned judge arrived having regard to the advice that is given to us upon that point.

There only remains the question of breach of the rule by failure to stop. The case for the *Metagama* was: We heard this faint whistle, we were under the impression that it was the Cape Race signal, and we starboarded, and we took the necessary steps to verify our impression that it was the Cape Race signal by taking out our watches to time this, and under those circumstances we did what was reasonable in acting as we did. The answer is: "Oh, the rule does not speak of a person who is under this or that impression in reference to a signal; the rule is precise and definite, and it says that a steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, is under a certain duty and that duty is to stop," and Mr. Stephens, quite properly I think, in the court below upon the authorities admitted that it was no answer to a case for breach of the rule to say: "Oh, well, it was an excusable mistake on my part; it turned out to be the signal from a vessel forward of my beam, but it was quite an excusable mistake on my part in thinking it was something else." He admits

that when once it is proved that it was this faint whistle, that it was the whistle of the *Clara Camus*, he comes under the obligation to comply with the terms of the rule. He did not comply with the terms of the rule and the only question, it seems to me, is to decide first of all whether the learned President ever dealt with this point in his judgment, and, secondly, if he did, whether really under the circumstances the court could accept his conclusion as a result of that finding. I have anxiously looked through the judgment again and again, and the conclusion I have arrived at is that the learned President did, as judges very often do, in the course of giving a judgment which is not a written judgment, particularly if it is a long judgment, sometimes unconsciously overlook some matter which is a matter of importance, and which at one time no doubt had been a matter of serious contest in the case. The reason why I say that is this: It is a long judgment, and the learned President first of all sets out the cases on the one side and on the other side, and then he deals with the contentions, and he is dealing with Mr. Bateson's contention that it is no answer for the *Metagama* to say that they were justified in mistaking the signal they heard, and he refers to Mr. Stephens's admission, in which he says: "If he proves to be wrong and it is the signal of an approaching vessel the burden cast upon him by the signal is as great as though he had guessed right and it is a burden which must be faced." Then the President goes on in this way: "What took place at 8.43 was that there being a signal which is ultimately located in the course of the evidence on the starboard bow, and somewhere on the starboard bow at three or four points (the bearing upon which the *Clara Camus* is presently seen) what was done was to take helm action which would bring the vessel upon a course of ten degrees further south, and give her a greater clearance of Cape Race. Then that helm action having been taken, the vessel steadied and proceeded. I am satisfied that that was done, and I am satisfied with the variety of witnesses who gave evidence on that matter of fact; but as to whether it was a proper thing to do I must say something further on the advice I have received." Now it seems to me that after going through the case on the one side and the other, taking Mr. Stephens's statement and admission, the learned President reserved, as it were, for further consideration in the case of the *Metagama*, this question of helm action, and that is all he reserved. Then he goes on to find both to blame on the ground of excessive speed, and he goes on: "and the question is whether I can discriminate? I am not able to depart from the old rule as to the result of a judgment of both to blame, unless there are substantial grounds upon which I can divide the responsibility for the collision." Then he again considers the case of the two vessels from that point of view and he deals with the *Clara Camus*, and, in my opinion, reading that passage carefully, he does not refer or intend to refer to anything other than speed and he considers that so far as he is concerned the only charge against her which is substantial is speed. Then he goes on to the *Metagama* and he deals with speed in her case, and of course this is for the purpose of discriminating, as he expresses it. He deals with the question of speed and then he comes to the question which he has already reserved of helm action. He deals with that and expresses his conclusion about it and then he says: "The result is that after considering the submissions Mr. Bateson made, I find these vessels both to blame." It seems to me impossible to accept the judgment as satisfactory in that it does not expressly refer to one of the most material charges against the *Metagama*, and it would be unsatisfactory, if I may say so with deference to the President, merely if he did not refer to it, but if the conclusion is that for some reason or another the learned President overlooked the point then it seems to me a position develops in which this court must consider what the position ought to be if proper consideration is given to the point. The conclusion I have come to is that the learned judge did overlook it and did not deal with it. If I am right about that the next question is this: Was it a serious breach of the rule? Was it such a breach that contributed to the collision? Was it a breach so serious that it enables the court clearly to discriminate between these two vessels? If I answer those questions as against the *Metagama*, as I think I must, it follows that there is here established, in my opinion, a case in which it is not only possible, but it is necessary to discriminate between the culpability of these vessels and to apportion the damage. My brethren agree with me in that, and think that the proper proportions should be two-thirds and one-third instead of half and half.

The appeal succeeds and is allowed with costs.

Warrington, L.J.—I agree. The only question which I think we have to determined is whether in refusing to discriminate between the degree of fault on the part of these two vessels the learned judge has omitted to consider some material point which he ought to have considered before he arrived at that conclusion. I think he has in this case refused to consider the allegation made against the *Metagama* that in addition to breaking the first paragraph of Reg. 16 as to moderate speed in a fog, she has also broken the second paragraph of the regulation which requires a ship on hearing a signal, apparently forward of her beam, to stop her engines. That he has omitted to consider that point it seems to me plain. I think he had it in his mind in the earlier part of his judgment, where he states the admission of Mr. Stephens in these terms: "Mr. Stephens has fairly recognised that however excellent a navigator the captain of his vessel is, and however excellent his intentions were, in a condition where fog was rapidly getting worse,

if he takes time to consider whether a sound signal which he hears and thinks to be the signal of a lighthouse is the signal of a lighthouse, and if he proves to be wrong and it is the signal of an approaching vessel, the burden cast upon him by the signal is as great as though he had guessed right, and it is a burden which must be faced." He therefore recognised that there was imposed upon the master of the *Metagama* the obligation of obeying Reg. 16, notwithstanding that he was in doubt and may have honestly mistaken a signal which he heard for the signal of the lighthouse of Cape Race, instead of the signal of a ship; but when he comes really to deal with the question of apportionment of the blame it seems to me quite plain that he does omit to consider that point. First, he says this: "They were both to blame; they were travelling at excessive speeds in a dense fog." It was the excessive speeds and the excessive speeds only of both ships that he regarded as factors leading to the conclusion that they were equally to blame. Then, when he comes to see whether he can discriminate between them it seems to me clear that he considers he cannot discriminate between them because he can make no distinction in point of speed. He deals with the two ships in succession, first the *Clara Camus* and then the *Metagama*. Now, it is quite plain with regard to the *Clara Clamus* that he concludes his investigation in that respect by finding that she had been proceeding, when the collision came, at about six knots. He then examines in a similar way the conduct of the *Metagama*, and he concludes that examination with these words: "There is ground, I think, for the doubt which Mr. Camps [Mr. Camps was was a surveyor called by the defendants] expressed as to whether the speed of the *Metagama* was not more than the speed of the *Clara Camus*, but neither of those vessels attended to the regulations, and they both of them did what they thought was making the best of difficulties as they arose, and they both of them contributed in that way by their excessive speeds in dense fog to the collision which occurred." I think it is quite clear he did not consider the question of the breach of the second paragraph of Reg. 16, and having omitted to consider that, and that having been a breach of the regulation on the part of the *Metagama*, with no corresponding breach of the regulation having been committed by the *Clara Camus*, I think the learned judge ought to have apportioned the blame two-thirds to one-third instead of half and half.

I will only say one word about starboarding the helm, which, again, was another complaint made against the *Metagama* and was not made against the *Clara Camus*. I think on that it is clear again that the learned judge did not consider the bearing of that act of the *Metagama* in reference to the fact of the collision. I think he only considered it in reference to the question whether it rendered the damage when it occurred more serious than it was. But it it not necessary to say more about that, inasmuch as we are advised that the starboarding the helm under the circumstances was not an act of negligence on the part of the master of the *Metagama*.

SCRUTTON, L.J.—I agree, and only add a few words of my own because we are differing from the learned judge. The question is whether there is anything to justify the departure from the ordinary rule in apportioning both to blame in equal proportions, and I think it is clear that where a Court of Appeal accepts the findings of fact of the judge and agrees with him as to whether there is or is not a breach of the regulations the court will be very slow to interfere with the apportionment made by the judge below; but in cases where the judge has made his apportionment by finding a breach of the regulation and the Court of Appeal find there was no breach of the regulation, or in cases where the judge has made his apportionment by finding that there was no breach of the regulations, and the Court of Appeal find that there was a breach of the regulation the court will interfere, to such an extent as seems right, with the apportionment of the judge. In this case the learned judge has said the ships were both to blame, that they were travelling at excessive speed in a dense fog—"and the question is whether I can discriminate." He comes to the conclusion that he cannot. On the question whether he could discriminate because the *Metagama* had starboarded, I think we cannot interfere with his decision. The assessors advise us that they think that it was an error of judgment but not such an error of judgment as to amount to a breach of duty or good seamanship, and under those circumstances I see no reason why we should interfere on that ground. But there is another matter which involves, in my view, a breach of the regulation. These two large ships were on nearly opposite courses near Cape Race, a locality very subject to fog and, I am afraid, a locality very subject to large ships going at an immoderate speed in fog. Under those circumstances the *Metagama* going at nearly a full speed, at 14 knots, with a thick fog in fact ahead and, according to her own story, warnings of fog in the shape of wisps of fog about, heard on the starboard side a signal, and I think that those on board the *Metagama* were doubtful whether it was Cape Race or whether it was a steamer, but it was very faint. They proceeded to try and time the signal by their watches, to get additional light as to whether it was Cape Race, by hearing whether it recurred at the Cape Race interval, and they starboarded, which might be to go to the south of Cape Race and it might be because they heard the whistle on the starboard side and thought they would get out of the way, but they did not stop their engines, and I have no doubt that what they heard was the whistle of the other ship, and under those circumstances there was a steam vessel bearing apparently forward of her beam, the fog signal of a vessel the position of which

is not ascertained. They did hear the fog signal of the vessel but they were not sure what it was, and it seemed a long way off, a long way away. Under those circumstances, I think in the least favourable view of the situation, they must assume the worst against themselves, and the worst against themselves being that it was the fog whistle of a vessel, they should have stopped their engines, and in my view there was a breach of the regulation. Next, was that breach of regulation such that it might have contributed to the collision or might have made the collision worse than it was? Because if a regulation is broken which under no conceivable circumstances had anything to do with the collision at all it ought not to affect the apportionment by the judge. Now the effect of their not stopping their engines was that for over a minute they kept on with the engines going 14 knots instead of keeping on for over a minute with stopped engines and their way going off. That must have affected the position in which they were at the end of the period over a minute when the collision happened. I am not going to find, I have not the materials for finding, what the exact result would have been. It looks to me as if it was a near thing whether they would have missed the other boat or not, they might or they might not have; they might have hit the other boat astern instead of being hit on the starboard side. Apart from the difference of position, they would have come into collision with less force than they did, having kept their engines going 14 knots for over a minute; there would have been less momentum. Under these circumstances, it seems to me there has to be taken into account in discriminating between the two ships the fact that the *Metagama*, besides breaking the regulation for going at a moderate speed, had broken another part of the regulation in that she had not stopped her engines when she heard the signal of a ship forward of her starboard beam, and that breach of regulation very probably did, and at any rate is not shown not to have, increased the damage in the collision. Under these circumstances I think this is a case in which we can interfere and ought to interfere with the apportionment made by the judge, and I agree with the apportionment of two-thirds and one-third.

Solicitors for the appellants, *Thomas Cooper and Co.*

Solicitors for the respondents, *William A. Crump and Co.*

[ERRATUM, p. 491 (*ante*), sixth line from the end of the right-hand column, read:—" . . . *It appeared that the J. was, until 1924, in the management and control of the plaintiffs, or some of them.* . . ."]

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Friday, Oct. 16, 1925.

(Before MACKINNON, J.)

MIKKELSEN *v.* ARCOS LIMITED. (*a*)

Charter-party — Full and complete cargo — Notice of claim clause — Effect of—Change of port of destination—Demurrage.

Under two charter-parties of June 1924 the steamship H. was to proceed to Leningrad and there load a full and complete cargo of Russian timber and convey the same to an English port as specified in the bills of lading. The charter-parties provided that the charterers should supply sufficient ends for broken stowage, and clause 5 provided that any dispute arising at the port of loading should be settled before the signing of the bills of lading, otherwise claims were to be endorsed on the bills of lading, and if for any reason the master was prevented from so doing, he was to give notice of the claim and the amount thereof to the charterers by telegraph. The steamship H. performed two voyages, and on each occasion the master complained of the bad and insufficient loading. On the second voyage the ship was directed to proceed to Great Yarmouth, but on arrival the charterers said this was a mistake and the correct destination was Boston. The plaintiffs claimed damages for dead-freight of the cargoes that should have been carried but were not carried, and for expenses incurred by the change of destination.

Held, that the contract was to load a complete and full cargo, and bad loading due to want of supervision or inexperience was no excuse. Held, further, that clause 5 was an ordinary condition of policies and did not invalidate the claim. Held, also, that the plaintiff was entitled to reasonable compensation for the services rendered on account of the change of port of destination.

Cuthbert *v.* Cumming (1855, 11 *Ex.* 405), *distinguished.*

ACTION tried by MacKinnon, J. without a jury.

The plaintiff was the owner and the defendants were the charterers of the steamship *Huldra*. Under two charter-parties of June 1924 the steamship *Huldra* was directed to proceed to Leningrad and there load full and complete cargoes of Russian timber and convey the same to an English port as directed by the agents of the defendants and specified in the bills of lading. The charterers were to arrange for the loading of the cargoes and were to supply sufficient ends not exceeding 7½ per cent. for broken stowage.

The steamship *Huldra* performed two voyages and on each occasion carried considerably less cargo than her carrying capacity. On each

(*a*) Reported by R. A. YULE, Esq., Barrister-at-Law.

occasion the master complained to the agents of the defendants at Leningrad of the bad loading and short cargo.

Under the second charter-party the port of destination was Great Yarmouth or Boston, as directed, and as a matter of fact, the ship was directed to proceed to Great Yarmouth. On arrival at this port, the charterers averred that their Leningrad agents had made a mistake and that Boston was the proper port. Owing to the delay that took place while arrangements were being made for the ship to proceed to Boston, the tide became unfavourable, and the steamship *Huldra* was unable to put into Boston for some days after arrival off that port.

The plaintiff claimed damages for dead-freight of the cargoes that ought to have been carried but were not carried, and also claimed demurrage on account of the expenses incurred by the change of port of destination.

The defendants pleaded as regards the claim for dead-freight that the cargoes shipped were as full and as complete cargoes as were customarily shipped at Leningrad. It was further pleaded that under clause 5 of the charter-party the plaintiff was precluded from making a claim. Clause 5 reads as follows: "Any dispute arising at the port of loading shall be settled before signing the bills of lading, otherwise claims shall be endorsed upon the bills of lading and if for any reason the master is prevented from so doing he shall telegraph notice of the claim and the amount thereof to the charterers." As regards the claim for demurrage the defendants pleaded that the expenses were incurred by the action of the plaintiff himself.

Clement Davies for the plaintiff.

Somervell for the defendants. — Russian standards are longer and of larger section than timber from Scandinavian ports, and therefore there is more difficulty in handling them. This, coupled with the fact that labour was inefficient, made it impossible for the defendants to load more than they had done. As the loading was that customary at the port, the principle in *Cuthbert* v. *Cumming* (*sup.*) applied. As regards clause 5, disputes had arisen, but the master had neither endorsed the claim on the bills of lading nor informed the charterers by telegraph.

MACKINNON, J., after stating the facts, continued: The case of *Cuthbert* v. *Cumming* hardly applies. That was a contract to load a complete and full cargo of sugar and (or) other produce. It did not decide that the charterer was bound to carry other produce in addition to sugar or molasses in order to fill up spaces, but might be an authority that if cargo were loaded in receptacles customary at the port of loading, those receptacles must be used and the charterer would not be bound to fill interstices with other cargo. In the case before me the contract is an express and unqualified contract to load a full and complete cargo with sufficient ends for broken stowage. On the evidence I am satisfied that the charterers had not supplied a sufficient number of ends (in fact, 2½ per cent. only, whereas the limit was 7½ per cent.), and it is no answer to the claim to say that the labour was unskilled or badly supervised; that is the misfortune of the charterers.

As regards clause 5 of the charter-party, it is a common stipulation in policies of insurance that notice of loss or damage must be given within a certain time, but no one would suggest that failure to notify would invalidate the claim. I therefore hold that the defendants are liable for short cargo on both voyages.

As regards the change of port of destination under the second charter-party the ship had proceeded to Great Yarmouth as ordered by the defendants' agents at Leningrad, and the plaintiff is entitled to reasonable remuneration for the extra services while arrangements were being made for the ship to proceed to Boston. The plaintiff therefore succeeds and judgment will be entered accordingly.

Solicitors for the plaintiff, *Botterell* and *Roche*.

Solicitors for the defendants, *Wynne*, *Baxter*, and *Keeble*.

House of Lords.

Thursday, Dec. 10, 1925.

(Before Lords BUCKMASTER, ATKINSON, SUMNER, WRENBURY and CARSON.)

UNITED STATES SHIPPING BOARD *v.* BUNGE Y BORN LIMITADA SOCIEDAD. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party — Fuel oil supplies — Deviation from chartered voyage for purpose of obtaining supplies—Liberty to call at any ports in any order—Claim for demurrage.

A steamship constructed to use oil fuel was chartered to carry a cargo from the River Plate to a safe port in the United Kingdom, or on the Continent between Marseilles and Hamburg inclusive. By clause 29 of the charter-party it was provided that "the steamer shall have liberty to call at any port or ports in any order for the purposes of taking bunker coal or other supplies." The vessel was loaded with a cargo part of which was to be discharged at Malaga and part at Seville, and it was agreed that Malaga should be the first port of discharge. After discharging at Malaga the vessel had enough oil fuel left to take her to Seville, and to discharge her cargo there, but it would not have carried her to any further point. No oil fuel being obtainable either at Malaga or at Seville, she called at Gibraltar to obtain oil fuel from a tank steamer which was expected to arrive, but owing to the non-arrival of the latter, the vessel proceeded to Lisbon to procure oil supplies. Lisbon

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

was out of the direct course from Malaga or Gibraltar to Seville. On a claim by the charterers claiming damages for the deviation :

Held, that the call of the vessel at Lisbon for the purpose of obtaining oil supplies constituted a deviation which was not within the terms of the charter-party given either expressly or by implication. In order to justify such a deviation it was for the owners to show that it was reasonably necessary in a business sense and for this purpose it was essential to show that all necessary steps had been taken to supply the vessel with adequate oil supplies at the commencement of the voyage. The owners, having failed to prove this, were therefore liable to the charterers in damages in respect of such deviation.

Quære *whether the shipowners had any right to deviate for the purpose of obtaining the fuel that might be necessary to take their vessel out of the port of final discharge after the discharge had been completed.*

Decision of the Court of Appeal (132 *L. T. Rep.* 323) *affirmed.*

BY a charter-party dated the 23rd Oct. 1920, and made between the plaintiffs as owners and the defendants as charterers, the steamer *Alamosa* was chartered to carry a cargo of maize from the River Plate to a safe port in the United Kingdom or on the Continent between Marseilles and Hamburg, inclusive. Subsequently it was agreed that the charterers might load a cargo for Malaga and Seville, Malaga to be the first port of discharge, and the steamer was loaded accordingly.

By clause 29 of the charter-party it was provided that " The steamer shall have liberty to call at any port or ports, in any order, for the purpose of taking bunker coal or other supplies, to sail without pilots, to tow and be towed, to assist vessels in distress, and to deviate for the purpose of saving life or property." Disputes having arisen under the charter-party, the matter went to arbitration.

The shipowners claimed demurrage and the charterers counterclaimed for freight overpaid, for short delivery, and for deviation.

The material facts as found by the umpire were these. The *Alamosa* was a steamship constructed and intended to use oil fuel. On her way from the River Plate to Malaga she put into Rio de Janeiro to bunker, and there took on board a further supply of oil fuel. After discharging part of her cargo at Malaga she had about ninety tons of oil fuel in her bunkers, which would be sufficient to enable her to reach Seville and to discharge there, but not sufficient to enable her to get away. No supplies of oil fuel were procurable either at Malaga or Seville. On her way from Malaga to Seville the vessel had to pass Gibraltar, and arrangements were made that she should obtain supplies of oil fuel from an oil tanker expected there. The *Alamosa* went to Gibraltar and waited there for two days, but as the tanker had failed to arrive, she then left and went to Lisbon, the nearest port at which oil fuel was procurable, whereby the voyage was prolonged some 300 miles. The umpire found that in going to Lisbon the master acted reasonably and he awarded, subject to the opinion of the court, that the charterers' claim for damages for deviation failed.

The questions for the court were: (1) Whether upon a true construction of the charter-party and upon the facts stated the *Alamosa* was guilty of deviation by going to Lisbon for oil fuel ; and (2) whether, if there was a deviation, the contract of affreightment was displaced or avoided so as to give the charterers a good defence to the owners' claim for demurrage.

The Court of Appeal held, affirming the decision of Bailhache, J., that clause 29 of the charter-party must be read as giving a liberty to call for bunkers or supplies only at a port or ports on the way of the voyage, and that the vessel did deviate to an unauthorised extent in proceeding to Lisbon. The owners were therefore liable to the charterers in damages in respect of such deviation.

The shipowners appealed.

Sir *Leslie Scott*, K.C., *Dunlop*, K.C., and *Stenham* for the appellants.

Kennedy, K.C., *A. T. Miller*, K.C., and *van Breda*, for the respondents, were not called upon.

Lord BUCKMASTER.—This appeal comes before your Lordships in the following circumstances. The appellants are the owners of a vessel known as the *Alamosa*, and on the 23rd Oct. 1920 they chartered that vessel to the respondents for the purpose of carrying a cargo of maize. The voyage was from the River Plate to ports between Marseilles and Hamburg, but ultimately the actual ports of discharge were fixed as Malaga and Seville. The charter-party contained a clause—No. 29—which provided that the steamer should have " liberty to call at any port or ports in any order, for the purpose of taking bunker coal or other supplies, to sail without pilots, to tow and be towed, to assist vessels in distress, and to deviate for the purpose of saving life or property." It is only necessary, in passing, to comment upon that clause by saying that a series of decisions has established that the first right which is there conferred is liberty to call at any port or ports upon the line of route between the port of loading and the ports of discharge. Liberty to deviate for the purpose of saving life or property is not material to the present dispute. What happened to the vessel was this : She took in oil at Rio de Janeiro, but the supply was not adequate to take her to both the ports of discharge, and at the same time to clear her from the final port. What resulted was this : She went first to Malaga, and, I suppose, then finding that she had not enough oil to take her outside the port of Seville, though it is found that she had enough to take her there, arrangements were made for a tank steamer to meet her at Gibraltar in order to take in further oil. The tank steamer failed to keep the appointment, and, in the result, the master took the vessel to Lisbon,

some distance off the route, for the purpose of getting the necessary oil supplies.

That that was a deviation is not in dispute, but it is said that it was a deviation which is justified either under the terms that are expressed or under the terms that are implied in the charter-party. The actual dispute arose because in the course of discharging the charterers exceeded the stipulated time by one day and nine and a quarter hours, with the result that the owners claimed demurrage, the answer to which was that, as there had been deviation, the claim for demurrage could not be maintained, and, further, that the owners were themselves liable for the damages which the charterers had suffered by reason of the fact that the deviation had taken place. The Court of Appeal has held that the charterers were right in both these contentions. Upon the facts it appears to me that when once deviation has been established, as it clearly has in the present case, it becomes incumbent upon the owners to show that that deviation was one which in all the circumstances of the case was justified. Now it cannot be maintained that the deviation is one that can be found within the express provisions of clause 29 to which I have referred. It must, therefore, be supported, if it can be supported at all, by the doctrine to which Sir Leslie Scott referred, that, if the deviation was reasonably necessary in a business sense, then it was in the course of the voyage which the charter prescribed. If, however, that were to be established, it appears to me that it would be necessary for the owners to show that all necessary steps had been taken to supply the vessel with adequate oil supplies at the commencement of the voyage, and of this there is no evidence at all, and in my opinion for that reason alone that argument fails.

Further, I desire to say that I am far from convinced that the shipowners had any right under this charter-party to deviate from their prescribed route for the purpose of obtaining the fuel that might be necessary, not only to take the ship to the port of final discharge, but to take her out of that port after the discharge had been completed. It is for these reasons that I think the judgment of the Court of Appeal should be affirmed, and I move your Lordships accordingly.

Lord Atkinson.—I concur.

Lord Sumner.—I agree. The decisions both of this House in *Glynn* v. *Margetson* (7 Asp. Mar. Law Cas. 366; 69 L. T. Rep. 1; (1893) A. C. 351), and of other courts before and since that case have invested clauses of this type—the words at the end of clause 29—with a meaning which it is now impossible to shake. I think it is quite clear upon the present facts that calling at Lisbon for fuel was not within that express permission which the charter-party gives, and the implied term which is contended for, that there was a right to go out of the way to Lisbon for that purpose under the circumstances, is in conflict with the express words and therefore not capable of being implied. It appears to me not to be such a term as is necessary to give business effect to the contract between the parties, but the very contrary. It appears to me to be a term which reasonable business men would not have agreed to, if it had been brought before them, and I think the contention really proceeds upon the familiar doctrine that it would be a convenient thing to secure advantage for oneself and make somebody else pay for it—a doctrine which sometimes brings one into conflict with the law. It is quite a different thing from saying that, had the express clause been availed of, and a call been made for oil supplies on the line of the voyage, the charterers could not have complained if the vessel had taken there more oil than the limited quantity required to complete the performance of the charter.

Lord Wrenbury.—I concur.

Lord Carson.—I also concur.

Appeal dismissed.

Solicitors for the appellants, *Thomas Cooper and Co.*

Solicitors for the respondents, *Richards and Butler.*

Oct. 26, 27, 29, *and Dec.* 11, 1925.

(Before Lords Cave, L.C., Atkinson, Buckmaster, Carson, and Blanesburgh.)

Adelaide Steamship Company v. The King. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision — Requisitioned ship — War risk — Assessment of compensation—Cesser of hire during repairs.

The petitioners were the owners of a vessel, the W. which was requisitioned by the Admiralty during the War and used as a hospital ship and later as an ambulance transport. The vessel was requisitioned under charter-party T.99, clause 19 of which provided that: "The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar but not more extensive clause: Warranted free of capture, seizure, and detention and the consequences thereof . . . and also from all consequences of hostilities or warlike operations. . . . ." And by clause 25 that hire should cease to be payable if the ship should cease to be able to do her work "owing to deficiency of men or stores, breakdown of machinery . . . or any other cause." While the vessel was under requisition she was bringing a number of wounded soldiers from Havre to Southampton one night and came into collision with another vessel, the P., and the owners of that vessel brought an action against the petitioners for damages. The House of Lords held that the collision was caused by the

(a) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

negligence of the W., and that the petitioners were therefore liable for damages to the owners of the other vessel.

On a petition of right brought by the petitioners in this case, the House of Lords held that the collision arose in circumstances which constituted a war risk, and that the Crown was liable. The case was remitted to the High Court for the assessment of damages.

Held, (1), *Lords Carson and Blanesburgh dissenting, that the Crown was not bound to indemnify the W. either wholly or partially against the liability which she had incurred to third parties in consequence of the negligence of her master*; (2) *that the claim for costs fell with the claim for damages*; *and* (3), *Lord Blanesburgh doubting, that the claim for loss of hire was excluded by clause 25 of the charter-party.*

Decision of the Court of Appeal (ante, *p.* 366; 131 *L. T. Rep.* 548) *affirmed.*

Appeal by the petitioners from the decision of the Court of Appeal (Bankes, Warrington, and Scrutton, L.JJ.) reported *ante*, p. 366; 131 L. T. Rep. 548.

The petitioners were the owners of a vessel, the *Warilda*, which was requisitioned by the Admiralty during the War for use as a hospital ship and an ambulance transport. While under requisition the *Warilda* was bringing a number of wounded soldiers from Havre to Southampton one night and came into collision with another vessel, the *Petingaudet*. In a collision action it was held that the owners of the *Warilda* were liable to the owners of the other vessel owing to the negligence of the *Warilda*. The case was remitted to the High Court for assessment of the damages.

The Court of Appeal held, affirming the decision of Greer, J., that the petitioners were only entitled to recover as damages such items as consisted of reasonable costs and expenses of repair to the *Warilda*. They were not entitled to be reimbursed the damages and costs which they had had to pay the owners of the vessel with which the *Warilda* collided because the collision was not a direct result of a warlike operation but was the result of the negligent performance of such operation, and further, that by the words "other cause" in the cesser of hire clause the vessel was off hire while under repair.

The owners of the *Warilda* appealed.

C. R. Dunlop, K.C. and *H. C. S. Dumas* for the appellants.

Sir *Thomas Inskip*, K.C. (S.-G.), *W. Norman Raeburn*, K.C., and *R. H. Balloch* for the respondent.

The House took time for consideration.

Lord Cave, L.C.—This appeal is concerned with the third stage in a prolonged litigation which has arisen out of a collision between the steamship *Warilda* (acting as an ambulance transport) and the steamship *Petingaudet* (a merchant vessel) which occurred in the early morning of the 24th March 1918. In the first stage of the contest, a collision action which was carried to this House, it was determined that the collision was due to the negligence of the master of the *Warilda*, and the *Warilda* was held liable to the *Petingaudet* for damages. In the second stage, which also reached this House, it was determined that the collision was a consequence of a warlike operation in which the *Warilda* was engaged, and accordingly that under clause 19 of the charter-party under which the vessel was being employed (which was the familiar charter-party T. 99) the *Warilda* was entitled to recover from His Majesty damages for the collision. The third stage, in which the appeal arises, is concerned with the measure of these damages, and the questions litigated are whether the *Warilda* can recover from the Crown as part of such damages (1) three-fourths of the sum which the *Warilda* has been held liable to pay to the *Petingaudet* for the damage caused to that vessel, (2) three-fourths of the costs incurred by the *Warilda* in defending the collision action, and (3) hire money or compensation for loss of hire during the period when the *Warilda* was herself undergoing repair. Greer, J. and the Court of Appeal have held that none of these sums can be recovered, and the appeal is against that decision.

Upon the first point the arguments were well balanced, but upon the whole I have come to the conclusion that the decision of the Court of Appeal is right. Clause 19 of charter-party T. 99 (which has the marginal note "War risks damage or loss of ship") is in the following terms:

19. The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause:—Warranted free of capture, seizure, and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war.

It is common ground that an ordinary English policy of marine insurance would contain the Institute Time Clauses, including the first of those clauses, which is known as the collision or running-down clause and which provides (in effect) that, if the insured ship comes into collision with another ship and becomes liable to pay and pays damages in respect of such collision, the insurer will pay to the assured three-fourths of the sum so paid, and will also, if the liability of the insured ship has been contested, with the consent in writing of the insurer, pay a like proportion of the costs which the assured thereby incurs or is compelled to pay. This being so, the question to be determined in this case is whether the liability undertaken by the collision clause is or is not a risk which would be excluded by the "f. c. and s." clause set out in clause 19 of the charter-party as being a consequence of warlike operations. If it would, then the Crown is clearly liable; but if not, the claim now under consideration must fail. My Lords, I do not

think that it would be so excluded. It was held in *Ionides* v. *The Universal Marine Insurance Company* (1 Mar. Law Cas. (O. S.) 353; 14 C. B. (N. S.) 259), and has not since been doubted, that in applying the exception created by the f. c. and s. clause the court must look at the proximate and not at the remoter consequences of the warlike operation; and, while it has been decided by this House that the collision itself and the consequent damage to the *Warilda* were the direct result of the warlike operation in which the *Warilda* was engaged, it does not follow that the liability of the *Warilda* to the owner of the *Petingaudet* falls within the same category. That liability arose, not from the collision taken by itself, but from the negligence of the master of the *Warilda* which alone constituted the cause of action, and was, therefore, not a direct and proximate consequence of the warlike operation. This seems to me to follow from the decision in the case of *De Vaux* v. *Salvador* (4 Ad. & E., 420), where it was held that the sum which a shipowner had to pay for damage to another ship caused partly by the negligence of his servants was too remote from the sea perils against which his ship was insured to be recovered by him under a marine policy. Lord Denman, C.J., in delivering the judgment of the court in that case, said: "The ship insured is driven against another by stress of weather; the injury she thus sustains is admitted to be direct, and the insurers are liable for it. But the collision causes the ship insured to do some damage to the other vessel; and, whenever this effect is produced, both vessels being in fault, a positive rule of the Court of Admiralty requires the damage done to both ships to be added together, and the combined amount to be equally divided between the owners of the two. It turns out that the ship insured has done more damage than she has received, and is obliged to pay the owners of the other ship to some amount, under the rule of the Court of Admiralty. But this is neither a necessary nor a proximate effect of the perils of the sea; it grows out of an arbitrary provision in the law of nations from views of general expediency, not as dictated by natural justice, not (possibly) quite consistent with it; and can no more be charged on the underwriters than a penalty incurred by contravention of the revenue laws of any particular State, which was rendered inevitable by perils insured against."

It is true that the policy to be hypothesised under clause 19 of the charter-party is a policy containing the collision clause, and that where that clause is present in a policy the underwriters are liable for a proportion of the damage caused to the other ship; but this is the result, not of a loss by the perils insured against, but of the "special contract" of the underwriters contained in the collision clause: (see *Xenos* v. *Fox*, 3 Mar. Law Cas. (O. S.) 146; 19 L. T. Rep. 84; L. Rep. 3 C. P., at p. 635). In these circumstances it seems to me to follow that the Crown is not liable in this case, and is not bound to indemnify the *Warilda* either wholly or partially against the liability which she has incurred to third parties in consequence of the negligence of her master.

In arriving at this conclusion I have not relied on the third sentence in clause 19 of the charter-party, which is in the following terms:

> Such risks are taken by the Admiralty on the ascertained value of the steamer, if she be totally lost, at the time of such loss, or, if she be injured, on the ascertained value of such injury.

I was impressed by the argument of Mr. Dunlop that the purpose of this sentence was, not to limit the liability of the Admiralty to the payment of damage done to the *Warilda*, but only to define the value which was to be put upon the *Warilda* where the value of that vessel was material; and accordingly I do not found on this stipulation any conclusion adverse to the appellants. But the sentence is at all events not inconsistent with the view which I have taken of the meaning of the clause.

With regard to the claim for three-fourths of the costs incurred by the *Warilda* in resisting liability to the *Petingaudet*. I think that this falls with the claim for three-fourths of the damages; and in any case this claim could hardly have been supported in view of the fact that the Crown did not consent to the proceedings by the *Petingaudet* being contested.

As to the claim for loss of hire while the *Warilda* was under repair, I agree with Greer, J. and the Court of Appeal in holding that this is excluded by clause 25 of the charter-party, which is as follows:

> 25. If from deficiency of men or stores, breakdown of machinery, or any other cause, the working of the steamer is at any time suspended for a period exceeding twelve running hours, pay shall cease for the whole of such and any subsequent period of whatever duration during which the vessel is inefficient.

It was not argued before your Lordships, nor could it (I think) have been successfully argued, that the scope of the words "any other cause" ought to be limited by the *ejusdem generis* rule; but it was suggested that this claim, if excluded by clause 25, might be recovered under the contract of insurance contained in clause 19. To this the answer given by Scrutton, L.J. that the Admiralty were not insurers of freight, appears to me to be fatal.

For these reasons I am of opinion that this appeal fails and should be dismissed with costs, and I move your Lordships accordingly.

Lord Atkinson concurred.

Lord Buckmaster.—Two facts lie at the threshold of this appeal and must be borne in mind in its determination. The first, that the collision between the *Warilda* and the *Petingaudet* has been declared by this House to be a consequence of warlike operations, and the other that it was due to the negligence of the navigating officer of the *Warilda*. It follows

from the first that the Admiralty is responsible for the actual damage that the *Warilda* suffered, and from the second that the *Warilda* was responsible to the *Petingaudet* to make good her damage ; the main question in this appeal is whether the damage so paid and the costs of the litigation which determined the *Warilda* to blame can be recovered by the *Warilda* from the Admiralty. The rights of the parties are contractual and arise under a document known as T. 99, upon the terms of which the Admiralty requisitioned the *Warilda* by a letter dated the 3rd Aug. 1915. This document was in the form of a charter-party, but it also contained clauses of marine insurance, the nature and extent of which form the subject of the present controversy. By clause 18 the Admiralty was exempt from liability from ordinary sea risks, and by clause 19 they accepted the risks of war in terms which have already been set out. The ordinary English policy of marine insurance contains clauses known as " institute time clauses," the first of which throws upon the insurer the liability to pay, to the extent of three-fourths of the value of the ship, the damages which the insured vessel may be called upon to pay by reason of collision—as well as three-fourths of the costs to which the assured is put in defending proceedings. It is this clause that the appellants say render the Admiralty liable in the present instance. In my opinion this contention is not well founded. The ordinary marine policy never covered damages paid to third parties owing to negligent navigation (*De Vaux* v. *Salvador*) (*sup.*), and the clause as to freedom from capture and seizure which operates to limit risks under such a policy does not exclude such liability, for the subject-matter on which this exclusion operates never included it (*Xenos* v. *Fox*) (*sup.*). The introduction of clause 1, which was, in fact, an indemnity as to third-party liabilities, was not within the ordinary compass of marine insurance, nor do I think its introduction has extended the meaning of the clause as to freedom from capture or seizure so as to make that warranty include something to which in its original meaning it never related. Even if this view be not accepted, I still think the appellants must fail, since the only risks undertaken by the Admiralty are risks of war, and although this accident arose in the course, and therefore as the consequence, of a warlike operation, yet the risk that materialised was the risk due to negligence and not to the risk of war. In the course of a warlike operation an independent negligent act was committed, and it is the liability consequent thereon for which the *Warilda* has been held liable. Upon the question of hire I have nothing to add to what has already been said.

Lord Carson.—Each of the learned Lords Justices in the Court of Appeal was of opinion that the words in clause 19 of T. 99, " such risks are taken by the Admiralty on the ascertained value of the steamer, if she be totally lost, at the time of such loss, or, if she be injured, on the ascertained value of such injury," excluded the third-party risk covered by the collision clause " because," as Bankes, L.J. said, " the extent of the Admiralty's liability cannot be measured by the scale indicated in this paragraph "—and indeed the same Lord Justice said that but for the paragraph quoted he should have felt considerable doubt as to the construction to be put upon the clauses constituting the contract. It is clear that if the effect of this paragraph was as held by the Lords Justices, there would be no need to go further in the discussion of the case, and that the claim of the appellants would on the main question be without foundation.

I agree with the noble Viscount on the Woolsack that the purpose of the sentence quoted was not to limit the liability of the Admiralty to the payment of damage done to the *Warilda*, but only to define the value which was put upon the *Warilda* when the value of that vessel was material. The sections to which we were referred by counsel for the appellants in the Marine Insurance Act of 1906, under the heading of " Measure of Indemnity," showed, in my opinion, the necessity for the limitation in the paragraph quoted, whilst it also seemed to me at least that clause 19 covered risks in which the value of the ship was not involved. I do not think, therefore, that the words in sect. 19, so much relied upon, offer any answer to the case put forward for the appellants. The main question, however, to be decided is as to whether the owners of the *Warilda* can recover from the Crown the sums they have been compelled to pay to the owners of the *Petingaudet* for damages caused to that ship by the collision, having regard to the decision in this House that the *Warilda* was engaged in warlike operations, though negligently carried out, and that the collision or damage was a consequence of hostilities or warlike operations.

I do not desire to repeat again at length clauses 18 and 19 of the charter-party T. 99, but read together they seem to me to define the risks taken by the owners, which may shortly be called as in the margin, " sea risk," and the risks against which the Admiralty became the insurers, viz., as also described in the margin, " war risk damage or loss of ship." Under this division of " risks " it is clear, to my mind, that all the possible risks were intended to be covered. The risks undertaken by the owners under sect. 18 would or might be insured against by them, and it is admitted that any ordinary English policy of marine insurance would contain the clauses known as " institute time clauses," by the first of which the insurer would be obliged to pay to the extent of three-fourths of the value of the ship, the damages which the insured ship might be called upon to pay by reason of the collision.

The question to be determined is, I think, what is the effect of the f.c.s. clause upon the liability of the insurer under this clause ? If there was no f.c.s. clause it is, I think, clear that the insurer would be liable in the events that

have happened. But as the f.c.s. clause applies, and as this House has decided that the collision occurred as a consequence of warlike operations, I think the question narrows down to the liability or non-liability of the insurer under these circumstances.

I find it is difficult to see how the insurer in such a case could be held liable. If there had been no negligence I apprehend the liability of the Admiralty would be beyond question, but as between owners and the insurer can the negligence make any difference when the f.c.s. clause applies and you follow to its logical conclusion the decision of this House that the collision or damage "was a consequence of hostilities or warlike operations"?

In my view it is impossible in such a case by drawing a distinction between the "proximate" and the "remoter" consequences of the warlike operation to take away from the insurer the benefit of the f.c.s. clause and thus render him liable. For the reasons I have briefly stated, I am of opinion that the appellants are entitled to succeed on this branch of their claim. My Lords, as regards the other branches of claim, viz., the costs incurred by the *Warilda* owners in resisting liability for the consequences of the collision and the claims for loss of time while the *Warilda* was under repair, I am not prepared to dissent from the conclusions come to by the noble Viscount on the Woolsack.

Lord Blanesburgh.—Three sums are claimed here by the appellants, and, as the considerations applicable to each are not identical, it is convenient to deal with them separately.

The first and principal sum represents three-fourths of the amount which the appellants became liable to pay and have paid by way of damages to the owners of the *Petingaudet* for the damage caused to that vessel by the collision between her and the *Warilda*.

The basis of the claim is made apparent by the terms in which it is expressed. It follows the language of the first of the Institute Time Clauses, the collision clause to which the attention of your Lordships has been so frequently directed, and it proceeds upon the footing that the presumed contract between the appellants and the Admiralty—T. 99—is to be read as if there were embodied in it, by reference, a provision in the terms of that clause. And, my Lords, I desire to say at once that unless that position can be made good by the appellants, they must, in my judgment, fail in this claim. I would, however, also add that if their position in this respect is well founded, then, in the events which have happened, the liability of the Crown in respect of this sum, is, I think, at once established.

That being the issue, there has never, I think, been any controversy between the parties as to the governing considerations upon which its solution depended. It has throughout been common ground—to adopt the words of Scrutton, L.J. —that the effect of clauses 18 and 19 of T. 99 is to put sea risk on the owners and war risk on the Admiralty, a phrase which, further expanded, imports that, subject to any modifying provision in either of these clauses, there is hypothesised an ordinary policy of marine insurance embodying also the Institute Time Clauses with a war risk policy so framed that the two together cover the whole ground. Accordingly, it having been decided by this House that the collision in question resulted from warlike operations of the *Warilda* negligently conducted—in other words, that it resulted from a war risk—it is again common ground—and I think rightly so—that the liability of the Crown in respect of this sum emerges unless one of two things is established: either (*a*) that albeit the collision was a war risk, still the marine underwriter under the hypothesised policy of marine insurance remains, upon the true construction of the collision clause in that policy, liable in respect of this sum; or (*b*) that, as a result, so it is said, of the third sentence of clause 19 of T. 99 the hypothesised war risk policy is to contain no collision clause at all.

The Solicitor-General, at your Lordships' Bar, in terms accepted this position. He agreed that unless that third sentence availed the Admiralty to the effect I have stated the Crown must accept liability for this claim, if it was once established, that, under his hypothesised policy the marine underwriter was free of liability in respect of it.

And this has been the position of the Crown's advisers throughout.

"It was contended for the Crown," says Greer, J. in his judgment, "that the promise of indemnity contained in the part of the Institute Time Clauses above set out was not affected by the f.c.s. clause, and that the marine underwriters would continue liable under the Institute Time Clauses, notwithstanding the presence in the policy of the exceptions covered by the f.c.s. clause; and, secondly, whether that be so or not, the promise of indemnity contained in clause 19 did not cover the liability of the shipowner to pay damages to the owners of the *Petingaudet*."

It is of the first importance, as it strikes me, to realise that these are, with reference to this claim, the only issues between the parties. As so stated, the questions in debate at once resolve themselves into mere questions of construction; of the collision clause on the one hand; of the third sentence of clause 19 of T. 99 on the other. And many considerations —such, for instance, as that of negligence— cease to be important or even relevant.

Is, then, the marine underwriter, in the event, free of liability for this sum, notwithstanding the collision clause in his policy? On this point I find myself in agreement with what I take to be the view of Bankes, L.J. I think he is. The question turns entirely upon the meaning to be placed upon the introductory words of the clause: "If the ship hereby insured shall come into collision 'with any other ship or vessel.'" Is the collision there referred to confined to one which is a peril of the sea insured against by the policy, or does it extend

to one, which, resulting from warlike operations, is put beyond the purview of the policy altogether by clause 21, the f.c.s. clause? As Lord Shaw pointed out when this matter was last before the House, a "collision" in this policy may be either a sea risk covered by it or a war risk excluded from it. To which class of collision is reference made in this clause? My Lords, if it were not for the opposite view taken by others for whose opinion I have a profound respect, I should have thought the answer was plain. Whether the question be treated purely as one of construction of the policy as a whole, regardless of the history and purpose of the collision clause, or whether that history and purpose be also kept in mind, I should have thought that the reference clearly was to a collision, being a peril of the sea which is covered by the policy, and not to one with which the policy has no concern. A conviction that this is also the common-sense view of the matter must not be allowed to darken counsel. But that conviction is, I confess it, strong.

The effect of a clause like the f.c.s. clause, as explained by Lord Selborne, L.C. in *Cory* v. *Burr* (5 Asp. Mar. Law Cas. 109; 49 L. T. Rep. 78; 8 App. Cas. 393), is that the insurers are not to be liable for the things to which the warranty applies. *Primâ facie*, therefore, any term in this policy which is sufficiently satisfied by reference to a risk for which the insurers retain liability must be so confined if the warranty is to have its intended effect. An interesting illustration of this, and in a matter immediately relevant, is supplied by clause 13 of the Institute Time Clauses. That clause provides that "when the vessel shall have been stranded, sunk, on fire, or in collision with any other vessel"—note the identity of the phrase with that of the collision clause—"underwriters shall pay the damage created thereby." On this clause there is, of course, no question that, this present collision being an excepted risk, there is on the marine underwriters no liability at all in respect of that damage. The Crown has accepted liability for it in these present proceedings.

The view, however, is apparently taken that in this matter the collision clause is a law unto itself, upon a ground, which is most clearly expressed by Greer, J. in his judgment. There he says that the clause introduced "an additional contract of insurance dealing with an entirely new subject-matter which has nothing to do with damage to the insured ship, but is of the same character as a third-party risk policy on a motor-car or other vehicle moving on land. . . . The f.c.s. clause does not in my judgment free the insurer from the indemnity promised in the Institute Time Clauses in respect of collision occasioned by the negligence of servants of the insured owners even where that negligence takes place in the course of carrying out a warlike operation."

I have some difficulty in following the reasoning here because it does not appear to be directed to the terms of the clause with which in this case we are alone concerned. Unlike other forms of running-down clause to be found in the books, and with which the learned judge's observations seem more directly to deal, there is no reference in this clause to the negligence of the servants of the insured owners or of anybody else. The sole preliminary condition of liability prescribed by the clause is that the insured vessel shall have been in collision with another vessel and that the insured person shall have paid or shall have become liable to pay damages in respect of that collision. The learned judge omits even to consider whether the collision so referred to can in view of the f.c.s. clause have any meaning other than that which, for example, and in *pari materia*, it admittedly bears in clause 13 of these same Institute Time Clauses. The learned judge apparently treats the clause as if it were in the terms of that under discussion in *Taylor* v. *Dewar* (2 Mar. Law Cas. (O. S.) 5; 5 B. & S. 58) and *Xenos* v. *Fox* (*sup.*), where liability is made to attach in case "by accident or negligence of the master or crew" the insured ship runs down another, a perfectly general and independent form of expression.

Such is neither the form nor, I believe, the intent of the present clause. Nor ought its terms to be stressed to give it that effect. These terms are relative and dependent reflecting the original purpose of the collision clause which certainly was not to attach liability to an insurer for damages unconnected with an insured risk. Its purpose was to extend liability in respect of a peril of the sea insured against for a consequence which the courts had held to be too remote to be recognised, but against which insured persons desired to be indemnified. In such a case, as Lord Blackburn observes, "the prejudice which the owner of the ship sustains . . . is a consequence of the peril of the sea, the collision, and it may be and every day is insured by a running-down or collision clause now in common use, but it is not a loss of the ship": (*Inman Steamship Company* v. *Bischoff*, 5 Asp. Mar. Law Cas. 6, at p. 11; 47 L. T. Rep. 581, at p. 586; 7 App. Cas. 670, at p. 686).

It is accordingly quite foreign to the conception of the clause that an insurer should under it be liable for collision damage to another ship when under the same policy he is under no liability for damage from the same collision to the insured ship; or that, to take the present case, he should be free from liability under clause 13 of these clauses, but should, under the very same words, be hit under clause 1. In my judgment, however the clause be regarded, there is no room for the view that under it and in respect of this collision the marine underwriter is under any liability whatever.

If that be so, it follows, for the reasons already given, that the liability of the Crown for this sum is established unless the provisions of the third sentence of clause 19 of the charter-party are sufficient to show that the hypothesised war risk policy is to contain no collision clause at all. For convenience I

again transcribe the sentence in question: "Such risks are taken by the Admiralty on the ascertained value of the steamer, if she be totally lost, at the time of such loss, or if she be injured, on the ascertained value of such injury."

I think that all of your Lorsdhips at the hearing were of the opinion, at all events I myself hold the view very strongly, that that clause is merely operative to define the value of the *Warilda* in cases where it is material to ascertain it, and cannot be invoked to limit the liability of the Admiralty to the payment of damage sustained by the *Warilda* if, apart from that clause, a more extended liability is, upon the true view of the whole document, undertaken by the Admiralty. It is not by such words of ambiguous import that you can effectively neutralise the operation upon the war risk insurance of the admission that the collision clause is part of the marine risk.

For these reasons I am of opinion that the liability of the Crown in respect of the appellants' first claim is established.

Their second claim, also under the collision clause, is for three-fourths of the costs incurred or paid by the appellants in contesting the liability of the *Warilda* for the collision.

This claim, I think, is not sustainable. Such costs are, under the clause, only recoverable if the proceedings in question were taken "with the consent in writing" of the Admiralty. No such consent was given, probably, it may be, because the collision was then regarded by the Admiralty as a marine and not as a war risk. But for whatever reason, the consent was not given, and accordingly the claims of the appellants for these costs must necessarily fail.

The third claim of the appellants has greatly exercised my mind. It is for hire money during the period the *Warilda* was undergoing repair of the damage sustained by the collision. The hire was withheld by the Admiralty under clause 25 of the charter-party, the terms of which are before your Lordships.

As I read that clause, it is in substance the complement of clause 12 which places obligations upon the appellants in the following terms:

> The owners shall provide and pay for all wages provisions . . . and all other expenses in connexion with the master, officers, engineers and crew . . . for all deck and engine room stores . . . for boats . . . and for the maintenance of the steamer in a thoroughly efficient state in hull and machinery for and during the service.

Clause 25 as I read it is at all events primarily pointed to cases in which the working of the steamer is suspended owing to causes for which as between the owners and the Admiralty the owners are responsible, and I have difficulty in seeing how it can properly be extended to cases where the suspension, as here, is attributable to a cause for which, in a question with the owners, the Admiralty is responsible.

And this was apparently the view of the Admiralty when in Aug. 1918 this claim was first made. It was rejected because, as was stated: "The vessel was inefficient owing to a marine risk—*i.e.*, collision." I appreciate that answer, and my own view is that in principle it is right. But that principle concedes the appellants' case, for the result of your Lordships' previous decision is that the vessel was inefficient, not owing to a marine, but to a war risk. Applying that principle, could it, for instance, be contended that if the damage to the *Warilda* had been done, as was the damage to the *Ikaria* in *Leyland Shipping Company Limited* v. *Norwich Union Fire Insurance Society Limited* (14 Asp. Mar. Law Cas. 258; 118 L. T. Rep. 120; (1918) A. C. 350)—by hostile submarine attack — that the *Warilda*, during the repair of that damage, would, under clause 25, have been off hire. It seems to me that so to contend would stress the clause to breaking point. Yet, I have difficulty in finding any dividing line between such damage and that with which we are here concerned.

These are my difficulties, and they are not met by the statement, quite correct as it is, that the war risk policy is an insurance on ship and not on freight. Accordingly I have felt it my duty to express them in justice to the appellants. But having done so I do not further press them, as I understand all your Lordships are of opinion that the decision of the courts below on this point should be affirmed.

I acquiesce in that view. But if, in other matters, the decision of this appeal had rested with me, I should, in common with my noble and learned friend who has just spoken, have allowed the first of the appellants' claims, with some consequential directions as to costs.

Appeal dismissed.

Solicitors for the appellants, *Parker, Garrett, and Co.*

Solicitor for the respondent, *The Treasury Solicitor.*

Judicial Committee of the Privy Council.

June 22, 23, 25, 30, *July* 2, *and Nov.* 17, 1925.

(Present: Lords Haldane, Shaw, Wrenbury, Carson, and Blanesburgh.)

Lord Strathcona Steamship Company Limited *v.* Dominion Coal Company Limited. (a)

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Charter-party—Purchase of ship with notice of charter-party—Successive owners of ship—User of ship in a way inconsistent with the charter-party — Frustration of contract — Charterers' right to an injunction.

By a charter-party, dated the 24th July 1914, *a steamship was chartered by the appellants as*

(a) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

owners to the respondents for ten consecutive St. Lawrence seasons with an option of continuing the charter for a further eight seasons. Between 1916 *and* 1918 *the vessel was under requisition by the British Government. The ownership of the vessel was changed four times between* 1917 *and* 1920. *The present owners contended* (1) *that the contract under the charter-party was frustrated by the action of the Government;* (2) *that there was no privity of contract between them and the respondents; and* (3) *that they were not bound to respect the charter-party but could, in defiance of its terms, use the vessel at their own will in any other way.*

Held, that the appellants having acquired from another rights in a ship which was already under charter, with notice of rights which required the ship to be used for a particular purpose and not inconsistently with it, were in the position of constructive trustees with obligations which a court of equity would not permit them to violate. The doctrine of frustration did not apply to the facts of the case. The respondents were therefore entitled to an injunction.

Tulk v. Moxhay (2 *Ph.* 774) *and* De Mattos v. Gibson (4 *De G. & J.* 276) *followed.*

APPEAL from a judgment and order of the Supreme Court of Nova Scotia (*en banc*), dated the 1st March 1924, affirming the judgment of Mellish, J. in the Supreme Court of Nova Scotia, dated the 20th June 1922. By a charter-party, dated the 24th July 1914, the steamship *Lord Strathcona* was chartered by the owners, the Lord Curzon Steamship Company, to the respondents for ten consecutive St. Lawrence seasons, commencing with 1915, with the option to the respondents of continuing the charter for a further period of five more seasons, and a still further option of three more St. Lawrence seasons thereafter. The vessel was in the service of the respondents in 1916 and continued during the St. Lawrence season, namely, until the 14th Dec. 1916, being used by the respondents for their trade under the charter-party. At the close of the 1916 season the British Government made an effective requisition of the vessel, and she remained under requisition for 1917 and 1918. During the course of those years various changes were made in the ownership of the vessel. All the successive owners, including the appellants, who had become owners of the vessel in 1920, were aware of the existence of the charter-party and of the responsibilities under it. During the St. Lawrence season 1920 the respondents insisted that the appellants, the then owners of the vessel, should perform the terms of the charter-party; but the appellants contended that the charter-party had been broken by reason of the requisition of the British Government, and refused to perform the terms of the charter-party.

The respondents accordingly instituted an action in the Supreme Court of Nova Scotia claiming, *inter alia*, a declaration that the appellants as owners of the vessel must carry out the terms of the charter, and an injunction to restrain the appellants from using the vessel in any way inconsistent with the rights of the respondents under the charter.

Mellish, J. held that the respondents were entitled to the declaration and injunction claimed, and an order was made, dated the 20th June 1922, that the charter-party was a valid and subsisting contract, and that the respondents were entitled to its full performance by the appellants, together with an injunction restraining the appellants from employing the vessel in any way inconsistent with the employment and use provided in the charter-party.

That decision was affirmed by the Supreme Court, *en banc* (Russell, Chisholm, and McKenzie, JJ.).

The appellants now appealed to His Majesty in Council.

Le Quesne, K.C. and *D. N. Pritt* for the appellants.

Sir *Leslie Scott*, K.C., *F. Hinde*, and *F. L. Moss* for the respondents.

The considered opinion of their Lordships was delivered by

Lord SHAW.—This is an appeal from a judgment and order of the Supreme Court in Appeal of Nova Scotia (*en banc*), dated the 1st March 1924, which affirmed a judgment and order of Mellish, J. in the Supreme Court of Nova Scotia, dated the 18th May 1922.

The questions involved in the case depend upon a consideration of the charter-party about to be mentioned and of the actings of parties under and in reference to that contract.

The charter was dated the 20th April 1914, corrected to the 24th July 1914. It was made between the Lord Curzon Steamship Company Limited, as the owners of the steamship *Lord Strathcona*, and the respondents as charterers thereof. The charter was a long-term charter, namely, for ten consecutive St. Lawrence seasons, commencing with the year 1915, with the option to the respondents of continuing the charter for a further period of five more seasons and a still further option of three more seasons thereafter. Should these options be exercised by the respondents as charterers the period of the contract thus extended to eighteen years. The St. Lawrence season referred to was to commence, except as to the first season 1915, five days prior to the opening of navigation to Montreal and not later than the 15th May in each year. The re-delivery to the owners of the steamship was to be between the 15th Nov. and the 15th Dec. in each year.

The ship went into the service of the respondents in 1916. She was delivered, or commenced service on the 10th July, and she continued during the St. Lawrence season, namely, until the 14th Dec. 1916, being used by the respondents for their trade purposes under the charter-party. The British Government, which had previously intimated that the vessel would be required for the purposes of war in 1915, when she was ready for the year, abandoned this

position and allowed the use of the vessel under the charter for the season 1916 as stated.

They made, however, an effective requisition of the vessel at the close of the 1916 season, and the vessel remained under requisition for 1917 and 1918 by the British Government. She came on service again by the withdrawal of the Government requisition on the 2nd July 1919 and remained on service till the end of the season, namely, Dec. 1919. Shortly put, the vessel was thus under requisition for some two and a half years, namely, from the end of the 1916 season until early in July 1919. During the course of these years various changes, to be afterwards referred to, were made in the ownership of the vessel.

There are three questions which arise in the appeal—these are, first, whether the contract under the charter-party was frustrated by the action of the Government, as just described. Second, whether any rights of the Dominion Coal Company, as charterers of the vessel, existed as against the appellants, the Lord Strathcona Steamship Company, as owners thereof, there having been no direct privity of contract between those parties. The third question has reference to an order upon the appellants to repay a portion of the hire of the *Lord Strathcona* under an agreement made without prejudice.

The questions will be dealt with in their order.

1. On the question of frustration their Lordships are clearly of opinion that this doctrine, which has been much developed and commented upon in recent years, cannot be applied to the facts of the present case. Put shortly, frustration can only be pleaded when the events and facts on which it is founded have destroyed the subject-matter of the contract, or have, by an interruption of performance thereunder so critical or protracted as to bring to an end in a full and fair sense the contract as a whole, so superseded it that it can be truly affirmed that no resumption is reasonably possible.

It is a mistake to say that the doctrine of frustration is a hard and fast doctrine which can be applied as a general principle in a definite measure to all cases alike. The facts and circumstances of each particular contract as well as the nature and duration of the interruption to performance must all be taken into account. Shipping cases afford easy illustrations of the variety of circumstances alluded to. A voyage is arranged to be made during fixed dates. The substantial interruption of such a voyage almost necessarily concludes the question of frustration in the affirmative. Or, again, a charter is for a short term and into that term such an interruption is projected as to preclude business arrangements being readjusted so as to suit limited and disjointed periods of time; then, again, it becomes well nigh clear that frustration has resulted.

In the present case there is a seasonal charter extending over a long period of possibly eighteen years. The interruption has been concluded and the vessel has been restored in good sailing order after a period of use by the Government of, say, three seasons. Upon these facts then in truth the question has really settled itself in the sense that a long balance of time and season remains during which, after resumption, the contract can be effectively carried on. It happens in the present case that, after the Government interruption had ceased, the parties did resume the practice of running the vessel as owners and charterers. The range of business has not been lost, the suitability of the vessel for performance had not been impaired. In these circumstances their Lordships are clear that the judgments of the courts below upon this topic are right and that frustration of the contract contained in the charter-party did not occur. Had the question accordingly arisen between the original charterers of the vessel, the Lord Curzon Steamship Company, as owners, and the respondents, as charterers, the case would have been at an end.

2. Upon the point of privity of contract and the nature of the right or remedy still open to the charterers of the vessel the following facts and dates have to be kept in view. The writ was issued by the respondents on the 31st July 1920. It was directed against the appellants as present owners and against the Lord Curzon Steamship Company as parties to the charter-party and it certainly claimed a declaration and made demands which are of a wide character and have been exposed to considerable criticism. Generally speaking their Lordships look upon the writ as an attempt to substitute the appellants in the entirety of the obligations resting upon the Lord Curzon Steamship Company as the original owners. A declaration was claimed by the respondents under the charter-party, under which the appellants could be called upon as in an action of specific performance to perform the obligations under the charter in the same sense and degree as the original owners, the Lord Curzon Steamship Company. It will be necessary to see whether, under the principles of English jurisprudence this demand can be justified as stated, or whether under the other claims made in the writ English equity is able to afford to the charterers against the present owners, the appellants, any remedy for the wrong arising to them by the threatened loss of their rights under the charter-party.

The charter-party is dated the 20th April 1914, corrected to the 24th July 1914. The ship had been built in England for the Lord Curzon Steamship Company under plans provided by the Dominion Coal Company, and it was agreed that, when complete, she should be chartered to the respondents, and this was done by the charter-party mentioned. Then occurred a series of transmissions of title to the ship. The dates are:—

The 14th Dec. 1917; Bill of Sale; Lord Curzon Company to The Century Shipping Company.

The 25th Feb. 1919; Bill of Sale; Century Shipping Company to Lord Lathom Company.

The 18th Dec. 1919; Bill of Sale; Lord Lathom Company to Lord Strathcona Company (No. 1).

The 22nd June 1920; Bill of Sale; Lord Strathcona Company (No. 1) to Lord Strathcona Company (incorporated in 1920).

So far as the knowledge of the existence of the charter-party was concerned their Lordships are clearly of opinion that all these successive owners were well aware of it, and this knowledge was, by notice, passed very clearly and properly on from each owner to the successor. It was only very late in the day when any flaw on this point was attempted to be taken. An important document in the case is that of the 1st Sept. 1919, namely a memorandum of agreement by which the Lathom Company agreed with the Strathcona Company about to be formed, which contained the following clause:—

> The steamer is chartered to the Dominion Coal Company as per charter-party dated New York, the 20th April 1914, corrected to the 24th July 1914, which charter the buyers undertake to perform and accept all responsibilities thereunder as from date of delivery in consideration of which the buyers shall receive from date of delivery all benefits arising from the said charter. All liabilities up to date of delivery to buyers to be for account of sellers.

In the opinion of the board the appellants thoroughly understood that the charter-party and its responsibilities and obligations thereunder were to be respected. This is not a mere case of notice of the existence of a covenant affecting the use of the property sold, but it is the case of the acceptance of their property expressly *sub conditione*.

The position of the case accordingly is that the appellants are possessed of a ship with regard to which a long running charter-party is current, the existence of which was fully disclosed, together, indeed, with an obligation which the appellants appear to have accepted to respect and carry out that charter-party. The proposal of the appellants and the arguments submitted by them is to the effect that they are not bound to respect and carry forward this charter-party either in law or in equity but that, upon the contrary, they can, in defiance of its terms, of which they had knowledge, use the vessel at their will in any other way. It is, accordingly, when the true facts are shown, a very simple case raising the question of whether an obligation affecting the user of the subject of sale, namely, a ship, can be ignored by the purchaser so as to enable that purchaser, who has bought a ship notified to be not a free ship but under charter, to wipe out the condition of purchase and use the ship as a free ship. It was not bought or paid for as a free ship, but it is maintained that the buyer can thus extinguish the charterer's rights in the vessel, of which he had notice, and that the charterer has no means, legal or equitable, of preventing this in law.

In the opinion of the board the case is ruled by *De Mattos* v. *Gibson* (33 L. T. Rep. (O. S.) 193; 4 De G. & J. 276) also a shipping case, the case of the user of a piece of property by a third person (*e.g.*, the respondent company in this case) of "the property for a particular purpose in a specified manner." Their Lordships think that the judgment of Knight Bruce, L.J., plainly applies to the present case: "Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller."

A principle, not without analogy, had previously been laid down in reference to the user of land.

In the opinion of their Lordships the case of *De Mattos* v. *Gibson* (*sup.*), still remains, notwithstanding many observations and much criticism of it in subsequent cases, of outstanding authority.

The general character of the principle on which a Court of Equity acts was explained in *Tulk* v. *Moxhay* (2 Ph. 774). The plaintiff there was owner in fee of Leicester-square, and several houses forming the square. He sold the property to one Elms in fee, and the deed of conveyance contained a covenant obliging Elms, his heirs and assigns, to "keep and maintain the said piece of ground and square garden . . . in its then form . . . an open state, uncovered with any buildings." Elms sold to others, and the property came into the hands of the defendant, who admitted that he had purchased with notice of the covenant. The defendant, "having manifested an intention to alter the character of the square garden, and asserted a right, if he thought fit, to build upon it," the plaintiff, who still remained owner of several houses in the square, filed a bill for an injunction. All this is familiar knowledge, but it appears to have been sometimes forgotten what was the nature of the argument for the defendant. He contended that the covenant did not run with the land so as to be binding upon him as a purchaser, and Sir Roundell Palmer on his behalf, relied on the dictum of Lord Brougham, L.C. in *Keppell* v. *Bayley* (2 My. & K., p. 547), to the effect that "notice of such a covenant did not give a Court of Equity jurisdiction to enforce it by injunction against such purchaser, inasmuch as 'the knowledge by an assignee of an estate, that his assignor had assumed to bind others than the law authorised him to affect by his contract—had attempted to create a burthen upon property which was inconsistent with the nature of that property, and unknown to the principles of the law—could not bind such assignee by affecting his conscience.'" No reply was called for to this argument and the Lord Chancellor said that Lord Brougham never could have meant to lay down the

doctrine "that this court would not enforce an equity attached to land by the owner unless under such circumstances as would maintain an action at law." "If that be the result of his observations," added the Lord Chancellor, "I can only say that I cannot coincide with it."

It has sometimes been considered that *Tulk* v. *Moxhay* (*sup.*) and *De Mattos* v. *Gibson* (*sup.*) carried forward to and laid upon the shoulders of an alienee with notice the obligations of the alienor, and therefore that the former is liable to the covenantee in specific performance as by the law of contract, and under a species of implied privity. This is not so; the remedy is a remedy in equity by way of injunction against acts inconsistent with the covenant, with notice of which the land was acquired. The former was the view of Kay, J. in *London and South-Western Railway Company* v. *Gomm* (45 L. T. Rep. 505; 20 Ch. Div. 562); but it was corrected by the Court of Appeal substantially in the sense above stated. So confined, that is, to a remedy in equity by injunction against the violation of restrictive covenants, the application of the principle of *Tulk* v. *Moxhay* (*sup.*) was affirmed. The same result had been reached in *Haywood* v. *Brunswick Permanent Benefit Building Society* (45 L. T. Rep. 699; 8 Q. B. Div. 403), and other decisions have followed in a like sense.

The cases on this branch of the law are legion. But following the leading authorities just cited there may be specially mentioned that of *Catt* v. *Tourle* (20 L. T. Rep. 551; L. Rep. 4 Ch. 656), in which Selwyn, L.J. affirms with precision the principles of *Tulk* v. *Moxhay* (*sup.*) and *De Mattos* v. *Gibson* (*sup.*).

But *Tulk* v. *Moxhay* (*sup.*) is important for a further and vital consideration, namely, that it analyses the true situation of a purchaser who, having bought upon the terms of the restriction upon free contract existing, thereafter when vested in the lands, attempts to divest himself of the condition under which he had bought. "It is said that, the covenant being one which does not run with the land, this court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken."

In the opinion of the board these views, much expressive of the justice and good faith of the situation, are still part of English equity jurisprudence, and an injunction can still be granted thereunder to compel, as in a Court of Conscience, one who obtains a conveyance or grant *sub conditione* from violating the condition of his purchase to the prejudice of the original contractor. Honesty forbids this; and a court of equity will grant an injunction against it.

It may be mentioned that essentially the same principle has been applied by the House of Lords in the Scotch case of the *Earl of Zetland* v. *Hislop* (7 App. Cas. 427), in which the superior of land (according to law holding the *dominium directum* thereof and, therefore, of course, having a continuing patrimonial interest therein) granted contracts of feu to various vassals holding the *dominium utile* of the land under that permanent tenure. By these contracts the vassal, his heirs and assignees and their tenants were prohibited from using the property for carrying on the trade of a publican. Various transactions of sale and transfer of the property had occurred: four of the purchasers asserted their right to carry on a publican's business, and the Earl of Zetland asked interdict (or injunction) against such a violation of the restrictions contained in the feu charter. In the House of Lords, as stated, the patrimonial interest of the superior was affirmed and also his right to interdict unless (which was alleged and which was made the subject of a remit for probation) he was precluded from this remedy by acquiescence and waiver.

It has been said—it was strongly urged for the appellant in this case—that a remedy by way of injunction against the owners not disposing of their ship in any other way than under the charter-party could not be granted because there was no such negative covenant to enforce by injunction.

Lord Selborne, in *Wolverhampton and Walsall Railway Company* v. *London and North-Western Railway Company* (L. Rep. 16 Eq. 433, at p. 440), disposed of such an argument thus, in language which still remains unimpaired in force: "The technical distinction being made, that if you find the word 'not' in an agreement—'I will not do a thing'—as well as the words 'I will,' even although the negative term might have been implied from the positive, yet the court, refusing to act on an implication of the negative, will act on the expression of it. I can only say, that I should think it was the safer and the better rule, if it should eventually be adopted by this court, to look in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise, whether this is the court to come to for a remedy. If it is, I cannot think that ought to depend on the use of a negative rather than an affirmative form of expression."

A perusal of the numerous decisions on this branch of the law shows that much difficulty has been caused by the attempt to extend these principles to cases to which they could not, by the nature of the case, have been meant to apply. It has been forgotten that—to put the point very simply—the person seeking to enforce such a restriction must, of course, have and continue to have, an interest in the

subject-matter of the contract. For instance, in the case of land he must continue to hold the land in whose favour the restrictive covenant was meant to apply. That was clearly the state of matters in the case of *Tulk* v. *Moxhay* (*sup.*) applicable to the possession of real estate in Leicester-square. It was also clearly the case in *De Mattos* v. *Gibson* (*sup.*), in which the person seeking to enforce the injunction had an interest in the user of the ship. In short, in regard to the user of land or of any chattel, an interest must remain in the subject-matter of the covenant before a right can be conceded to an injunction against the violation by another of the covenant in question. This proposition seems so elementary as not to require to be stated. And it is only mentioned because in numerous decisions, as is clearly brought out in the judgment of Lord Wrenbury, then Buckley, L.J., in *London County Council* v. *Allen and others* (111 L. T. Rep. 610, at p. 613; (1914) 3 K. B. 642, at pp. 656–658, it was necessary to shear away this misapplication or improper extension of the equitable principle. As Romer, L.J. said in *Formby* v. *Barker* (89 L. T. Rep. 249; (1903) 2 Ch. 539, at p. 554): " If restrictive covenants are entered into with a covenantee, not in respect of or concerning any ascertainable property belonging to him, or in which he is interested, then the covenant must be regarded, so far as he is concerned, as a personal covenant, that is as one obtained by him for some personal purpose or object."

Applying that to the case of land and referring to numerous cases upon the subject, Buckley, L.J. says in *London County Council* v. *Allen and others* (*sup.*): " Inasmuch as at the date when the covenant was taken the covenantee had no land to which the benefit of the covenant could be attached, it was held that the benefit of the restrictive covenant could not enure against a derivative owner even where he took with notice."

The board notes the observations made by Scrutton, L.J. in the case of *London County Council* v. *Allen and others* (*sup.*), in which, alluding to various decisions, the learned judge puts this point as to the possible inconvenience, not only private but public, which may result from a strict adhesion to the principle that the enforcement of a restrictive covenant must be confined to those having patrimonial interests in the subject-matter. His Lordship takes the not unfamiliar case of restrictive covenants imposed by an owner of a large block of land in the terms of conveyance of the various fractions in which it may be split up for private use, and he observes: " I regard it as very regrettable that a public body should be prevented from enforcing a restriction on the use of property imposed for the public benefit against persons who bought the property knowing of the restriction, by the apparently immaterial circumstance that the public body does not own any land in the immediate neighbourhood. But, after a careful consideration of the authorities, I am forced to the view that the later decisions of this court compel me so to hold."

The question here alluded to may subsequently arise, and their Lordships are unwilling, because it is unnecessary in the present case, to make any pronouncement upon it; for the present is, as has been seen, a case as to the user of a ship, with regard to the subject matter of which, namely, the vessel, the respondent has, and will have during the continuance of the period covered by the charter-party, a plain interest so long as she is fit to go to sea. Again, to adopt the language of Knight Bruce, L.J., in the *De Mattos* v. *Gibson* case (*sup.*): " Why should it (the court) not prevent the commission or continuance of a breach of such a contract, when, its subject being valuable, as for instance a trading ship or some costly machine, the original owner and possessor, or a person claiming under him, with notice and standing in his right, having the physical control of the chattel, is diverting it from the agreed object, that object being of importance to the other? A system of laws in which such a power does not exist must surely be very defective. I repeat that, in my opinion, the power does exist here."

In considering the character of the doctrines of equity in a case like the present it is essential to remember that these doctrines are of several kinds and fall partly, though not exclusively under different heads. If this is not borne in mind uncertainty and confusion are apt to arise. Dicta of eminent judges which apply under one principle get to be regarded as though they illustrated a principle which is in reality different.

Equity has, in addition to the concurrent jurisdiction, auxiliary and exclusive jurisdiction. The enforcement of trusts is in the main an illustration of the exclusive jurisdiction. The scope of the trusts recognised in equity is unlimited. There can be a trust of a chattel or of a *chose in action*, or of a right or obligation under an ordinary legal contract, just as much as a trust of land. A shipowner might declare himself a trustee of his obligations under a charter-party, and if there were such a trust an assignee, although he could not enforce specific performance of the obligation, would fail to do so only on the broad ground that the Court of Equity had no machinery by means of which to enforce the contract. Subject to this an assignee of the charterer could enforce his title to the *chose in action* in equity, even though he could not have done so at law.

There are cases of a different type in which equity is proceeding, not on the footing of trust, but of following, by the exercise of concurrent and auxiliary jurisdiction, the analogy of the common law. Such are the cases of so-called equitable easements. This was explained by the Court of Appeal in *London County Council* v. *Allen* (*sup.*). There it was held that an owner of land, deriving title under a person who had entered into a restrictive covenant concerning the land, which covenant did not run with the land at law, was not bound by the

covenant although he took the land with notice of it, if the covenantee were not in possession of or interested in land for the benefit of which the covenant was entered into. In the judgments it was pointed out that such a covenant did not run with the land at law, and that there was a series of authorities which showed that in the case of land mere purchase with notice was not sufficient. The reason was that under this head of its jurisdiction equity had followed law except to the extent of recognising a negative covenant as capable of operating for the benefit of a dominant tenement. The principle proceeded on the analogy of a covenant running with the land or of an easement, as explained by Jessel, M.R., in *London and South-Western Railway Company* v. *Gomm* (*sup.*). This restriction of the principle on the analogy of easements at law rendered mere notice insufficient, and cut down the jurisdiction from the wider principle stated by Knight Bruce, L.J., in *De Mattos* v. *Gibson* (*sup.*) to the narrower head established in order to accord with the legal analogy in the case of land.

But in no other regard does this or any other decision of commanding importance seem to affect the general principle which Bruce, L.J. laid down. If a man acquires from another rights in a ship which is already under charter, with notice of rights which required the ship to be used for a particular purpose and not inconsistently with it, then he appears to be plainly in the position of a constructive trustee with obligations which a Court of Equity will not permit him to violate. It does not matter that this court cannot enforce specific performance. It can proceed, if there is expressed or clearly implied a negative stipulation. The judgment of Lord Chancellor St. Leonards in *Lumley* v. *Wagner* (1 De G. M. & G. 604) appears to be conclusive of the principle. "Wherever," says that very eminent judge, at p. 619, "this court has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give."

For the reasons already fully set forth the board is of opinion that the injunction granted by Mellish, J. in the seventh head of his order of the 20th June 1922, was correct, and was properly affirmed by the Supreme Court for the reasons set forth by Chisholm, J. The fundamental point indicated is thus determined.

The consequences of this decision, both as to the future use of the vessel and as to damages, will be applied in the court below. It is incredible that the owners will lay up the vessel rather than permit its use under the contract, of which they were notified, and the provisions of which it is now determined they ought to respect. The resumption of use under the charter-party will thus simplify the ascertainment of damages. An interlocutory judgment has already been pronounced against the other defendant, the Lord Curzon Steamship Company, and the court below will determine the working out of the point of damages in view of these circumstances. It is to be hoped that now the question of principle has been determined the parties may work out without further appeal to courts of law the consequential details.

The question as to the moneys deposited with the Eastern Trust Company at Montreal is one of no little difficulty. The vessel had been redelivered by the Government, and the parties were at variance as to whether the charterers should have the use of the vessel on the charter-party terms, the appellants maintaining that the contract had been frustrated. In these circumstances an arrangement was made for chartering the vessel by the appellants to the respondents for the balance of the 1920 season at $66,000 per month, being much in excess of the hire under the charter-party. The owners, the appellants, took one half of this, the other half was, from time to time, paid over to the Eastern Trust Company to abide the orders to be made under this litigation. The moneys so paid to the Trust have by par. 3 of Mellish J.'s order been rightly ordered to be repaid to the respondents, and par. 3 will accordingly stand. But the learned judge by par. 2 has also ordered the appellants to repay to the respondents the amount by which the hire paid directly to the appellants exceeded the charter-party rate. In their Lordships' view, however, the true effect of the agreement was that the hire actually payable thereunder to the appellants as distinct from that placed *in medio* was to be retained by the appellants as their own in any event. It was only on this footing that they entered into the agreement. That par. (2) will accordingly be struck out.

Their Lordships will, therefore, humbly advise His Majesty that the appeal be allowed for the purpose of variation of Mellish, J.'s order as follows :—

1. By omitting from clause 1 thereof all the words after the words "valid and subsisting contract."
2. By omitting clause 2.
3. By omitting clause 4.
4. By omitting from clause 6 th words "the amounts certified by the referee under clause 2 hereof, and the amount of the said damages under clause 4 hereof when assessed, and,"

subject to these variations, the said Order should be affirmed.

The cause should be remitted to the court below to deal with the question of damages. There will be no costs of this appeal, the order as to costs in the court below to stand.

Solicitors for the appellants, *Ince, Colt, Ince, and Roscoe*.

Solicitors for the respondents, *William A. Crump and Son*.

Nov. 10, 12, 13, 16, *and Dec.* 10, 1925.

(Present: Lords DUNEDIN, SUMNER, and WRENBURY.)

BRITISH PETROLEUM COMPANY LIMITED *v.* ATTORNEY-GENERAL FOR CEYLON. (*a*).

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Ship—Stranding of ship in harbour—Damage—Alleged negligence of pilot—Claim against harbour authority—Breach of contract or tort—Ceylon Pilots Ordinance No. 4 *of* 1899, *s.* 11.

By sect. 11 *of the Pilots Ordinance No.* 4 *of* 1899 "*The governor or the owner or master of a ship shall not be answerable to any person whatsoever for any loss or damage occasioned by the fault or incapacity of any pilot acting in charge of that ship within the limits of any port brought under the operation of this Ordinance.*"

Held, that those words were absolute and without exception, so that even if a ship suffered damage in a harbour by reason of the fault of the pilot, the harbour authority were excused by that section and that irrespective of whether the fault was breach of contract or a tort.

Decision of the Supreme Court of Ceylon affirmed.

APPEAL from a decree of the Supreme Court of Ceylon (Bertram, C.J. and Ennis, J.) dated the 27th Feb. 1924 reversing the decision of the trial judge (Maartensz, J.) dated the 19th March 1923.

The appellants, who were the plaintiffs in the action, were the owners of the steamship *British Ensign.* The action was brought to recover damage suffered by that ship in grounding on a rock in the berth which was allotted to her in the harbour of Colombo by the harbour authorities. The respondent was sued as representing the Government of Ceylon who were the harbour authority of Colombo.

The main question at issue in the appeal was whether the Government could be made liable to the appellants either in contract or in tort. Maartensz, J. found that the relationship between the respondent and the appellants was a contractual relationship nd that the action lay in contract and not in tort. He therefore gave judgment for the appellants for the sum of 62,000*l.* On appeal to the Supreme Court of Ceylon that judgment was reversed and judgment was entered for the respondent. The appellants now appealed to His Majesty in Council.

A. T. Miller, K.C., *S. L. Porter*, K.C., and *J. St. C. Lindsay* for the appellants.

W. N. Raeburn, K.C. and Hon. *R. Stafford Cripps* for the respondent.

The considered opinion of their Lordships was delivered by

Lord DUNEDIN.—The steamship *British Ensign*, belonging to the plaintiffs and appellants, laden with benzine, arrived outside the harbour of Colombo, on a voyage from Rangoon to Suez for orders, on the 10th Sept. 1919. She needed bunker fuel and consequently wished to enter the harbour for that purpose. She signalled for a pilot and a pilot came off, who proceeded to put her into a berth in the harbour. She was moored to certain stationary buoys in the harbour. In all the manœuvres required to place her in the berth she was under the charge of the pilot. She took in the fuel required, and next morning essayed to leave the berth. It was then found that she had taken the ground at the stern. After some ineffectual efforts to free her from the ground she was eventually got off at high tide and proceeded on her voyage. Before she started from the harbour, a perfunctory examination was made of her hull, so far as could be seen or felt by divers, and it was not thought that she had sustained any injury, but eventually, when she came to England and was dry-docked, it was found that her stern and some of the plates of her hull had been severely injured. The plaintiffs then raised the present action against the defendant, the Attorney-General of Ceylon—the Government of Ceylon being the harbour authority of Colombo—for the damage done.

The harbour of Colombo is a roadstead which has been artificially turned into a harbour by the erection of breakwaters which has converted it into a closed area of 640 acres. The erection of the breakwaters was effected under various ordinances having the authority of law which constituted the Government the harbour authority and gave them rights and imposed duties. Under the ordinances no vessel may enter without a pilot. When entered, she is directed to a berth and the pilot takes her there. A pilot also takes her away from the berth and out to sea. A tariff is charged which varies according to services rendered and the size of the ship. It is not necessary to go into particulars because it is common ground that the *British Ensign* in respect that she only entered for coaling (liquid fuel being held as equivalent to coal) and taking in water, fell to be charged a special consolidated rate of Rs.200 for a stay not exceeding ninety-six hours.

The so-called berths in the harbour are rectangular spaces which are marked by means of numbered buoys. The buoys at the part of the harbour with which the case has to do, are placed in pairs, east and west, at a distance of 600ft. The distance between each pair is 400ft., and the line between each pair of buoys represents the middle line of a berth. In other words, each berth is represented by a parallelogram 600 by 400. The berth to which the *British Ensign* was sent was numbered No. 21 and the centre line buoys were marked, 43 being the eastmost and 33 the westmost respectively. After complaint was made and before the trial of the action, very minute inspection by divers was made of the place in which the ship had taken the ground. It then became apparent that in the neighbourhood of buoy 43 there was an irregular boomerang-shaped piece of rock

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

such as would easily account for the injuries on the ship's bottom if she were allowed to rest on it.

The plaintiffs accordingly contend that by accepting a fee from them for the entry to the harbour and berthing of their ship, the harbour authority impliedly contracted to give the ship a safe berth; that the berth provided and to which the ship was compulsorily obliged to go was not safe, and consequently the harbour authority is liable in damages. The defendant, on the other hand, contends that no contract had been entered into by him or could be inferred against him by the mere taking of dues which, by ordinance equivalent to statute, he was obliged to charge. Further, he said that the berth provided was, in fact, a safe berth for the ship, in the sense that a ship properly placed within the limits of No. 21 would be safe, but that the ship was improperly placed in respect that the soundings, which were well known to the pilot, indicated not indeed a rock, but a shallow patch where the rock was, and that a ship should not have been placed there. Further, he said, that in any view, even if a contract was held against him, the failure to keep the ship safe was a tort, and the Government of Ceylon, which is just another name for the Crown, is not liable for torts; and, further, if with or without a contract the fault in putting the ship in an unsafe position was the fault of the pilot, he (the defendant) was specially excused by sect. 11 of Ordinance No. 4 of 1899, which is in these terms: "11. The governor or the owner or master of a ship shall not be answerable to any person whatsoever for any loss or damage occasioned by the fault or incapacity of any pilot acting in charge of that ship within the limits of any port brought under the operation of this Ordinance."

To this the plaintiffs replied that sect. 11 had not the effect contended for and that by Roman-Dutch law the Crown is answerable in tort. The learned trial judge found for the plaintiffs. He found that, in respect of the decision in such cases as *Parnaby* v. *Lancaster Canal Company* (11 A. & E. 223), *Mersey Board* v. *Gibbs; Mersey Board* v. *Penhallow* (11 Mar. Law Cas. (O. S.) 353; 14 L. T. Rep. 677; 11 H. L. Cas. 686), *The Moorcock* (6 Asp. Mar. Law Cas. 357, 373; 60 L. T. Rep. 654; 14 Prob. Div. 64), *Francis* v. *Cockrell* (23 L. T. Rep. 466; L. Rep. 5 Q. B. 501), and *Lax and another* v. *Mayor, &c., of Darlington* (41 L. T. Rep. 489; 5 Ex. Div. 28), there was to be inferred a contract from the payment of the dues; that such contract was to provide a safe berth; and that the non-provision of a safe berth was a breach of contract and not tort. As to the latter point, he also founded on an *obiter dictum* in the judgment of this Board in *Scrutton, Sons, and Co.* v. *Attorney-General for Trinidad* (124 L. T. Rep. 257). As to the Crown being free from liability in tort, the question in his view did not arise. Had it been so he would have been bound by the decision of the Court of Appeal in *Colombo Electric Tramway Company* v. *Attorney-General* (16 N. L. R. 161).

Appeal being taken to the Appeal Court, this judgment was reversed, and the action dismissed. The Chief Justice held that there was no contract and discriminated the cases quoted on the point in respect that in them there was an invitation to the ship or to others to avail themselves of the services offered; whereas here the ship entered the harbour as of right, and what she paid was a mere due or toll and not a consideration for a contract. That being so, the fault which in fact he ascribed to negligent berthing by the pilot was a tort and therefore the Crown was not liable as in the case of the *Colombo Electric Tramway Company*, above quoted.

The other learned appeal judge rested his judgment upon a different ground. He was not inclined to say there might not be a contract. But the fault he held was the fault of the berthing pilot, and then whether that fault was looked on as a breach of contract or a tort; in either case the Government was freed by the terms of sect. 11.

Their Lordships were favoured with a careful and interesting argument on the various points of law which may be gathered from the contentions of the parties and the opinions of the learned judges above set forth. They think, however, that it is necessary first to come to a clear conclusion as to the facts, and it will then be apparent what points of law are necessary to be determined for the decision of the case.

There is no question but that the vessel in being berthed was entirely under the control of Pilot Sorensen, and that he was directed by the master attendant, whose orders in that matter he was bound to obey, to place the vessel in berth No. 21. Now Sorensen, as all other pilots, was in possession of a chart showing the soundings all over the harbour and with this chart he was very familiar. That chart showed in the immediate neighbourhood of buoy 43, that is to say the eastmost or shoreward end of the berth, that there was what has been called a shallow patch. The exact extent of the patch he did not know because the shallow patch was outside the 30ft. contour line, and the soundings which were shown individually are at distances of 50ft. from east to west and 200ft. from north to south. Within 100ft. to the north of 43 there was a sounding of 23.9ft., and to the west of that two others of 23.3 and 24.3 respectively. After that, continuing to the west, came the contour line of 30ft. The length of the *British Ensign* was 430ft. and her draught as she arrived at her moorings 25.6 forward and 24.10 aft. With the filling up of the oil, her draught aft would slightly increase. Sorensen was fully aware of the shallow patch and says he would not have placed the stern of the vessel over it. An examination of the position, in the light of the accurate soundings, showed that there was quite room to place a ship of the size of the *British Ensign* in the berth without its stern being over the shallow patch. As a matter of fact, Sorensen thought he had left the vessel

clear of the patch. The ship is moored by an anchor to the west and by a cable from each of the two buoys. The buoy is capable of being pulled to a certain extent towards the ship. What seems to have happened is that there was a mistake made, either by one of the ship's crew, unnoticed by Sorensen, or by Sorensen himself, as to how many shackles of chain were out from the ship towards the anchor. The result was that the ship was not pulled up sufficiently near to buoy 33, a position which would have cleared her stern from the shallow patch. All the pilots examined speak to the shallow patch. They all say that berth 21 was fit for a ship of the size of the *British Ensign* if properly placed, and this was not cross-examined to by the plaintiffs. The truth is that the plaintiffs rested their claim on the idea of a contract for a safe berth in fact, and considered that if the actual position to which the ship was conducted by the pilot, appointed by the harbour authority, turned out to be unfit they were entitled to succeed.

In this state of the facts, which is in accordance with the views of the court below, it seems to their Lordships that it is quite unnecessary to decide many of the legal questions raised. In particular, they need not decide the question as to whether, looking to the position of the harbour authority as distinct from private persons owning a wharf or premises, there was a contract. Assuming that there was a contract, it would only be a contract to provide a berth to which it was safe to go. The ship was improperly moored therein. That was either the fault of the pilot or the ship's crew (if they moved the ship after the pilot left them). If it was the fault of the ship's crew it was not the fault of the respondent. If it was the fault of the pilot, then their Lordships hold that the harbour authority is excused by reason of sect. 11, and that irrespective of whether the fault was breach of contract or a tort.

As to sect. 11 their Lordships agree with the Court of Appeal. The words are absolute and without exception. There is nothing in the section to cut it down to questions only arising between the persons mentioned and persons not mentioned, excluding all questions which may arise between the persons mentioned *inter se*. Looking to the position of the harbour authority who were not like a private trader catering for trade, but were obliged to furnish facilities, it is not a section which need cause surprise or excite anxiety to restrict its operation.

For these reasons their Lordships are of opinion that the appeal falls to be dismissed and they give no opinion as to the general questions raised. They would, however, wish to remark that as to the question of whether the Roman-Dutch law differs from the English in holding that the Crown may be liable for a tort, inasmuch as the matter has often been mooted and has been solemnly settled by the case of the *Colombo Electric Tramway Company* (*sup.*), and inasmuch as the question in Ceylon is always not only what is Roman-Dutch law, but how far has any part of it been recognised in Ceylon, they would require very clear arguments to induce them to reverse the Court of Appeal on such a matter.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

Solicitors for the appellants, *William A. Crump* and *Son*.

Solicitors for the respondent, *Burchells*.

Supreme Court of Judicature.

COURT OF APPEAL.

July 16, 17, 20, *and Nov.* 9, 1925.

(Before BANKES, SCRUTTON, and ATKIN, L.JJ.)

NETHERLANDS AMERICAN STEAM NAVIGATION COMPANY *v.* H.M. PROCURATOR-GENERAL. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Indemnity Act—Seizure of neutral vessel—Detention—Claim by owners for compensation for loss of use of vessel—Prerogative right of the Crown—Jurisdiction of Prize Court—Indemnity Act 1920 (10 & 11 *Geo.* 5, *c.* 48), *ss.* 2 (1) (b), 3 (a).

By sect. 3 *of the Indemnity Act* 1920 (10 & 11 *Geo.* 5, *c.* 48): "*Nothing in the foregoing provisions of this Act shall*—(a) *affect or apply to proceedings in any prize court as respects any matter within the jurisdiction of the court.*"

Early in October 1915 *the steamship S., the owners of which were neutrals, was on a voyage from Buenos Aires to Sweden with a cargo of maize, linseed, and bran. In the course of that voyage she entered the Downs on the* 15*th Oct. where she was detained by H.M. naval patrols and searched so far as it was possible to do so without discharging her cargo and bunkers. On the* 25*th Oct. she was placed under an armed guard and a pilot and removed to the Royal Albert Dock and there thoroughly searched, her cargo for that purpose being discharged. After the search was completed, the cargo was reloaded and on the* 5*th Dec. the vessel was allowed to resume her voyage. A claim having been formulated by the owners under the Indemnity Act* 1920 *for compensation for the loss of the use of the vessel before the War Compensation Court,*

Held, that the facts amounting to seizure or capture in prize, the claim of the neutral owners for compensation was not within the jurisdiction of the War Compensation Court, by reason of the provisions of sect. 3 (a) *of the Indemnity Act* 1920.

APPEAL by the Procurator-General from the decision of the War Compensation Court upon

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

a claim by neutral owners for compensation for the detention of their vessel. The facts, which are sufficiently summarised in the headnote, appear fully from their Lordships' judgments.

The owners claimed 20,500*l.* for forty-one days detention at 500*l.* a day under sect. 2, sub-sect. 1 (*b*), of the Indemnity Act 1920 on the ground of an "interference with their property" by reason of the exercise of "a prerogative right of His Majesty," or, in the alternative of a power of search conferred by reg. 51 of the Defence of the Realm Regulations.

In his answer the Procurator-General took the preliminary objection: (1) that the claim was not cognisable by the War Compensation Court, as it did not fall within the provisions of the Indemnity Act; and (2) that the detention complained of was made in the exercise of the belligerent right of visit and search conferred by the law of nations, and was therefore exclusively cognisable by a court of prize.

The War Compensation Court decided that the Crown's dealings with the *Sommelsdijk*, a neutral ship, was an exercise of the prerogative right of His Majesty, and that the War Compensation Court was therefore entitled to consider a claim for compensation by the neutral owners of that ship.

The Indemnity Act 1920 (10 & 11 Geo. 5, c. 48) provides:

Sect. 2. (1) Any person not being a subject of a state which has been at war with His Majesty during the war and not having been a subject of such a state whilst that state was so at war with His Majesty. . . . (*b*) Who has otherwise incurred or sustained any direct loss or damage by reason of interference with his property or business in the United Kingdom through the exercise or purported exercise, during the war, of any prerogative right of His Majesty or of any power under any enactment relating to the defence of the realm, or any regulation or order made or purporting to be made thereunder, shall be entitled to payment or compensation in respect of such loss or damage; and such payment or compensation shall be assessed on the principles and by the tribunal hereinafter mentioned, and the decisions of that tribunal shall be final. . . .

The Defence of the Realm (Consolidated) Regulations 1914 provide:

Reg. 51. The competent naval or military authority, or any person duly authorised by him may, if he has reason to suspect that any house, building, land, vehicle, vessel, aircraft or other premises or any things therein, are being or have been constructed, used or kept for any purpose or in any way prejudicial to the public safety or the defence of the realm, or that an offence against these regulations is being or has been committed thereon or therein, enter, if need be by force, the house, building, land, vehicle, vessel, aircraft, or premises at any time of the day or night, and examine, search and inspect the same or any part thereof, and may seize anything found therein which he has reason to suspect is being used or intended to be used for any such purpose as aforesaid.

The Procurator-General appealed.

Sir *Douglas Hogg*, K.C. (A.-G.), Sir *Patrick Hastings*, K.C., and Hon. *Geoffrey Lawrence*, K.C. for the appellant.

Le Quesne, K.C. and Sir *Robert Aske* for the respondents.

Cur. adv. vult.

BANKES, L.J.—This appeal from the War Compensation Court raises an important question, and one which, if decided in the claimants' favour, would have far-reaching effect. The claim is that the applicants, as the owners of a neutral vessel which was searched and brought to London in exercise of the belligerent right of visit and search, have a right under the Indemnity Act 1920 to prefer a claim for compensation before the War Compensation Court. The Procurator-General, as representing the Crown, challenged the jurisdiction of the court. The court, without coming to any decision on a very material point in the case, overruled the objection to the jurisdiction. The Procurator-General appeals.

There is no dispute about the facts, which can be stated quite shortly. Early in the month of Oct. 1915 the respondents' vessel, the *Sommelsdijk*, was on a voyage from Buenos Aires to Helsingborg and Malmo with a cargo of maize, linseed, and bran. On or about the 15th Oct., when the veseel entered the Downs, she was detained by H.M. naval patrols and searched, as far as it was possible to do so without discharging her cargo and bunkers. The detention in the Downs continued until the 25th Oct., when an armed guard and a pilot were placed on board, and orders were given that the vessel was to proceed to London, and then, quoting the language of the master in par. 13 of his affidavit, "The ship was taken to Gravesend accompanied by a torpedo boat from the Edinburgh Channel, and brought to an anchor at Gravesend," and from Gravesend the vessel was taken up into the Royal Albert Dock and there thoroughly searched, her cargo for that purpose being discharged. After the search was completed, the cargo was reloaded, and ultimately on the 5th Dec., again quoting the master's language, "the ship was allowed to resume her voyage." The claim as formulated by the owners was for the loss of the use of this vessel from the 25th Oct. to the 6th Dec. 1915—namely, for forty-one days at 500*l.* per day. In the judgment of the court, Sir Francis Taylor stated that counsel for both parties concurred in presenting the case as one in which the vessel had been detained in the Downs and brought to London in exercise of the belligerent right of visit and search. The case was so treated in the arguments before this court.

Two very important questions were raised by these arguments. The first was whether visit and search was an exercise of the prerogative right of His Majesty within the meaning of sect. 2, sub-sect. 1 (*b*), of the Indemnity Act 1920. The second was whether the claim was one within the jurisdiction of the Prize Court, and, if so, whether it was not, by the terms of

the Indemnity Act, excluded from the jurisdiction of the War Compensation Court. The court appears to have considered that they had not sufficient evidence before them to enable them to decide the second of these two questions, and as they were apparently under the impression that counsel on both sides agreed to that course, they reserved the question for further consideration. We are assured by counsel for the Procurator-General that the court was under a misapprehension as to his attitude, and that he desired a decision on the evidence as it stood. Counsel for the claimants asks that the matter should be remitted to the court for their decision. I do not think that this court should take that course if it is satisfied that it has all the necessary evidence upon which to come to a decision. To do so would merely be to put the parties to unnecessary expense. I propose to rest my judgment upon the view I take of the second question. Sect. 3 (*a*) of the Indemnity Act deals expressly with proceedings in a prize court. It provides that " Nothing in the foregoing provisions of this Act shall (*a*) affect or apply to proceedings in any prize court as respects any matter within the jurisdiction of the court." It is argued for the claimants that this provision only applies to proceedings commenced before the passing of the Act. I do not so read the section. The Act is an Act to restrict the taking of legal proceedings. It assumes a jurisdiction in a court of law to entertain the proceedings it refers to but for the interference of the Legislature; and it uses the expression " proceedings " in reference to future proceedings as well as to those already commenced. The opening words of sect. 1, sub-sect. (1), make this clear. The provision is that " No action or other legal proceedings whatsoever . . shall be instituted in any court of law." I see no reason why the expression " proceedings " in sect. 3 should not have the same meaning as in sect. 1; indeed, I see every reason why they should have the same meaning, and why claims within the jurisdiction of the Prize Court should be excluded from the operation of the Indemnity Act. The Prize Court is a court specially constituted to administer internationally the rules of international law. These rules recognise an entirely different standard of compensation and of responsibility from that which is accepted by a court of law using that expression in its ordinary sense. It is for that reason that in matters in which the Prize Court has jurisdiction its jurisdiction has always hitherto been accepted as exclusive. It would indeed be a strange result if in matters over which a Prize Court undoubtedly has jurisdiction that jurisdiction should be taken away and handed over to a tribunal constituted *ad hoc* to deal with questions arising out of the late war. It would be still more strange if that tribunal should have contemporaneous jurisdiction with Prize Court, in which case either court could have jurisdiction to award compensation which had already been refused by the other. I entertain no doubt that the War Compensation Court has no jurisdiction to deal with any matters within the jurisdiction of the Prize Court.

I pass now to consider the jurisdiction of that court, and I will refer to a passage from the judgment of Sir Samuel Evans in the case of *The Roumanian* (13 Asp. Mar. Law Cas. 8, at p. 11; 112 L. T. Rep. 464, at p. 467; (1915) P. 26) as containing a comprehensive statement on that subject. He says: " But the jurisdiction and exclusive jurisdiction of the Court of Admiralty in prize was never doubted. ' The nature of the ground of the action—prize or not prize—not only authorises the Prize Court, but excludes the common law '—Lord Mansfield in *Lindo* v. *Rodney* (2 Dougl., 613, at p. 615). These functions of the Prize Court have now been allotted to this division of the High Court, and contests between the various divisions would not now occur. It was considered, however, that the Judicature Acts did not render unnecessary the commission which had been issued by the Crown at the beginning of each war, and accordingly a commission was issued at the beginning of this war, in, I think, the same operative terms as the old commissions. By this commission the court is ' authorised and required to take cognisance of and judicially to proceed upon all and all manner of captures, seizures, prizes and reprisals of all ships, vessels and goods that are or shall be taken, and to hear and determine the same; and according to the course of Admiralty and the law of nations, and the statutes, rules and regulations for the time being in force in that behalf, to adjudge and condemn all such ships, vessels, and goods as shall belong to the German Empire or the citizens or subjects thereof, or to any other persons inhabiting within any of the countries, territories or dominions of the said German Empire, which shall be brought before you for trial and condemnation.' " The question for decision in the present case is whether the modern practice of carrying out the right of visit and search constitutes a seizure within the meaning of the commission. In the absence of any authority to the contrary it would seem that the means adopted under the present practice of carrying out a visit and search would amply justify a finding of a seizure. What more is wanted than the forcible detention of a vessel, followed by the placing of an armed guard on board in order to compel the carrying out of orders that the vessel is to proceed to some named port, and there to remain until allowed to proceed? Oppenheim (International Law, 3rd edit.), in dealing with the question of search of vessels, sect. 421, says this: " But since search can never take place so thoroughly on the sea as in a harbour, it may be that, although search has disclosed no proof to bear out the suspicion, grave suspicion still remains. In such cases she may be seized and brought into a port for the purpose of being searched there as thoroughly as possible." The cases which have come before the Prize Court in consequence of seizures made during

the late War appear to have been mostly cases where action was taken either under the Order in Council of the 11th March 1915, under which vessels might be required to discharge goods at a British or Allied port, or under the order of the 16th Feb. 1917, which authorises the bringing in of vessels for examination, and if necessary, for adjudication before the Prize Court. *The Stigstad* (14 Asp. Mar. Law Cas. 388 ; 114 L. T. Rep. 705 ; (1916) P. 123) and *The Bernisse and The Elve* (15 Asp. Mar. Law Cas. 167 ; 124 L. T. Rep. 554 ; (1921) 1 A. C. 458) are illustrations of this class of case. In both cases the question turned upon whether the conditions giving the right to take action under the Orders in Council existed, but I think that it appears to have been assumed that had the bringing of the vessels into port for the purpose of search taken place under the general right of visit and search, the Prize Court could undoubtedly have had jurisdiction to deal with the claims. Sir Arthur Channell, in *The Bernisse and The Elve*, before the Privy Council, suggests that there could be little doubt that the Prize Court could have jurisdiction to exonerate the Crown from liability in a case where reasonable ground existed for exercising the right of search at sea.

The case of *The Roumanian* (*sup.*) is more nearly in point. In that case a British vessel in the early days of Aug. 1914, and before the declaration of war, was on a voyage to Hamburg with a cargo of oil. It was suggested to her owners that in the national interest the vessel should be diverted to a port in the United Kingdom, and this was done, and the oil was discharged into tanks at Purfleet. Proceedings were taken in the Prize Court for condemnation of this cargo. The German owners objected to the jurisdiction on several grounds, and, amongst others, that no act was done manifesting the intention to seize and retain the prize. The act relied upon by the Crown was the delivery of a letter by the Custom House officer to the captain, in which he informed him that the oil "is placed under detention." On this point Lord Parker (13 Asp. Mar. Law Cas., at p. 210 ; 114 L. T. Rep., at p. 5) says this : "It will be observed that the letter giving notice of the detention of the cargo did not refer to its detention as prize, and it was accordingly argued on behalf of the appellants that there was no effectual seizure as prize until the writ in these proceedings was affixed to the tanks containing the petroleum. It is clear, however, that the Custom House is the proper authority to seize or detain, with a view to its condemnation as prize, any enemy property found in a British port. It is equally clear that the letter in question was intended to operate, and must have been understood by all concerned as intended to operate, as such a seizure. No other possible intention was suggested. Under these circumstances their Lordships are of opinion that the cargo was effectually seized as prize upon the delivery of the letter." These authorities appear to me to afford strong confirmation of the view that the action of the naval authority in the present case amounted to a seizure which clothed the Prize Court with authority to entertain the claim of the respondents to this appeal. This is sufficient, in my opinion, to dispose of the appeal, and it is unnecessary to express any opinion upon the question whether within the meaning of sect. 2, sub-sect. (2), of the Indemnity Act 1920, the seizure of the vessel was an exercise of the prerogative right of His Majesty.

In the judgment in the court below stress is laid upon a passage from a judgment of mine in *Commercial and Estates Company of Egypt* v. *Board of Trade* (132 L. T. Rep. 516 ; (1925) 1 K. B. 283). I do not think that anything that I said in that case has any real bearing upon the point with which the War Compensation Court was dealing. In the decision referred to I was dealing with a case in which a claimant's property had been seized under the right of angary, a right which, to use Lord Parker's words, "is generally recognised as involving an obligation to make full compensation." Under such circumstances the question was whether the claimant's case fell within sub-sect. (*a*) or sub-sect. (*b*) of sect. 2 (iii.) of the Indemnity Act 1920—in other words, whether but for this Act the claimant would have had a legal right to compensation, or whether the claimant had no such legal right. In choosing between these two alternatives I accepted the passage from Lord Alverstone's judgment in *West Rand Central Gold Mining Company Limited* v. *The King* (93 L. T. Rep. 207 ; (1905) 2 K. B. 406) as my guide.

In my opinion the appeal succeeds, the decision of the War Compensation Court must be set aside, and a declaration made that that court has no jurisdiction to entertain the claim. The appellant must have the costs here and below.

SCRUTTON, L.J.—In this case the War Compensation Court has decided that the Crown's dealing during the Great War with a neutral ship, the *Sommelsijk*, was an exercise of the prerogative right of His Majesty, and that the War Compensation Court was therefore entitled to consider a claim for compensation by the neutral owners of that ship.

What had happened to the *Sommelsdijk* was agreed by counsel to be that in exercise of the belligerent right of search she had been detained in the Downs, then brought to London with an armed crew of forces of the Crown on board and in charge of one of His Majesty's destroyers, there searched and ultimately released.

It was common ground that before the War the belligerent right of search of neutral vessels was usually exercised at sea, but that during the War the presence of submarines and the size of modern ships led to an extension of that procedure by which the neutral ship was brought into port for examination, without being necessarily brought before the Prize Court for adjudication. Oppenheim (par. 429) speaks of capture or seizure "because grave

suspicion demands a further inquiry which can only be carried out in a port," and (par. 184) that "seizure is effected by securing possession of the vessel through the captor sending an officer and some of his own crew on board," and directing her to steer according to captor's orders. I cannot doubt that what happened here was a "seizure," the legality of which could be investigated in the Admiralty sitting in Prize, which also would deal with any claim for compensation for undue delay in seizure and examination. The President informed us that such matters had been frequently dealt with by the Admiralty sitting in Prize, and we were supplied with a list of cases supporting his view. The President's judgment in *The F. J. Lisman* (Lloyd's List, at p. 462), on the 19th Nov. 1919, says: "Wrongful detention may give cause for an award of damages by the Prize Court, and any wrongful or vexatious act in the course of the exercise of belligerent rights of seizure or detention may give cause for such an award." Sect. 52 of the Naval Prize Act 1864, refers any petition of right arising out of the exercise of any belligerent right on behalf of the Crown to the Admiralty. The Admiralty had before the Indemnity Act exclusive jurisdiction in questions of prize depending not "on the locality, but the nature of the question, which is such as is not to be tried by any rules of the common law, but by a more general law, which is the law of nations." Per Lee, C.J., in *Key and Hubbard* v. *Pearse*, as reported in *Le Caux* v. *Eden* (1 Dougl., at p. 608). Also: "The Judge of the Admiralty was judge of the damages and costs, as well as of the principal matter." See per Lee, C.J., in *Rous* v. *Hassard*, as reported by Lord Mansfield in *Livingston and Welch* v. *Mackenzie*, cited in *Le Caux* v. *Eden* (1 Dougl., at p. 603); see also per Ashurst, J., in *Smart* v. *Wolff* (3 Term Rep. 343). The court only gave compensation for unreasonable and unjustifiable delay.

If this was the position before the Indemnity Act, did that Act, whose title stated that it was to restrict the taking of legal proceedings and to "provide in certain cases remedies in substitution therefor," affect the hitherto exclusive jurisdiction of the Admiralty or alter the remedy for acts done in pursuance of belligerent rights? I think sect. 3 shows it did not. "Nothing in the foregoing provisions of this Act shall (*a*) affect or apply to proceedings in any prize court as respects any matter within the jurisdiction of the court." Clearly sect. 1 of the Act would not prevent proceedings in a prize court, and I find it impossible to suppose that sect. 2 was intended to give an alternative and different remedy for matters presumably only cognisable in the Prize Court, in view of the provisions of sect. 3. The War Compensation Court appears to have thought that counsel had agreed to postpone the question whether the matter in dispute was within the jurisdiction of the Prize Court, but counsel for the Crown, referring to the shorthand notes, state that this was a misapprehension.

In my view the Admiralty in Prize had exclusive jurisdiction in this matter. and even if seizure of neutral property for examination in time of war is, as against the neutral, part of the King's prerogative, claims for compensation for exercise of that part of the prerogative are not conferred on the War Compensation Court by the Act. The Act was passed immediately after the case of *De Keyser's Royal Hotel Limited* v. *The King* (122 L. T. Rep. 691; (1920) A. C. 508) had examined the prerogative right of the Crown to seize the goods of a subject without making compensation, and negatived it when compensation was made. It was this portion of the prerogative that the Indemnity Act was dealing with.

It becomes, therefore, in my view, unnecessary to examine whether, as against a neutral on the high seas, the State, in detaining his goods for search, does so by "the prerogative right of His Majesty." But I doubt whether the term "prerogative right" has any applicability to such a case. As against an enemy, or a neutral supposed to be assisting an enemy, making war seems to me not a question of "right" but of "force." When the State captures an enemy ship or kills an enemy subject it does not seem to me to be exercising a "right" at all; and though, if you ask who, on behalf of the State, can decide to capture or kill, the answer may be "His Majesty by his prerogative can bind the State in this matter," this does not give His Majesty any "prerogative right" over belligerents or neutrals. This is the view taken by Warrington, L.J. in the case of *Re Ex-Czar of Bulgaria's Property* (123 L. T. Rep. 661, at p. 667; (1921) 1 Ch. 107, at p. 139): "I may point out that prerogative properly describes the power and authority of the King in relation to his own subjects, and not rights vested in him in relation to persons owing no allegiance to him," and I think by Lord Parker, in *The Zamora* (13 Asp. Mar. Law Cas., at p. 332; 114 L. T. Rep. 626, at p. 629; (1916) 2 A. C., at p. 92), where he says: "An exercise of the prerogative cannot impose legal obligation on anyone outside the King's dominions who is not the King's subject." However, it is not necessary, in my view, to attempt the thorny task of defining the prerogative, except to say that it is not in the Indemnity Act intended to cover belligerent acts hitherto only cognisable in the Prize Court, if at all.

It only remains to mention the case of *Commercial and Estates Company of Egypt* v. *Board of Trade* (*sup.*) on which the War Compensation Court rely. It is perhaps enough to say that the question of prize courts, or whether compensation for the right of angary could be obtained in a prize court, or the effect of the Indemnity Act on prize court proceedings was never mentioned or discussed at all. The decision therefore does not bind us in this case, where the effect of the Indemnity Act on prize court proceedings is directly raised. But as I think the headnote of that complicated case

in the Law Reports is not accurate as far as I am concerned, I say a word about it. The goods in that case were undoubtedly professedly seized under the Defence of the Realm Regulations; the right of angary was never mentioned until after writ. I took the view (p. 289), and I think Bankes, L.J. agreed (p. 280), that the War Court had jurisdiction, for there was a seizure purporting to be under a regulation. Atkin, L.J. (p. 297) apparently differed on the ground that it was immaterial that the seizure purported to be under a regulation, if the regulation was *ultra vires*. I thought (p. 287) that this was just the case where the Indemnity Act was wanted. But Bankes, L.J. and I differed as to whether a claim for damages came within the principle for payment of price on compensation in sect. 2 (2) (i.), and Bankes, L.J. holding it did not, went on to find "a legal right for compensation" under sect. 2 (2) (iii.) in the right of angary. I do not think, as stated in the headnote, I dissented from the propositions that the regulations did not apply to a seizure of goods of a neutral brought into the country against his will, or that the requisition was justifiable in exercise of a prerogative right of angary; in the view I took I did not find it necessary to express any opinion on them (see p. 289). The court did differ on the question whether the Act provided one measure of compensation, and one only, for a seizure purporting to be under regulations, though in fact not justifiable. But, as I have said, the effect of the Act on the Prize Court was never mentioned or determined; and the decision does not, therefore, affect the present case.

In my opinion the appeal should be allowed, and judgment entered for the Crown on the claim, with costs here and below.

Atkin, L.J.—I agree with the other members of the court that the claim of the neutral owners for compensation was not within the jurisdiction of the War Compensation Court because it was a matter within the jurisdiction of the Prize Court. See Indemnity Act 1920 (3) (*a*). The jurisdiction in prize has been stated to be founded upon an original capture. I am not sure that even this proposition is not too widely stated. For example, I find in Story on Prize Courts (Ed. Pratt, 1854, p. 31): "Though a mere maritime tort unconnected with capture *jure belli* may be cognisable by a Court of Common Law, yet it is clearly established that all captures *jure belli* and all torts connected therewith are exclusively cognisable in the Prize Court." It may well be that a claim for injury to goods or to person made against a person exercising a belligerent right of search on the high seas, though neither vessel nor goods were ever brought in, might be held to be exclusively cognisable in the Prize Court. Good reasons could be adduced why it should. But assuming that there must be a capture as a condition precedent to jurisdiction in prize, it appears to me that the forcible bringing in of a vessel under an armed guard for purposes of search amounts to such a capture. If there were an immediate intention at the commencement of the operation to bring the vessel in for adjudication, there would be an obvious capture, and, in my opinion, it makes no difference that the present intention is to bring her in for search, with the further intention that if the search results in a particular way to have the vessel or goods adjudicated. It cannot be doubted that the practice of the Prize Court in this country has been to act on this view. I have no doubt myself that in proper circumstances the owners of a vessel or goods so brought in for search alleging unreasonable delay may apply to the Prize Court for relief, and that the Prize Court has jurisdiction in such a case to order release; and further has jurisdiction to award compensation if the ship has been brought in for search unreasonably or otherwise in the course of the search has been treated unreasonably. It would be remarkable if the result were otherwise, for in the absence of domestic legislation in the belligerent country the neutral owner would apparently be without remedy.

It is unnecessary in this view to consider the question whether the act of bringing in for search and detention within the realm would, apart from the terms of sect. 3 (*a*), be said to be the exercise or purported exercise of any prerogative right of His Majesty. I need only say that by our law the Sovereign declares war and wages war and does so by the prerogative, and that if acts done by members of the naval and military forces of the Crown as belligerent acts are not covered by the Indemnity Act both as to protection against proceedings and the granting of compensation, the Act would appear to lose much of its value. It must be remembered that under sect. 2 (*b*) the right of compensation is limited to interference with property or business in the United Kingdom. In the view that I have taken it does not seem to me to be necessary to discuss the angary case: *Commercial and Estates Company of Egypt* v. *Board of Trade* (*sup.*).

I agree that the appeal should be allowed and the claim dismissed with costs here and below.

Appeal allowed.

Solicitors for the appellant, *The Treasury Solicitor*.

Solicitors for the respondents, *Botterell* and *Roche*.

Wednesday, Dec. 2, 1925.

(Before BANKES, WARRINGTON, and SCRUTTON, L.JJ.)

PROCTOR, GARRATT, MARSTON LIMITED *v.* OAKWIN STEAMSHIP COMPANY LIMITED. (*a*)

ON APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Orders as to port of discharge to be given to ship after arrival at port of call—Obligation of ship to wait for orders at port of call.

By a charter-party dated the 26th June 1924 the claimants chartered a steamer to bring a cargo of wheat and (or) maize and (or) rye from the River Plate. The charter-party provided: "(4) That being so loaded the steamer shall with all convenient speed proceed to St. Vincent (Cape Verde) or Las Palmas or Teneriffe (Canary Islands) or Madeira or Dakar, at the master's option, for orders to discharge at a safe port in the United Kingdom or on the Continent . . . (22) Orders as to port of discharge are to be given to the master within twenty-four hours after receipt by consignees of master's telegraphic report to consignees of his arrival at the port of call . . ." The steamer left Rosario with a cargo of maize on the 2nd July 1924, and arrived at St. Vincent at 2.40 p.m. on Saturday, the 2nd Aug. About twenty-four hours before arriving at St. Vincent the master sent a wireless message to the charterers in London saying that he was nearing St. Vincent, and on arrival there he cabled to them that the ship had arrived and was awaiting orders. Owing to the fact that Monday, the 4th Aug., was a Bank Holiday the cable did not reach the charterers until Tuesday, the 5th Aug. The steamer left St. Vincent at 8 p.m. on the 2nd Aug. for Las Palmas, where she arrived on the 7th Aug., the master having arranged that any message which might come for him should be forwarded to the ship by wireless from St. Vincent. On the 6th Aug. the charterers sold the cargo as "shipped in good condition per steamship W. arrived St. Vincent." On the 14th Aug. the purchasers having learned that the ship was not at St. Vincent awaiting orders, refused to accept the cargo except at a reduction of 302l. 4s. 8d. from the contract price. The charterers claimed this sum from the owners as damages for breach of contract in not waiting at St. Vincent until they received orders as to port of discharge, or, alternatively in not waiting for a reasonable time after the expiration of twenty-four hours.

The owners contended that the master was not obliged to wait at St. Vincent after the expiration of twenty-four hours or at all, provided that before leaving he had made arrangements to have orders forwarded to him by wireless, and that the damages in any case were too remote.

The umpire held that the owners were not liable to the charterers by reason of the fact that the steamer did not wait at St. Vincent. Upon a case stated for the opinion of the court,

Held, it was a necessary implication from the terms of the charter-party that the vessel should remain at St. Vincent twenty-four hours, and at least a reasonable time thereafter in order to give the consignees time to give the necessary orders as to discharge. In the circumstances the shipowners were therefore guilty of breach of contract, and the charterers were entitled to succeed.

Decision of Roche, J. (ante, *p.* 526; 133 *L. T. Rep.* 633) *affirmed.*

APPEAL by the shipowners from the decision of Roche, J., reported *ante*, p. 526; 133 L. T. Rep. 633, upon an award in the form of a special case stated by the umpire, Mr. Stuart Bevan, K.C., for the opinion of the court.

By a charter-party, dated the 26th June 1924, the owners, the Oakwin Steamship Company Limited, chartered their steamship, the *Watsness*, to the charterers, Proctor, Garratt, Marston Limited, Rosario. The matter in dispute in the arbitration was the charterers' claim for damages in respect of the failure of the master of the steamship to wait, after arrival at St. Vincent (the port of call), for orders from the charterers as to port of discharge, and in sailing from St. Vincent before receiving such orders. The material clauses of the charter-party were:

(2) That the steamer . . . shall proceed as ordered by the charterers to the undermentioned ports or places, and there receive from them a full and complete cargo of wheat and (or) maize, and (or) rye.

(4) That, being so loaded, the steamer shall with all reasonable speed proceed to St. Vincent (Cape Verde) or Las Palmas, or Teneriffe (Canary Islands), or Madeira, or Dakar, at the master's option for orders (unless these be given to him by charterers on signing bills of lading), to discharge at a safe port in the United Kingdom or on the Continent within certain named limits.

(22) Orders as to port of discharge are to be given to the master within twenty-four hours after receipt by consignees of master's telegraphic report to consignees . . . of his arrival at the port of call, and for any detention waiting for orders after the aforesaid twenty-four hours the charterers or their agents shall pay to the steamer 30s. sterling per hour. The master shall give written notice to the charterers before signing final bills of lading, whether he will call at St. Vincent, Las Palmas, Teneriffe, Madeira or Dakar for orders. Should cable communication with the port of call be interrupted steamer shall proceed to Lisbon, Queenstown, or Falmouth at the master's option for orders, and the master is to advise charterers' agent of his arrival at the port of call.

The charter-party contained the usual exceptions clause.

The steamer left Rosario under the charter-party on the 2nd July 1924 with a cargo of maize. Before the ship left the master orally informed one of the managers in the charterers' office that the ship would be calling at St. Vincent and probably at Las Palmas. No point arose between the parties as to the service of a written notice by the master under clause 22 of the charter-party, and the arbitration

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

proceeded upon the footing that such written notice should be taken as having been given.

The final bill of lading signed at Rosario commenced as follows : " Shipped on board the *Watsness* now lying in the port of Rosario and bound for orders to St. Vincent. . . ."

The steamer arrived at St. Vincent on the 2nd Aug. 1924 at 2.40 p.m.

Before leaving Rosario the charterers had given the master a written notice instructing him on arrival at port of call to apply to them at 87, Leadenhall-street, London, for instructions.

About twenty-four hours before the steamer's arrival at St. Vincent her master had sent a wireless message to the charterers at their London address, advising them that the ship was proceeding to St. Vincent waiting for orders.

On Saturday, the 2nd Aug. 1924, after arrival at St. Vincent, the master cabled to the charterers at their London office : " *Watsness* arrived ; awaiting orders." This cable was received by the charterers at 9 a.m. on Monday, the 4th Aug. 1924, a Bank Holiday.

By a contract in writing, dated the 6th Aug. 1924, the charterers sold the cargo as " shipped in good condition per steamship *Watsness*, arrived St. Vincent," to Messrs. William H. Pim, jun., and Co. Limited, and on the same day cabled to the master at St. Vincent to proceed to Bilbao to discharge. Meanwhile, however, the steamer had waited at St. Vincent until 8 p.m. on the 2nd Aug., when she left, the master having instructed his agents that if any message should come through for him they were to transmit it to him by wireless. The steamer arrived at Las Palmas at 2.30 p.m. on the 7th Aug., and on arrival there the master received the charterers' orders to proceed to Bilbao, forwarded by his agents from St. Vincent by wireless.

On the 14th Aug. 1924 Messrs. Pim and Co. Limited, the buyers, having learned that the steamer was not at the date of their contract awaiting orders at St. Vincent, refused to accept the cargo upon that ground, and the market being down the matter was subsequently compromised by the charterers, and Messrs. Pim, by the latter accepting the cargo with a deduction of 302*l*. 4*s*. 8*d*. from the contract price.

It was contended on behalf of the charterers :

(*a*) That under the provisions of the charter-party it was the duty of the master to wait at St. Vincent until he received orders as to port of discharge or alternatively to wait for a reasonable time after the expiration of twenty-four hours.

(*b*) That the leaving St. Vincent without such orders and before the expiration of twenty-four hours constituted a breach of the charter-party.

(*c*) That by reason of such breach the charterers had suffered damage and special damage in the said sum of 302*l*. 4*s*. 8*d*.

It was contended on behalf of the owners :

(*a*) That they had committed no breach of the said charter-party.

(*b*) That the master was under no obligation to wait at St. Vincent (1) after the expiration of twenty-four hours, or (2) at all, provided that before leaving he had made effective arrangements to have his orders forwarded to him by wireless.

(*c*) That the charterers were under no liability to Messrs. Pim under their contract for sale.

(*d*) That in any case the damages claimed were too remote and were irrecoverable.

The umpire found as a fact that if the charterers were under any liability at all to Messrs. Pim such compromise was a reasonable and proper one for the charterers to make. He also found that if there was a breach of the charter-party by the owners the damages to which the charterers would be entitled by reason of such breach, if any, would (subject to their being recoverable in law as not being too remote) be the sum of 302*l*. 4*s*. 8*d*. so paid by the charterers to Messrs. Pim. Subject to the opinion of the court, however, he awarded that the owners were under no liability to the charterers by reason of the fact that the steamer left St. Vincent in the circumstances above set out.

Roche, J. held that it was an implied term of the charter-party that the ship should wait at St. Vincent for twenty-four hours and a reasonable time thereafter. In view of the fact that she arrived on the 2nd Aug. and that the 4th Aug. was a Bank Holiday, she should have waited until at least the 6th Aug. The charterers had broken their contract with the purchasers of the cargo, and the damages they had to pay by way of reduction from the contract price were not too remote. The charterers were therefore entitled to the damages claimed.

The shipowners appealed.

C. R. Dunlop, K.C. and *H. L. Holman* for the appellants.

A. R. Kennedy, K.C. and *Van Breda* for the respondents.

Bankes, L.J.—This is an appeal from a decision of Roche, J., who took a different view of the rights of the parties from that taken by the learned arbitrator to whom the matter was referred. The matter arose out of a dispute between the charterers and the shipowners, and the first question we have to decide is whether or not the shipowners were guilty of a breach of the charter-party, and if so, whether the damages claimed against them are recoverable in law. The learned judge took the view that the charterers were justified in their complaint, and also as to the amount of their claim.

The facts necessary for the decision may be stated very shortly. It was provided by the charter-party that the vessel should proceed to a loading place in the River Parana, and there

load a full and complete cargo of wheat or maize or rye, and then proceed to a port of call for orders. The vessel arrived at St. Vincent on Saturday, the 2nd Aug. at 2.40 p.m., and I should think it was very likely that the master anticipated that some time might elapse before he would receive orders, because it was the Saturday immediately preceding the Bank Holiday, so that Sunday and the Bank Holiday would be the two days succeeding the day of his arrival at St. Vincent. However, whatever his motive may have been, what he in fact did was this : He left St. Vincent without receiving any orders at 8 p.m. on the same day, having instructed his agents to transmit to him by wireless any orders they might receive from the charterers. The cable which he had sent to the charterers at their London address upon his arrival at St. Vincent was not delivered until Monday, which was a Bank Holiday, at 9 a.m., and neither the charterers nor the consignees appear to have taken any action until the following Wednesday, the 6th Aug. By a contract the charterers sold the cargo on that day "shipped in good condition, per steamship *Watsness*, arrived St. Vincent." After selling the cargo, orders were sent to the vessel to proceed to Bilbao to discharge. These orders were received at St. Vincent, and transmitted to the vessel by wireless, and they appear to have been received at Las Palmas on the 7th Aug., when the buyers ascertained that the vessel was not at St. Vincent at the date when they purchased the cargo. They refused to be bound by the contract. Accordingly they repudiated it upon the ground that there had been a breach of a condition of the contract. One material question therefore which arises in this case with reference to the construction of that contract is whether it was a condition of the contract that the vessel was at St. Vincent at the time the contract was made and was in a position to receive orders from the buyers of the cargo as to the vessel's place of discharge. In my opinion the construction of this contract is perfectly plain upon this point, because unless it is to be read as a contract embodying a condition that the vessel is at St. Vincent and in a position there to receive orders under the charter-party, there is no provision for the vessel receiving orders to proceed anywhere because, as was pointed out in the course of the argument, the sale contract under the heading of "destination" provides for the ultimate destination and discharge of the vessel, and also specifically provides for St. Vincent as being the port of call at which orders shall be given. In my opinion, therefore, upon the construction of that contract, it is plain that it was a condition of the contract that the vessel should be at St. Vincent so as to be able to receive orders and not being so, the buyers were justified in refusing to carry out the contract. On this part of the case I think both the arbitrator and the learned judge took the right view. But then it is said that the compromise entered into between the buyers and sellers in reference to the breach of contract was a reasonable one. I agree. I think the compromise was, in order to avoid the expenses of litigation, a reasonable one from the point of view of damages.

But now comes the main question to be decided, and that is as to whether or not the shipowners had committed a breach of the charter-party. Stated shortly the argument put forward on behalf of the appellants comes to this : that there may be introduced into a contract which provides that communications shall be made to the shipowner while in port, an implied condition that he may at his option substitute wireless messages while at sea after leaving the port of call.

It requires a very special contract to justify such an implication being made, and I do not find anything in this contract which justifies me in making such an implication. In my opinion the meaning of the contract is quite plain, it provides by clause 22 for what I may call an old-fashioned method of communicating with a vessel in port. That clause provides as follows : "Orders as to port of discharge are to be given to the master within twenty-four hours after receipt by consignees of master's telegraphic report to consignees . . . of his arrival at the port of call and for any detention waiting for orders after the aforesaid twenty-four hours the charterers or their agents shall pay to the steamer 30*s*. sterling per hour. The master shall give written notice to the charterers before signing final bills of lading whether he will call at St. Vincent, &c., for orders. Should cable communication with the port of call be interrupted, steamer shall proceed to Lisbon, Queenstown, or Falmouth, at the master's option, for orders, and the master is to advise charterers' agent of his arrival at the port of call." In my opinion the construction of that clause is plain. First of all, the master must arrive at the port of call and, having arrived there he must be in a position to receive orders which are to be given to him. It seems to me to be impossible to suggest that he may leave that port and proceed in the direction in which he thinks he will probably be ordered to go and receive wireless communications *en route*. The obligation of a master with reference to proceeding to a port for orders and remaining there for orders is very clearly stated in *Sieveking* v. *Maass* (6 E. & B. 670) to which Scrutton, L.J. has called my attention. There the charter-party provided that the vessel should proceed to a named port for orders, but there was no provision as to the vessel remaining at that port for any particular time or of any right of the charterers to give orders within a specified time. All that was provided was that the master was to proceed to a port for orders. The question therefore was for how long a period was he bound to remain there for orders, and what were his rights if after waiting a reasonable time no orders arrived ? The decision of the court of first instance which was affirmed by the Exchequer Chamber was that the duty of the master was to wait not an indefinite time, but only a reasonable time, and after the lapse of a reasonable time for the

receipt of orders, he was justified, in the absence of orders, in taking the cargo to a place named in the charter-party. In the present case the charter-party provides that " orders as to port of discharge are to be given to the master within twenty-four hours after receipt by consignees of master's telegraphic report to consignees . . . of his arrival at the port of call." In my opinion those words clearly imply that the master is to remain twenty-four hours at least, in order to give the consignees time to give him the orders they are entitled to give, and I think Roche, J. was quite right in saying that the ship should remain twenty-four hours and at least a reasonable time thereafter. In these circumstances what happened here was a clear breach by the master of his obligation under the charter-party, because not only did he not wait for twenty-four hours, but he hardly waited at all; he waited a few hours and then sailed away.

In my opinion, therefore, there was a breach of the charter-party and the learned judge was justified in saying that at the time the consignees did in fact give orders, which was on the Wednesday—a reasonable time after the expiration of the consignees' receiving the master's telegraphic report had not elapsed. On both grounds, therefore, I think, the charterers are entitled to succeed and the appeal must be dismissed.

Warrington, L.J.—I agree, and for the same reasons.

Scrutton, L.J.—I agree, and I only desire to add a few words of my own, because, although in my experience the commercial practice in this matter has been well understood and uniform, I do not think that practice has got into the reports.

When a charterer charters a ship to carry an entire cargo, he very frequently intends to sell that cargo while it is afloat, and it is obviously more convenient for him, from a commercial point of view, that he should be able to alter its destination according to the place where it is and thus be able, while the vessel is on her voyage, to fix her ultimate port of discharge. For that reason there has been, for at least seventy years, a very usual provision in charter-parties that a vessel being loaded, if she has not already received orders where to go, shall call at a port of call for orders which, in my experience, has always been understood to mean that she must go to that port, and wait there for a reasonable time for orders. I am startled to hear it suggested that a vessel may go to a port, leave her address there and depart, and trust to letters being forwarded. This seems to me to be a most unbusiness-like suggestion. It adds a second risk of communication to the risk of the first communication to the port of call. When *Sieveking* v. *Maass* was decided, seventy years ago, the usual form of charter was for the vessel to proceed to a port of call for orders, and the question to be decided in that case was what was to happen if the vessel waited at the port of call and no orders came. Lord Campbell, C.J., whose decision was affirmed by the Exchequer Chamber, had said that when the master had waited for orders a reasonable time he must take some further steps—a matter which is not material in the present case—but the courts there clearly treated it as being the duty of the ship to proceed to the port of call and wait there for a reasonable time for the orders which the charterers had undertaken to send.

Since that day commercial practice has elaborated the clause. It usually imposes a duty upon the ship to communicate with the charterers as soon as the port of call has been reached. Sometimes, as in the present case, an obligation is imposed upon the charterers to give orders within a specified time after the receipt of the cable informing them that the vessel has arrived at the port of call for orders, and not infrequently there is this further provision that if orders are not given within a specified time, demurrage or damages shall be paid for the detention of the ship after the expiration of the time. Speaking from my own experience the clause has never contained an express provision that the vessel is to wait, because that is taken for granted in the same way as is the ordinary obligation to discharge and load the ship in a certain time. If the vessel is not discharged or loaded within a certain time, the contract is broken, but if the clause is followed by a demurrage clause the vessel is bound to wait for the demurrage days to expire or a reasonable time, and although the clause does not expressly bind the vessel to wait, my view is that this has been the commercial practice for years. I agree, therefore, with the view expressed by Roche, J. that the expression " port of call for orders " means " a place for the receipt of orders in regard to the port of discharge," and by necessary implication the charter obliges the shipowners to keep their vessel at the port of call for twenty-four hours and at any rate for a reasonable time after that. In the words of a living author, where I think the law is correctly stated, and to the same effect as the statement of Roche, J.: " Where the vessel is chartered to proceed to a port as ordered the master is bound to wait a reasonable time for such orders." As completing the first point in this case, I ought to state that, although the charterers did not send a cable within the twenty-four hours specified by the charter for the vessel to wait, they sent one within about twenty-four hours after the expiration of that period, and I entirely agree with Roche, J. that that came within the reasonable time during which the vessel was compelled to wait, and the ship therefore broke the contract embodied in the charter-party.

Now the second point is this. Upon receipt of the cable from the ship notifying her arrival at St. Vincent, the charterers sold the cargo upon a contract of sale containing the statement " Arrived St. Vincent," which I have no

doubt means "arrived and at St. Vincent," and not "arrived and gone away, leaving an address." The statement "Arrived St. Vincent" was a very material matter for the buyers because they wanted to know where to give orders as to port of discharge. If "arrived St. Vincent" means "arrived and at St. Vincent," the vessel was in fact not at St. Vincent and had to be located somewhere else. Incidentally, I may say that I do not know how the vessel was justified in proceeding to Las Palmas; there seems to be no authority in the charter-party for her going there. The buyers, no doubt assisted by the fall in market prices and pleased to discover some reason for avoiding the contract, said to the charterers: "You have broken the condition precedent," but being charitable, as buyers always are, they added: "In these circumstances we are prepared to waive that condition provided you agree to accept a lower price," and the transaction went through on these lines.

The charterers then said to the shipowners: "Having made a settlement with our buyers on terms which the arbitrator has held to be reasonable we claim the deduction made from the contract price as damages for your breach of the charter-party in not waiting at St. Vincent for a reasonable time after the twenty-four hours specified by the charter." Although this is a little puzzling at first sight, it seems to be justified in this way. The port of call for orders being provided in order to enable the charterers to sell the cargo afloat it must be in the contemplation of the shipowners that the detention of the ship at the port of call for orders may affect a contract made by the charterers for the sale of the cargo, and that the charterers are therefore entitled to rely upon this term of the contract being fulfilled, so that when the shipowners say that their vessel is at St. Vincent the charterers are entitled to assume that the vessel will remain there for the time it ought to remain there under the terms of the charter-party and that the shipowners will perform the contract and not break it. If then the charterers, relying on the contract, have stated a fact in their contract with the buyers which subsequently turns out to be untrue because the shipowners have broken the contract they (the charterers) may say to the shipowners: "The damages we have to pay by reason of the statement we made relying upon your performing the contract, follow as the result of your breach of the contract." I had some difficulty in seeing how the buyers could recover more than nominal damages, because I do not know what the nature of the claim was. It appears to me to be a question of fact as to which I am precluded by the findings of the learned arbitrator who, if I may say so with respect to him, knows a great deal about contracts of sale. In these circumstances, although I have some doubt as to what would have happened if I had been the arbitrator, I cannot see my way to interfere with the learned arbitrator's findings of fact.

For these reasons I think Roche's judgment was correct and this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Holman, Fenwick, and Willan.*

Solicitors for the respondents, *Richards and Butler.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

June 9, 10, 11, 12, 15, 16, 17, 18, 19, 23, 24, 25, 26, 29, 30, *July* 1, 2, 3, 6, *and* 13, 1925.

(Before Greer, J.)

Banco de Barcelona and others v. Union Marine Insurance Company Limited. (a)

Insurance (Marine) — Cargo — Total loss — Scuttling of ship—Onus of proof.

The plaintiffs, a Spanish bank, claimed to recover, under a policy of marine insurance, for the total loss of a quantity of cloth sent by them from Barcelona to Galatz in Rumania. The ship on which the cloth was carried sank when near the coast of Sardinia and both ship and cargo were totally lost. On a claim under the policy,

Held, on the evidence, that the claim failed, because the ship on which the cargo of cloth was carried was scuttled with the connivance of the owners and some of those responsible for the management of the plaintiff bank.

Application of the rules with regard to onus of proof in cases where ships are scuttled discussed.

Action tried by Greer, J.

The plaintiffs, the Bank of Barcelona, claimed to recover under a policy of marine insurance for the total loss of a cargo of cloth on a voyage from Barcelona to a port in Rumania. The facts are fully stated in the judgment.

Sir *John Simon*, K.C., *C. T. Le Quesne*, K.C., and *R. F. Hayward* for the plaintiffs.

W. N. Raeburn, K.C., *A. T. Miller*, K.C., *S. L. Porter*, K.C., and *David Davies* for the defendants.

July 13, 1925.—Greer, J. read the following judgment: In this case the Bank of Barcelona are the plaintiffs, and the Union Marine Insurance Company Limited are the defendants. The action is brought on a policy of marine insurance dated the 3rd Dec. 1920, against the defendants, who subscribed for 14,505*l*., expressed to be upon 2867 bales of woollen cloth valued at 373,021*l*., on the steamer *Cruz* at and from Barcelona to Galatz. The plaintiffs say that during the night of the 28th–29th Nov. 1920, the said goods, while on the said voyage, were totally lost by perils insured against. By particulars they say that the perils insured against were perils of the sea,

(a) Reported by T. W. Morgan, Esq., Barrister-at-Law.

or, alternatively, barratry. The defendants deny that the loss was caused by perils insured against, and they also say alternatively that the loss, if any, was attributable to the wilful misconduct of the plaintiffs in procuring and (or) conniving at the casting away of the *Cruz* while laden with the said goods.

At the trial the plaintiffs' claim was based solely on a loss by perils of the sea. There has been some apparent difference of opinion on the proper application of the rules relating to onus of proof to cases like the present. It seems desirable, therefore, that I should state at the outset what I conceive to be the relevant rules of law that have to be applied in deciding issues such as are here raised by the pleadings. It is indisputable that marine insurance cases afford no exception to the general rule that before a plaintiff can become entitled to judgment he must prove his case, that is to say, he must establish his cause of action to the reasonable satisfaction of the tribunal. The sinking of a ship by the wilful act of the ship's officers is not a peril of the sea, though it may be barratry if it be done against the wishes of the owners: (see *Samuel and Co.* v. *Dumas*, *ante*, p. 305; 130 L. T. Rep. 771; (1924) A. C. 431; especially per Lord Cave, L.C., and per Lord Finlay). Lord Cave: "On this view the expression 'perils of the sea,' while it may well include a loss by accidental collision or negligent navigation, cannot extend to a wilful and deliberate throwing away of a ship by those in charge of her"; and Lord Finlay says: "The sea water cannot in a case of scuttling be regarded as the cause of the loss. The cause was the fraudulent act which admitted it into the ship"; and "The possibility of scuttling is not a peril of the sea; it is a peril of the wickedness of man, and would have to be mentioned expressly in the policy, like barratry or pirates, in order that the assured should recover from the underwriter in respect of it. If the scuttling is carried out by the captain and crew in fraud of the owner it is an act of barratry, and the owner may recover under the policy, which ordinarily enumerates barratry as one of the perils insured against."

If scuttling be proved, such proof negatives loss by perils of the sea. It is not an independent defence in the nature of confession and avoidance like contributory negligence. In cases like contributory negligence, if the plaintiff proves his allegation of negligence and the defendant fails to satisfy the tribunal that there was contributory negligence, the plaintiff succeeds; but where the defence is one that merely negatives the claim, then if, as the result of all the evidence, the court is left in doubt as to whether the claim is made out, though there may have been *primâ facie* evidence in support of it, the plaintiff fails: (see the judgments of Bankes, Scrutton, L.JJ., and Eve, J. in *La Compania Martiartu* v. *Royal Exchange Assurance*, *ante*, p. 189; 129 L. T. Rep. 1; (1923) 1 K. B. 650; affirmed *ante*, p. 395; 131 L. T. Rep. 741; (1924) A. C. 850.) When that case reached the House of Lords, their Lordships expressed no opinion about the point of onus of proof, as they came to a definite conclusion that the ship had, in fact, been scuttled with the connivance of the owners; and they reserved the other question for future decision; but they did not dissent from the views expressed by the Court of Appeal, which seem to me clearly to be in accordance with principle.

It was quite impossible in the present case to make out a case of barratry. The only possible alternatives were loss by perils of the sea or loss by the wilful misconduct of some members of the crew, with the consent of the owners or the bank. It follows that, if in the result the plaintiffs have failed to satisfy me beyond reasonable doubt that the *Cruz* was lost by perils of the sea, they have failed to prove their case, and there must be judgment for the defendants. But if I am able upon the evidence to reach an affirmative conclusion, it is better that I should state my conclusion rather than leave the case to be determined merely on the ground of insufficient evidence to satisfy the plaintiff's obligation to prove his case.

As the case fails to be determined by decisions of fact, it is unnecessary for me to recapitulate all the facts proved in evidence; it will be enough for me to state my material findings.

Before the *Cruz* sailed from Barcelona, the bank had obtained complete control over the business of a firm known as Allende and Co., and over the business of the Bengolea Steamship Company, who were the owners of the *Cruz*; that is to say, the bank held the majority of the shares of the Bengolea Company; they had appointed a majority of the board of directors of the Bengolea Company; and one of their employees, Señor Campiani, had been appointed assistant manager of the company to look after the interests of the bank; they had acquired in the name of Tacher all the local stock of cloth and wool belonging to Allende and Co. The bank had allowed Allende and Co. to become indebted to them on various accounts to the amount of about 80,000,000 pesetas, in respect of which they had held securities which were difficult to realise and were wholly inadequate. The Bengolea Company owed the bank about 10,000,000 or 11,000,000 pesetas. The financial position of the bank became one of grave anxiety and, partly because their dealings with Allende and Co., became the subject of rumour and partly, no doubt, for other reasons not explained by the evidence, depositors began to call in their money, and in the result, on the 27th Dec. 1920 the bank closed its doors, and afterwards went into liquidation. Those responsible for the affairs of the bank, including the general manager, Señor Martinez, and probably with the knowledge and assent of Señor Estruck, the chairman, adopted questionable methods of concealing the true state of the accounts between Allende and the bank. Instead of realising their securities, they took them over from Allende at an agreed figure, either par or above par, which was far in excess of their real value. They were all of them securities

which are not usually saleable on the market. The bank also agreed to take over all Allende's cloth and wool at excessive prices, through their nominee, Señor Tacher. By these means the amount due from Allende was apparently reduced to 35,000,000 pesetas. Having become the owners of the cloth, it was of great importance to the bank to turn it into money as quickly as possible; and it was important to the management to be able to justify their extraordinary proceedings in taking over the cloth as purchasers and crediting the price, instead of continuing to treat the cloth as a security and only crediting its value when that value was ascertained by sale.

The *Cruz* was insured on a time policy in the sum of 50,000*l.*; she was worth about 32,000*l.* at the time of her loss. The bank were interested as owners of the majority of the shares in the Bengolea Company and as mortgagees of the vessel. By a document bearing date the 26th Oct. the bank, by their nominee, Señor Tacher, purported to sell 500,000 metres of cloth of various descriptions to a Mr. Schuller, of Bucharest. I have very grave doubts whether that was a real transaction. The price which, in the aggregate, exceeded the equivalent in pesetas of 300,000*l.*, was an excessive price. The sale was made at a time when it was almost impossible to sell cloth at all. In my judgment, on the evidence, if Schuller had really wanted to buy cloth of the kind covered by the contract, he could have got it at a much lower price. Further, the goods were shipped, and the vessel sailed, without the bank having made any effort to ascertain from the Taraneasca Bank at Bucharest, the proposed guarantors, whether they were prepared to guarantee Schuller's bills or not. I attach some importance to the fact that no independent person was called to prove the negotiation of the contract, or that the contract was made. It is extraordinary, in a case of this sort, when it was vital to the plaintiffs to prove that they had made a real contract on which they were entitled to expect to receive substantial funds, that they did not get the evidence of Schuller or anybody connected with him.

At 5 p.m. on the 26th Nov. 1920 the *Cruz* sailed with 2839 bales of cloth on board, addressed to A. Schuller, of Bucharest, which were later invoiced at contract prices amounting by the final invoice of the 1st Dec. in the aggregate, including packing charges, to 8,003,986.25 pesetas. At the time the insurance was effected the final figures had not been ascertained. The total insurance effected was on a value estimated, including 10 per cent. contingent profit, at 9,240,754 pesetas, calculated as equivalent to 373,021*l.* It looks as if these figures included some of the goods consigned, not to Schuller, but to another purchaser, one Bujes.

According to the evidence of the mate, the *Cruz* set a course to pass south of Sardinia, a few miles from the coast and within sight of the light on Cape San Palo on San Pietro Island; but at 10 p.m. on the night of the 28th Nov. she found herself out of her course to the extent of fifty miles or more, in the neighbourhood of the island of Mal di Ventre, about eight miles or so from the coast of Sardinia, just to the north of the Gulf of Oristano. She then altered her course more to the south, and somewhere between Mal di Ventre and Catalano Rocks sea water rapidly came into the stokehold and engine room. The crew then left the ship in two lifeboats and landed on a sandy beach at San Giovanni, a little to the north of the Bay of Oristano. The engineer also gave evidence which was consistent with the facts as above stated, though he did not quite agree as to the time when the boat began to take in water. The mate and the engineer gave further evidence about the weather and its effect on the ship, and about the behaviour of the crew and the captain, but I am unable to attach credence to their evidence except to the extent of the facts above stated. The mate said that on the night of the 26th, the weather was bad; then it grew worse on the 27th, and on and from that day he described it as very bad, with a rough sea, the engines racing and the vessel labouring heavily so that they could not control her, and she did not steer properly. The hull, he said, was shaking and trembling very much, frequently sounding as though some heavy object was striking or falling against it. He also stated that when the captain heard of the water coming into the engine room he ordered the crew to save themselves, but refused himself to leave the ship, though frequently urged to do so by himself (the mate) and by the other members of the crew. The engineer told a similar story about the weather and the behaviour of the captain after the catastrophe.

There is, in my judgment, every reason to think that the evidence as to bad weather and its effect on the vessel was grossly exaggerated by these witnesses. It is a remarkable fact that the plaintiffs have not secured the evidence of any members of the crew except the two mentioned, who, if the vessel was intentionally sent to the bottom of the sea, must have taken an active part in the operation of bringing her to a safe place, and there sinking her. The firemen, the greasers, and the donkeyman, who is stated to have first called the engineer's attention to the inrush of water, are conspicuous by their absence. No evidence was forthcoming from any of the helmsmen or other members of the crew, nor was any satisfactory explanation given of the absence of these and other witnesses whose evidence would have been of vital assistance to the plaintiffs if their case had been well founded. The only other evidence about the weather is that which is provided by the weather reports from Port Mahon in Minorca and Cagliari in Sardinia, and the general reports of the London Meteorological Office, which are collected from all sources. These reports lend no support to the view that there was any weather which would put any strain on a vessel like the *Cruz*, which had been built under special survey for classification by the Bureau Veritas, and had

passed her examination with first class honours as a vessel fit to sail between European ports or along the coast of other continents, receiving marks equivalent to 100 A 1 at Lloyd's. She was built by a Belgian firm in 1902, examined in dry-dock by Bureau Veritas surveyors, and passed as retaining her class every four years. She had twice crossed the Atlantic, and since 1918, when she was last examined and passed in dry-dock by the Bureau Veritas, she had traded in the Mediterranean, across the Bay of Biscay, in the English Channel and the North Sea, and again in the Mediterranean. She had been examined by the Spanish authorities in Sept. 1920, and passed to sail under the Spanish Flag.

At Port Mahon force 2 in the Spanish Scale is the highest recorded between the 26th Nov. and the afternoon of the 28th, force 4 is recorded. This is rather more than force 4 on the Beaufort Scale, but less than force 5. At Cagliari, which is nearer where the ship would be on the 28th, the sea is stated to be "agitato." This appears from the London Meteorological report to be treated as equivalent to force 4 on the Beaufort Scale. The wind in that report is indicated as 4 on a scale which goes from 0 to 9. The verbal description of force 4 in the Beaufort Scale is "moderate breeze"; force 5 is described as "a fresh breeze"; and it seems plain that a vessel which would succumb to weather such as this by reason, as alleged by the plaintiffs' experts, of a fault in her original construction, could never have been fit to sail to sea at all. Such a vessel could never have successfully encountered the much more severe weather that the *Cruz* must have met with from time to time on her previous voyages. In my judgment the evidence fails to disclose any weather that would satisfactorily account for the vessel making leeway sufficient to take her 50 miles out of her course on the voyage to the coast of Sardinia. Still less does it disclose any weather which would have put a sufficient strain upon her to cause the disaster which happened in this case.

It remains for me to consider what effect should be given to the evidence of the diver Lambert. His evidence, if accepted, proves that when he surveyed the wreck a year later, he found the valves to two of the tanks open; all three Kingston valves, which are main inlet valves controlling the entry of the water from the sea, open, and the port side bilge injection valves open also. He also found the port water-tight door between the stokehold and No. 3 hold slightly open, and the starboard water-tight door to the same hold more widely open. The valves in a ship are operated by spindles to which a wheel or handle is attached for the purpose of turning the spindle. The screw on the spindle is almost invariably a right-handed screw, and the handle or wheel is moved left to right, or clockwise, to close the valves, and anti-clockwise to open them. It is plain, therefore, that one method of ascertaining whether a valve is open or closed is to test it by turning. If it turns to the right it must be open; if it were closed it would not turn to the right. Valves usually close by the valve descending into the valve seat, and open by lifting it out of the valve seat; but valves may be, and sometimes are, made when open are below the valve seat, and to close them the spindle lifts them into the valve seat. If a valve is of this kind it is plain that the spindle will go down as the valve opens, and come up as the valve closes. The diver stated that he went to test the valves on the assumption that if they could be turned to the right they were open, and if not, they were closed. If the valves were of the usual kind, being closed by turning to the right, the spindle would descend; but if they were of the unusual kind which closed by being lifted from below the valve seat, the spindle would rise when the wheel or handle was being turned to the right to close the valves. On both kinds of valves, turning to the right closes, turning to the left opens. The diver, a man of great experience in surveying wrecks under water and of great intelligence, and, it appeared, of great reliability, stated that with the idea in his mind that valves turned to the right to close and to the left to open, he gave the wheel of one of the valves three half-turns, and then six half-turns to the right, and as he turned the spindle went down. After he had given his evidence the plaintiffs obtained from the builders a working drawing of the Kingston valves that were made for the *Cruz* when she was built, and they proved that valves were made according to this drawing and sent by the builder's engineering department at Seraing to their shipbuilding department at Hoboken to be put into the ship, and that no other Kingston valves were so made and sent by the builder's engineering department for this ship. The drawing showed that these valves were of the unusual type that closed from below, and that if the spindle was turned to the right clockwise they would close, but the spindle instead of descending, would rise. I have to ask myself whether I should refuse to accept that part of the diver's evidence in which he positively states that he turned the valves to the right, because he also said the spindle descending when, if the valves shown in the drawing were the valves then in the ship, a descending spindle would show that the valves were shut, and were being opened by the diver. I think not. It is not conclusively proved that the original valves were still in the ship in 1920, though it seems likely that they were. The recollection of the diver may be mistaken when he says he saw the spindles go down. I do not think it is possible that he could make a mistake as to which way the wheel or handle turned. He went to test the condition of the valves on the assumption that they were open, by turning the spindles to the right, and if they had refused to turn to the right, it would have been impossible for him to have reported that they were open. It would probably have given him a slight shock, it would have surprised him so much that he could not have failed to remember it

even after so long a lapse of time. He sent his assistant, Hommett, down to confirm what he had observed, and afterwards Francesconi, the Italian diver, also went down and observed the condition of the valves. Unfortunately, the defendants were unable to secure Hommett's attendance as a witness; they called Francesconi, but he was unable to give any account of what he saw and did, by recollection only, and after argument I ruled that he was not entitled to refresh his memory by reading his sworn statement made before the consul. Therefore I had not the advantage of reading that report; but I cannot leave out of sight the fact that two witnesses did go down for the purpose of seeing whether Lambert's evidence could be confirmed, and the defendants have had the reports of those divers and continued to defend this action and resist the claim made by the plaintiffs.

In my judgment the defendants proved that the tank injection valves to the tanks under two of the holds were open; that both main injection Kingston valves were open; and that the port bilge injection valve was open. There are other parts of the diver's evidence which seems to me to negative the theory of how the loss happened put forward by the plaintiffs' witnesses, but I do not think it necessary to deal with these in detail. It is quite clear that on the facts, as I find them to be proved, it would be impossible for me to say that I am satisfied beyond a reasonable doubt that the loss of the *Cruz* was due to perils of the sea or to any peril insured against; but I do not think that I could let my judgment rest on that view only. I have considered with care all the evidence and the arguments of counsel for both parties, and I have come to the conclusion that the *Cruz* met her fate by being scuttled, and that she was so scuttled by the connivance of the owners and of some of those responsible for the management of the plaintiff bank. There must be judgment for the defendants with costs.

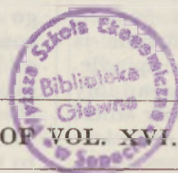
I desire to add two or three words, although I have not written them down, with reference to two matters on which there was a considerable amount of argument and discussion. The first is with reference to the question as to whether I ought to have drawn unfavourable inferences from the fact that the goods which the bank got from Allende were transferred in the name of a nominee named Tacher. On the whole, I think I ought not to draw an unfavourable inference from that, because it was what the bank did, not only in this case, but in two other cases, and I think that the explanation given—viz., that they wished to conceal from their customers the fact that they were dealing in such large quantities of goods, not by way of merely selling them on the market for what they would realise or by auction, but exporting them — may be a sufficient explanation of their conduct in that respect. But there were in connection with the documents which came into existence after the assignment to Tacher several discrepancies that gave rise to suspicion that those documents were not genuine documents made at the times at which they are dated but may have come into existence after the event, and, possibly, though not certainly, with a view to enabling the claim against the insurance company to be made in the name of Tacher and not in the name of the bank. Still, I do not attach very much importance to that part of the case, though it is very remarkable that Tacher's copy invoice book bears obvious signs of having been interfered with and not being now in its original condition, having a large number of pages inserted.

The other question on which there was a considerable difference of view expressed in this case was with reference to the action of the captain, or the evidence, rather of the mate and the engineer as to the action of the captain when the water came into the ship. The evidence leaves my mind in this state: I am still in doubt as to whether the captain lived, not to tell the story, but to refrain from telling the story, or whether in some way or other he met his death on that night. But I am satisfied of this, that the account given of what happened on that night by the mate and by the engineer is for some reason an untrue account, and that the captain did not behave as they said he behaved. It is not necessary for me to decide whether or not the captain is alive, and whether his evidence could have been procured by either the plaintiffs or the defendants; all I wish to say about that is that I decline to accept the evidence given of the plaintiffs' two witnesses as to the conduct of the captain.

Judgment for the defendants.

Solicitors for the plaintiffs, *Botterell* and *Roche.*

Solicitors for the defendants, *Parker, Garrett,* and *Co.*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